

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

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CIV-2017-092-004690  
[2020] NZDC 1184**

BETWEEN	NANCY FONG-ANAE Appellant
AND	HEMI SYMONS Respondent

Hearing: 24 January 2020

Appearances: H Phillips-Williams for the Appellant  
No appearance by or for the Respondent

Judgment: 24 January 2020

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**ORAL JUDGMENT OF JUDGE R J McILRAITH**

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[1] Before me this afternoon is the appeal of a Tenancy Tribunal order made by the Tenancy Tribunal in favour of Ms Hemi Symons against Nancy Fong-Anae, trading as Cartel Trading Limited.

[2] This matter was last before me on 15 August last year. On that occasion, Ms Symons attended the hearing in person and Ms Phillips-Williams appeared for Ms Fong-Anae, and Ms Phillips-Williams appears again today. On this occasion, there is no appearance in Court by Ms Symons or anyone on her behalf.

[3] On 15 August last year, I was unable to conclude the appeal. The reasons for that are set out in my minute of 15 August. In particular, I was advised that day that Ms Symons had lost all her documentation relating to the appeal and that they had, in effect, been misplaced during a move of residence, along with a move of her mother. I talked through with Ms Symons the basic substance of Ms Fong-Anae's submission,

which, in effect, is a serious allegation that Ms Symons deliberately misled the Tenancy Tribunal, falsifying photographs and evidence. Ms Symons strongly refuted that allegation. She maintained that she would be able to prove at the hearing of an appeal that the photographs she provided were genuine.

[4] I was concerned in that circumstance that Ms Symons was not able to adequately put forward her defence to the appeal of Ms Fong-Anae and, for that reason, adjourned the hearing. I made clear when doing so that the matter would return to me, and that if Ms Symons did not attend the reconvened hearing or filed no documentation or submissions, then I would deal with the matter on the day, effectively by way of formal proof.

[5] I made a note on the file that recorded that Ms Symons had left the address that the Court had as her address for service. That was the address of 14 Beatty Road, Pukekohe. Ms Symons advised me that she now resided at [address deleted] in Rotorua. I left a note on the file to the effect that the notice of hearing of appeal needed to be sent to that address. Regrettably, upon preparing the file this morning for this appeal, I have noticed that the notice of hearing date for today has not been sent to Ms Symons' address in Rotorua but instead to the address in Pukekohe, where we know that Ms Symons does not reside.

[6] An email that Ms Symons provided was also used to forward her the notice of hearing but, given the reality of email communication, I am not prepared to rely upon that, given in particular that Ms Symons stressed to me that she wanted the notice of hearing sent to the physical address.

[7] I have raised with Ms Phillips-Williams, on behalf of Ms Fong-Anae, the difficulty that I believe that creates. In particular, I do not consider it would be responsible for me to deal with the appeal by way of formal proof in the absence of Ms Symons when I have a residual concern that she may not be aware of the hearing. That said, I have considerable frustration at the position we find ourselves in and, no doubt, Ms Fong-Anae and those who have attended today feel the same degree of frustration.

[8] I have, therefore, raised with Ms Phillips-Williams what I consider to be a sensible way forward. In my view, this matter, when I have re-read the file this morning – and, in particular, the order of the Tenancy Tribunal – and focused upon the affidavits that have been filed in support of the appeal, has not proceeded as it ideally would have in the Tenancy Tribunal. I say that in the sense that I do not consider that all relevant evidence was before the Tenancy Tribunal, and I am alarmed at the suggestion that some of the evidence that was presented was falsified. Whether that is the case, of course, remains to be determined, but what I am clear on is that there is additional evidence that Ms Fong-Anae wishes to produce that would certainly undermine the gist of the evidence that was presented by Ms Symons at the Tenancy Tribunal, and could well lead to a very different conclusion as to the state of the property during Ms Symons' occupancy of it.

[9] The option that I consider is, therefore, the most appropriate one is an option that is available to me under s 118 Residential Tenancies Act 1986, and that is to quash the order of the Tenancy Tribunal and to order a rehearing of the claim by the Tribunal on such terms as I think fit.

[10] So, I am going to make a formal order quashing the order of the Tenancy Tribunal as set out in its order dated 27 October 2017. The consequences of that are twofold:

- (a) Firstly, the order of the Tenancy Tribunal dated 6 August 2018 with respect to an amount of rent arrears and water rates owed by Ms Symons to Cartel Trading Limited in the amount of \$4660.55 is no longer stayed pending determination of this appeal.
- (b) The second consequence is that there ought now to be a rehearing of Ms Symons' claim in the Tenancy Tribunal.

[11] In terms of the terms on which that rehearing should take place, the only views I express in terms of s 118(1)(a) Residential Tenancies Act are that it will be important, if that rehearing does take place – and I will return to that comment in a moment – that the evidence which Ms Fong-Anae has filed by way of affidavit in relation to her

appeal is presented to the Tenancy Tribunal so that the Tribunal is aware of what she says is the full picture.

[12] I consider that there is a very real possibility that Ms Symons has chosen simply not to participate in this appeal, because it was made clear to her previously that the only way she would be able to satisfy me that there was no merit to Ms Fong-Anae's appeal would be to prove the authenticity and genuineness of the photographs that were presented to the Tenancy Tribunal. It was clear to her at the last occasion that she faced very serious allegations. If, in full knowledge of that, she has chosen not to participate, then it is my anticipation that she will not participate in the Tenancy Tribunal rehearing either. It is, of course, a matter for the Tenancy Tribunal adjudicator what that would indicate if that is the case, but at least for my part it would indicate that Ms Symons has some difficulty demonstrating what she told me she thought would be the case when she last appeared before me.

[13] So, in summary, the order of the Tenancy Tribunal dated 27 October 2017 is quashed. The other order of the Tenancy Tribunal in favour of Ms Fong-Anae is no longer stayed, and a rehearing of the original claim by Ms Symons is to be scheduled. I note for that purpose that the Tenancy Tribunal will need to contact Ms Symons at the address that I have indicated earlier in this minute is her current address, so far as I am aware. This decision is also to be posted to that address as well as emailed to Ms Symons.

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Judge McIlraith  
District Court Judge

Date of authentication: 31/01/2020  
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.