

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV-2020-085-000159
[2020] NZDC 17768**

BETWEEN

TANYA MARIA LIEVEN and GRAEME
STEPHEN GRIEVE
Appellants

AND

[LEO POPE], [AIMEE WATKINS] and
[SEBASTIAN SIMS]
Respondents

Hearing: 2 July 2020

Appearances: The Appellants appeared in person
The Respondents were represented by [L Pope]

Judgment: 3 September 2020

JUDGMENT OF JUDGE W K HASTINGS

[1] This is an appeal from two decisions of the Tenancy Tribunal. In the decision dated 13 January 2020, Adjudicator Robertshawe awarded the tenants \$1,520.44, released two departing tenants from the tenancy, directed that the departing tenants' share of the bond be paid back to them, and dismissed the landlord Ms Lieven's claim. In the decision dated 28 February 2020, Adjudicator Robertshawe dismissed Ms Lieven's application for a rehearing.

[2] In a Minute from the appeal conference dated 22 May 2020, Judge Harrop was concerned that the notice of appeal was handwritten and difficult to follow. He said, "it is in everybody's interests that the points that are to be taken on appeal are clearly stated, enumerated and typed so that everybody can follow the argument." Ms Lieven complied with Judge Harrop's direction in an email sent to the Court dated 10 June 2020. She prefaced her typed appeal points commenting, "I consider this minuted

judge's directive harassment of a disabled person & also note they are the same written reasons filed, submitted & adjudicated upon at the Tenancy Tribunal ... the very same documents!" This was typed in full capital letters, as were many of the appeal points. The first three pages of the email set out ten appeal points under the heading "Step 3 – appeal details – please refer to attached rehearing application reasons as they are the same basis for appeal". There then follows under the heading "Appended notice of appeal" nine appeal points. There is finally another typed section that starts with "S48 – does not apply" and ends with a complaint about the Adjudicator. Although the typed version of the appeal points remains difficult to follow, it is legible. That legibility reveals Ms Lieven's tendency to misconstrue many of the Adjudicator's findings of fact, as well as Ms Lieven's misunderstanding of the law.

[3] Under s 117 of the Residential Tenancies Act 1986, any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal may appeal to the District Court against that decision. Section 118 then sets out the powers of the District Court hearing an appeal:

118 Powers of District Court Judge on appeal

(1) On the hearing of an appeal under section 117 of this Act, a District Court Judge may—

(a) Quash the order of the Tribunal and order a rehearing of the claim by the Tribunal on such terms as the Judge thinks fit; or

(b) Quash the order, and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings; or

(c) Dismiss the appeal.

(2) In ordering a rehearing under subsection (1)(a) of this section, the District Court Judge may give to the Tribunal such directions as the Judge thinks fit as to the conduct of the rehearing.

(3) The procedure at an appeal under this section shall be such as the Judge may determine.

[4] It is fairly settled law following Jeffries J's decision in *A R Cabarets Ltd v Hawkes Bay Development Co Ltd* that appellate Courts should "not look with a spider's eye at the decision of an experienced expert body" such as the Tenancy

Tribunal.¹ His Honour said there would have to be “clear and convincing reasons” to disturb such a decision. The courts have shown a reluctance to depart from findings by the Tribunal on the facts or to disturb discretionary decisions. For example, in *Focus Contracting Ltd v Property Management (Marlborough) Ltd*, Judge Zohrab stated at [8] that:

It is well established that in appeals from the Tribunal, which is a specialist body, the Court will be slow to depart from the Tribunal’s findings on the facts.²

[5] In this case, the appellants take issue with several of the Adjudicator’s findings of fact and law. Their appeal points appear to be focused on the Adjudicator’s answers to the issues she stated and resolved. It is useful therefore to deal with each of these issues in turn.

[6] The first issue was whether Ms Lieven provided proper notice of viewings by prospective purchasers. The Adjudicator found that she did not. The adjudicator found that Ms Lieven complied with her obligations under s 47(1), but that she breached her obligations under s 38(1) by stating that she would be showing a prospective international purchaser through the property Monday to Friday between 10am and 5pm, without giving specific notice of any viewing. The Adjudicator found that the tenants acted reasonably to seek 24 hours’ notice of an actual viewing under s 48(3A).

[7] Ms Lieven submitted that s 48, which governs the landlord’s right of entry, did not apply in this situation because she was showing the property to an international delegation as a real estate agent. She is wrong. She remained a landlord of the property she was showing, notwithstanding that she purported to wear her other hat as a real estate agent. Her status as a real estate agent cannot exempt her from her obligations as a landlord, nor should she have used her status as a real estate agent to pressure the tenants to accept a breach of their statutory rights. Although not the subject of this appeal, to my mind Ms Lieven’s conduct raises ethical and conflict of

¹ *A R Cabarets Ltd v Hawkes Bay Development Co Ltd* (1985) 5 NZAR 477.

² *Focus Contracting Ltd v Property Management (Marlborough) Ltd*, DC Blenheim CIV-2009-006-103, 17 December 2009.

interest issues under the Real Estate Agents Act 2008. The Adjudicator's findings on the first issue were correct.

[8] The second issue was whether Ms Lieven unreasonably withheld consent to assign the tenancy. The Adjudicator found that clause 4, Further Terms of the tenancy agreement allowed assignment with the prior written consent of the landlord, and that s 44(3) imposed an obligation on the landlord not to withhold consent unreasonably. The Adjudicator considered *Corban v Inspire Property Management Limited*³ and *McNaught v Te Aro Tenancies Limited*⁴ and came to the conclusion that Ms Lieven had an obligation to consider a partial assignment and was obligated to consider the suitability of the proposed replacements. The Adjudicator found that Ms Lieven withheld her consent unreasonably when she referred to the tenants' outstanding Tenancy Tribunal matter as the reason for refusing consent to the assignment, rather than the suitability of the proposed replacements.

[9] Ms Lieven submitted that the Adjudicator should have considered the doctrines of "waiver and estoppel" when she considered whether or not Ms Lieven unreasonably withheld consent to assignment of the tenancy. She submitted that she was within her rights to deny the change in tenants. Ms Lieven's submission in this regard overlooked the clause relied on by the Adjudicator. It has the effect described by the Adjudicator. I can find no fault with the Adjudicator's finding of fact, reasoning, or her application of the law to the facts.

[10] The third issue was whether the tenants issued an illegal trespass notice or engaged in any fraud, harassment or unlawful obstruction of the landlords. The Adjudicator found that the tenants were entitled to issue a trespass notice against the landlord subject to legal rights of entry under s48, to stop her unilaterally deciding when she would show the international delegation around the premises, and that issuing the notice was not a form of harassment. The Adjudicator also found that Ms [Watkins] had not committed fraud, as alleged by Ms Lieven, by signing the tenancy agreement and the bond form using, in one case, her first name, and in the other, her middle name.

³ *Corban v Inspire Property Management Limited* [2019] NZTT 4195098 (New Plymouth).

⁴ *McNaught v Te Aro Tenancies Limited* [2019] NZTT 4207961 (Wellington).

[11] A tenant is entitled to issue a trespass notice against a landlord.⁵ The notice is subject to the landlord's right to enter the premises lawfully under s 13 of the Residential Tenancies Act 1986. The Adjudicator was correct in stating that a trespass notice acts as a warning to prevent unlawful entry. The Adjudicator was also correct in finding that Ms Lieven's claim that Ms [Watkins] committed fraud by deciding to use her middle name lacked merit. There was no evidence before the Adjudicator that Ms [Watkins] intended to deceive anyone or to avoid legal obligations by using her second name. In fact, Mr [Pope] submitted that she made that decision because she never really liked her first name. In the absence of any evidence of an intention to deceive, or evidence from which such an intention could be inferred, Ms [Watkins]'s use of her middle name does not constitute fraud.

[12] The fourth issue was whether Ms Lieven engaged in intentional harassment of the tenants. The Adjudicator found that she did on two occasions. The first was Ms Lieven's response to the trespass notice, "Then I'll sue you for each & every loss The Purchase price is \$8m." The Adjudicator found that this was intended to trouble or worry the tenants and was "a direct threat to make them change their minds and accept a breach of their rights." The second was Ms Lieven's description of the new flatmates as "squatters." The Adjudicator found that this was "an attempt to unsettle the tenants about their tenure and reveals an agenda to use the refusal of assignment as leverage." The Adjudicator also found that Ms Lieven's complaint to the Law Society about Ms [Watkins]'s use of her first name and middle name on different documents "can be seen as part of a campaign that is consistent with the findings of an intent to harass in the matters that arose in the context of the tenancy."

[13] Once again, the Adjudicator was entitled to make these findings on the evidence. There is nothing in Ms Lieven's submissions that brings the Adjudicator's findings into question.

⁵ *Jianping Liu v Rajeswary Kalathil Padmajan* [2018] NZTT 4122619.

[14] For the reasons given, the appeal is dismissed.

Judge WK Hastings
District Court Judge

Date of authentication: 03/09/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.