IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2023-004-000739
[2024] NZDC 15819

BETWEEN	ASHUTOSH SHARMA Appellant
AND	AARON WAYNE RIDGWAY Respondent

Hearing: 4 July 2024

Appearances: No appearances by or for the Appellant
A Mandal for the Respondent

Judgment: 4 July 2024

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] Ashutosh Sharma appeals the decision of the Tenancy Tribunal declining a rehearing on 24 February 2023. The original order in respect of which he sought a rehearing was made on 14 December 2022 in the absence of Mr Sharma.

History

[2] The matter that was before the Tenancy Tribunal at that stage was an application by Mr Ridgway, as landlord, Mr Sharma as tenant, in respect of rent arrears. As the learned Tenancy Tribunal Adjudicators order says, the landlord's application was for rent arrears. The tenant had paid only $31,500 in rent and the tenancy was for a fixed term until August 2023. The tenant, being Mr Sharma, was in law, liable to pay rent to the end of the fixed term. The Adjudicator found that the claim for arrears was proven.

[3] Mr Sharma did not participate in that hearing although the landlord's agent, Janine McCormnick, did. The hearing was conducted remotely by audio call on Microsoft Teams and the tenant, Mr Sharma, was telephoned but did not answer. On 12 December, he had sought an adjournment of the hearing because he said he had contracted COVID-19.

[4] As the order of 14 December 2022 reveals, the landlord did not consent to an adjournment and because Mr Sharma had provided no evidence of contracting COVID-19 and no evidence that the illness would be so serious that he could not attend the audio hearing on 14 December, his request for an adjournment was declined. And he was ordered to pay $51,449.01.

[5] Mr Sharma then applied for a rehearing of that order. On 12 January 2023, the same Adjudicator granted a stay of proceedings, so as not to prejudice the outcome of that application and indicated that a date and time of a rehearing application hearing would be notified in writing.

[6] That hearing was conducted on 24 February 2023 by telephone from the Auckland District Court, although Mr Sharma participated on this occasion. In the Adjudicator's order of 24 February 2023, the background to the matter was set out (I do not plan to reiterate it, particularly since on page 4 of that order between paras [21] and [25], the Adjudicator set out the jurisdiction for the granting of a rehearing (where a substantial role or miscarriage of justice has or may have occurred or is likely to occur) and went on at paras [26] to [28] to say that the Tribunal had elected to accept at face value, Mr Sharma's explanation for failing to attend the earlier hearing. He then proceeded to hear his evidence and allow him to make submissions setting out his intended challenge to the Tribunal's decision.

[7] At paras [29] through [42], whilst the learned Adjudicator professed in the conclusion, not to be granting a rehearing, in fact, in effect, he did rehear the matter as is obvious within the order. He reached conclusions that Mr Sharma had not provided a credible narrative that a particular term should and was added to the tenancy agreement (or variation), to the effect that if an agency became involved, the tenant (Mr Sharma) would be justified in terminating the fixed term lease, which would then affect the Tribunal's decision on arrears.

[8] The Adjudicator found that Mr Sharma had not provided a credible narrative that such a term existed and found that there was no basis to order a rehearing on that ground. In addition, he found that the calculation of the arrears in the case was straightforward, merely a matter of deducting the rent paid from the rent due and therefore, given that the Tribunal did not find there was a variation of the tenancy agreement, there could be no recalculation of arrears on the basis that the tenancy had ended early. So, the Adjudicator found that there was no credible evidence that the calculation of arrears was inaccurate.

[9] In addition, Mr Sharma wanted to put forward Privacy Act matters concerning the release of personal information but if I may say so with respect, correctly, the Adjudicator saw no basis for revisiting the Tenancy Tribunal's rent arrears decision based on alleged breaches of privacy or similar.

[10] So, in his conclusion, Adjudicator Kee stated that he was not satisfied that the Tribunal's decision was substantially wrong or that a miscarriage of justice occurred or may have occurred. He said the proposed evidence would not have altered the Tribunal's decision. The rent calculation had not been shown to be potentially in error and he declined to order a rehearing. So, he dismissed the application.

Appeal hearing

[11] Today is the hearing of Mr Sharma's appeal against the declinature of a rehearing in this matter. The appeal hearing has been set down for some time. Earlier this week, the Registry drew to my attention that Mr Sharma was in Dubai and seemed to be expecting that he would participate in the appeal hearing by AVL link. But he had not applied for leave to do so; the Registry advised him that he must apply for leave.

[12] Either Tuesday or Wednesday this week, that matter came to me and having considered it, I declined that he should be able to participate by AVL link. I did so because Tenancy Tribunal hearings with self-represented appellants can be notoriously difficult, particularly when they often want to refer to voluminous documentation and it is difficult for the Court to understand or follow the proceedings, unless that

information can be physically revealed to the presiding Judge. In addition, I considered that the application to appear by audio-visual link had come too late.

[13] As it turns out, this morning I was greeted from the Registry by Mr Sharma's request for an adjournment because of my declinature of the AVL application. The respondent, earlier in the day, indicated through his lawyer, Mr Mandel, that they would consent to the appeal proceeding by way of AVL link for Mr Sharma. And given that the respondent was keen for the appeal to proceed, as indeed Mr Sharma had professed to be earlier as well, I had the Court immediately try to contact Mr Sharma to advise him that I had reconsidered and would now grant him a right of appearance by AVL.

[14] The Court has been trying all day to contact him. It first started emailing him to the provided email address, as I understand it, around 10 o'clock this morning and has continued on and off all day. The hearing was set down for 2.15 pm. At 2.15 pm, I was advised by the Registry that they had not been able to make contact with Mr Sharma. I stood the matter down, all the while, keeping Mr Ridgway's lawyer, Mr Mandel, on ice so to speak, so he has wasted the day hanging around Court, waiting on the pleasure of Mr Sharma.

[15] Just this afternoon, the Court has emailed at 2.30 pm, 2.42 pm, 3.06 pm, 3.14 pm, 3.25 pm and last at 3.45 pm. There has been no response from Mr Sharma and the Court has no other means of contacting him, given that he is in Dubai. The time now in Dubai, as I apprehended, is 8.05 am. Even though I appreciate that the Court's change of stance in respect to the AVL application was communicated late in the piece to Mr Sharma, I consider that by now, there is no reason not to expect him to have looked at his emails.

[16] Particularly, he applied for an adjournment, and one would think that he would be present in some way, online or otherwise, to hear the Court's decision about his adjournment application. He has not made himself available. He is not answering his emails. The Court has no way of knowing whether he is reading them.

Decision

[17] When I read this pretty voluminous file, given the simplicity of the original application and the issues involved, it is very clear to me that Mr Sharma has made a considerable practice of delaying matters, making himself unavailable to the Court and then seeking for matters to be reinstated, so that he could continue to stave off the fateful day when he would be required to comply with the order of the Tenancy Tribunal.

[18] I consider that today is yet another such example and that Mr Sharma's failure to answer any of the Court's emails today, despite the Court standing the matter down for almost two hours and continuing to try to contact him, indicates his bad faith in respect to this matter. I therefore consider that his appeal against the declinature to order a rehearing has not been prosecuted with diligence or in fact, at all, and I am going to dismiss it.

Jurisdiction

[19] Appeals under s 117 of the Residential Tenancies Act 1986, are appeals by way of rehearing and not appeals by way of hearing de novo. On such an appeal, the appellate body is entitled to reach its own independent findings on the evidence it receives, the appeal is heard on record of the oral evidence given below, subject to discretionary powers to rehear the whole or any part of the evidence or even to receive further evidence.

[20] In this context, the expression rehearing connotes that the appellate body is not limited to the correction of errors in the judgment below but may take into account development since the trial.[1]

[21] But it does not mean that the Court will hear all the evidence again as though it were a new trial.[2] On an appeal by way of rehearing, the appellate body is not restricted by any findings which the lower Court or tribunal has made. But the

[1] *Shotover Gorge Jet Boats Limited v Jamieson* [1987] 1 NZLR 437 at 439.
[2] *Pratt v Whanganui Education Board* [1977] 1 NZLR 476 at 490.

appellate body nevertheless acknowledges the advantage enjoyed by the decision-maker at first instance, which may have seen and heard the witnesses.

[22] There is something akin to a presumption that the decision appealed from is correct. And it is also customary for the appellate body to exercise restraint in interfering with discretionary decisions. Thus ordinarily, the appellate body will only differ from the factual findings of the decision-maker at first instance if the conclusion reached was not open on the evidence, that is where there was no evidence to support it, or the lower body was plainly wrong in the conclusion it reached.[3]

[23] I cannot see that the Tenancy Tribunal was plainly wrong in the conclusions reached in declining a rehearing. The conclusion that it reached was open on the evidence that it had seen and, in any event, as I say, in effect, the Adjudicator actually did conduct a rehearing because he traversed all of the issues which were presented by Mr Sharma in support of his application for rehearing.

[24] Normally, all that happens in a rehearing application hearing is that the Adjudicator receives and considers evidence as to the reasons why there needs to be a rehearing such as that one of the affected party was unable to attend or some such.

[25] Given that s 105(1) of the Residential Tenancies Act 1986 provides that the Tribunal has the power to order a rehearing where "a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur", it is incumbent on the person seeking the rehearing to prove on the balance of probabilities to the Tribunal, that the latter has or may have occurred or is likely to occur.

[26] Given what was placed before the Adjudicator, I concur with him that the applicant, now appellant, did not demonstrate either a substantial wrong or miscarriage of justice, let alone one that was then still likely to occur. I know not whether Mr Sharma is resident full-time in Dubai, I am somewhat dubious that is the case, but that he seeks to stave off an order that could be enforced as a judgment against him in this country, when he is perhaps, in financial difficulty. In other words, it appears to me very likely that Mr Sharma is impecunious and attempting to evade his creditors.

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[3] *Shotover Gorge Jet Boats Limited v Jamieson* at 441.

[27] Whatever the situation, I consider that the Court has extended him enough largesse. If he is not even sufficiently interested to participate today, on some basis, for example, to ascertain what the Court's decision is, in respect to his adjournment application, then I consider that he has or displays no bona fides, in respect to either this appeal or the hearing today. And for all of those reasons, I now dismiss his appeal.

M-E Sharp
District Court Judge