IN THE DISTRICT COURT
AT AUCKLAND

CIV-2004-004-558

**IN THE MATTER** of an appeal under the Residential Tenancies Act 1988

**BETWEEN** **ANNE ROBERTSON**

**Appellant**

**AND** **PAUL STIRLING and BRENDAN SMITH**

**Respondents**



Date of Hearing: 20 May 2004

Date of Judgment: 14 June 2004

Appearances: Appellant in person
No appearance of respondents

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**RESERVED JUDGMENT OF JUDGE RODERICK JOYCE Q.C.**

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## NATURE OF APPEAL

[1] This is an appeal under s.117 of the Residential Tenancies Act 1988. Upon the hearing of such an appeal this Court has the power to quash the order of the Tribunal and order a rehearing by it on such terms as the Court thinks fit, or to 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 to dismiss the appeal.

[2] The section advises that the procedure on appeal shall be such as the Judge may determine. In practice, except where there is justifiable contrary request or in the particular circumstances the Court itself considers that an actual rehearing of one or more of the original witnesses (or the admission of further evidence) is justified, the appeal is treated as one by way of rehearing on the notes of evidence recorded before the Tribunal. Nothing in the present case requires that I proceed on other than the last mentioned basis.

## APPEARANCES

[3] The respondents did not appear at the appeal hearing. In mid-April they had advised the Registry that they were "currently abroad for the period covering that date and for the foreseeable future". They, perfectly understandably, indicated no intention of returning just for this.

[4] Following the Registry's receipt of that advice and reference of it to me, they were offered the opportunity to instruct a solicitor or send written submissions, but they took up neither option.

## ORIGINAL ORDERS

[5] The appeal relates to orders made by a tenancy adjudicator on 28 August last year.

[6] Summarised, those orders required that:

- Anne Robertson forthwith pay Brendan Smith and Paul Stirling the sum of $1,147.47 forthwith calculated as follows:

  [a] Payable by the tenants to the landlord,

| | |
|---|---|
| Damage to Futon | 120.00 |
| Rug cleaning | 100.00 |

| | |
|---|---|
| Replace plate | 4.95 |
| Total | 224.95 |

[b] Payable by the landlord to the tenants:

| | |
|---|---|
| Breach of quiet enjoyment | 493.00 |
| Inadequate notice | 795.42 |
| Power | 84.00 |
| Total | 1,372.42 |
| Less | |
| (a) | 224.95 |
| Total | $1,147.47 |

Sections 38(1), (2); 39(2)(a); 51(1)(d); 77(2)(n); 78(1)(d).

- The Bond Processing Centre to pay the sum of $340.00 (Bond No: 3218898-007) to Brendan Smith and Paul Stirling forthwith.

Section 127(4)(a).

[7] The adjudicator supported those orders by extensive reasons to which, as necessary, I shall turn in due course.

[8] Ms Robertson (the landlord) then lodged this appeal. In her notice of that she said:

> *"I disagree with the order of the Tribunal 28/8/03.*
>
> *Decisions were made in favour of the tenants where no evidence was given for their application and where only partial evidence was given.*
>
> *Decisions were made against the landlord where there was evidence given to substantiate claims or no decision was given for claims where evidence was provided."*

## PARTIAL REHEARING RESULTS IN AWARD ADJUSTMENT

[9] Ms Robertson also sought a rehearing and that application was allowed in part. Specifically, she was granted a rehearing to allow amending of the amount ordered payable as compensation for the Futon, by way of an increase from $120 to $280, thus reducing the amount payable by her to the tenant/respondents to $987.47.

[10] Beyond that the adjudicator noted that the bulk of Ms Robertson's submissions appeared to amount to dissatisfaction with the findings of the Tribunal at the original hearing and, with the adjudicator not identifying any evidence to suggest that there had been any miscarriage of justice or substantial wrong, the application was dismissed

**APPEAL LIMITATION**

[11] Section 117(2) of the Act excludes appeals where the amount in dispute on appeal is less than $1,000. It might therefore be thought that, with the partial success had on appeal reducing Ms Robertson's net liability to less than a $1,000, her right to pursue her appeal had evaporated. But that would be to overlook two, related to each other, points.

[12] First, the net figure is only reached after deducting the amounts she recovered from the amounts the tenants recovered. That is a convenient way to reach a final figure. However, the fact remains that it derives from two separate – in all respects capable of standing alone – awards, one got by the landlord and the other got by the tenants.

[13] Secondly, what is put in issue by Ms Robertson (see below) comprises a $493 award for breach of quiet enjoyment and a $795.42 award for inadequate notice – in excess of $1,000 altogether.

[14] Thus no question of the outcome of the rehearing barring pursuit of the appeal arises. A similar view was taken in ***Stewart v Bland*** [1994] DCR 417.

**THE APPEAL**

[15] When, after a preliminary to the appeal hearing conference, the matter came before me by way of appeal against the original decision, Ms Robertson identified three headings under which she sought to pursue her appeal, they being:

- Unpaid rent.
- Notice issue.
- Breach of quiet enjoyment.

[16] It will be convenient to deal with her appeal under those headings, and in the order in which she promoted them. However, before turning to those headings or issues, I briefly record the genesis of the litigation before the Tribunal.

[17] It commenced with an application made by Ms Robertson by which she sought:

- Compensation under headings relating to missing or damaged items and the state of the premises upon their surrender; and

- Recovery of two weeks rent said to be unpaid.

[18] Upon the failure of a mediation, the tenants, Stirling and Smith, were given the opportunity to make a cross claim, which they did. By that they sought compensation for:

- Lack of quiet enjoyment of the house.

- Incorrect notice.

- Damage to tenants' possessions due to mould.

- Electricity used by the landlord.

[19] Just as the Robertson application had been supported by some narrative material and annexure of invoices, so did Stirling and Smith flesh out their case. Indeed they did so in apparently greater detail.

**RENT**

[20] As later explained before the adjudicator, Ms Robertson's claim in respect of unpaid rent was that she had agreed to the tenants moving out two weeks prior to the expiration of the notice she had given them, but subsequently considered herself not to be bound by that concession on account her perception of the state of the premises and chattels, as she subsequently found those to be.

[21] The notice Ms Robertson had given Messrs Stirling and Smith had been a 42 day one, that permitted a landlord (see s.51) where the premises are required for occupation by the landlord or by any member of the "landlord's family", an expression that carries the meaning provided for in s.2.

[22] The Stirling and Smith cross claim said:

*"We are seeking compensation for incorrect notice period under s.51(d) for the following reasons.*

*We were given the minimum of 42 days notice, but it is clear that the landlord originally intended to sell the house ..."*

[23] This whole business of notice and the circumstances surrounding same featured large in the hearing before the adjudicator. At the risk of over-simplifying the situation, Ms Robertson claimed that she had needed the premises for her daughter. She also referred to the imminent arrival in New Zealand of an AFS student who was to be in her care.

[24] Mr Stirling and Mr Smith claimed that the student was to be a tenant. In any event, there would have been scope for argument about whether this person would or would not have qualified as a *child who ... is to be ... cared for on a continuous basis by the landlord ....* And apart from all this Messrs Stirling and Smith contended, as illustrated by the content of their cross claim, that the real motivation was to sell. One way or another, said they, a 90 day notice was a prerequisite.

[25] What, however, is clear from the notes of evidence is that, well before the 42 day notice (if of utility) was due to expire, Mr Stirling had advised of the tenants' intention to move out early.

[26] This had prompted her to tell him that they were required to give three weeks notice. A few days later Mr Smith came back and saw her, pleading hardship. It was agreed that they could move out early which would give her vacant possession at the cost of two weeks rent.

[27] The notes show there was some dialogue about what moving out date that meant. The adjudicator promoted the idea that if there had been that agreement to end the tenancy (which indeed plainly there was) then the termination date must have been 6 June. And Mr Smith responded "I can confirm that, yeah that was 6th June". Ms Robertson advised the adjudicator that they moved out then with the rent paid up to that departure date.

[28] The evidence then turned to the matter of the state of the premises and contents, topics canvassed at great, and at times arguably tedious, lengths.

[29] Ultimately, the adjudicator was able to get to the cross claim. Discussion of that eventually arrived at the notice and related issues, Mr Smith asserting a requirement for a 90 day notice under s.51(1)(d), and he and Mr Stirling claimed compensation accordingly.

[30] Whereas Ms Robertson now claimed to be short changed on rent, their contention was that they changed their plans due to the inconvenience of the shorter notice. They had planned to go back to London said Mr Stirling. They decided to leave at the end of the 42 days notice said Mr Smith. They apparently took a short term apartment tenancy in the city at a higher rate, and with premises that were smaller. Indeed, Mr Stirling said they had had to pay "double rent" for a

while because, he claimed, they had to take the first place they could get, but still pay Ms Robertson out what, it is clear to me from the evidence, they had agreed – namely, rent down to 6 June 2003. So just as Ms Robertson sought a rent reconstruction on account the state of the premises, did Messrs Stirling and Smith reconstruct (compared with what they had told Ms Robertson at the time) the circumstances of their early departure.

[31] In expressing reasons for the award to the tenants on account the notice issue, the adjudicator said:

> *"The tenants claim that the 42 day notice of termination served by the landlord was invalid as the landlord did not require the premises on any of the grounds provided under Section 51(1)(a)-(c). The notice dated 9 May 2003 stated that the landlord required the house for her own use. The tenants state that she discussed selling the property with them after the notice was served and that she arranged for a valuer to inspect the premises.*
>
> *Ms Robertson agreed that she arranged a valuation after she had given notice so that she could 'weigh up her options' but says that her comment regarding sale of the premises was a 'throw away line'. Ms Robertson said that the reason for the 42 day notice was that her daughter was returning from overseas with the intention of living in the premises and that she had an overseas student coming to stay with her prior to her daughter's arrival. Ms Robertson said that when the tenants vacated the student lived in the premises and that her daughter arrived back in New Zealand on 7 August.*
>
> *The 42 day notice to terminate took effect on 20 June 2003. Despite the fact that Ms Robertson claims that the student was known to her and she considered her a family member I find that such a relationship does not meet the requirements of Section 51(1)(a). The ordinary meaning of family is clearly intended by this section of the Act and there is nothing in the Act to indicate an intention to include close family friends or anyone other than relatives. There is therefore no legal basis for the 42 day notice issued by the landlord and the tenants are entitled to compensation for this breach by the landlord.*
>
> *The date on which Ms Robertson said that her daughter returned to New Zealand is, coincidentally, 90 days from the date on which the notice of termination was issued. I have awarded the tenants compensation based on 20% of the rent for 48 days, being the balance of the correct notice period, a total of $795.42."*

[32] What has been lost to sight here (and, given the wrangling between the parties at the hearing, I can readily understand how it happened), is that Ms Robertson on the one hand, and Messrs Stirling and Smith on the other, had originally reached a mutually advantageous compromise over the notice issue. It had been agreed amongst them – notices or no (effective) notices – that the tenancy be brought to an end as of 6 June with rent paid up to that date, which it was.

[33] I am confident that a spectator to their discussions back then would have concluded that the mutual intention of the parties was that fulfilment of that arrangement (as in fact occurred) would resolve matters of notice and tenancy termination once and for all. Subsequently what plainly happened is that Ms Robertson, when she saw the state of chattels and premises sought, as I remarked earlier, to recant and that prompted Messrs Stirling and Smith to react in kind.

[34] In my consideration, viewing objectively the central and really undisputed facts surrounding the ending of the tenancy, it was in fact implicit in the termination terms agreed at the time that neither could thereafter claim against the other on account notice or rent. Unfortunately each of them, the landlord on one side and the tenants on the other, having themselves lost sight of the original arrangements and intention, managed to divert the adjudicator away from that fundamental point.

[35] It follows that Ms Robertson could no more go back on her concession over the two weeks rental, than could Mr Stirling and Mr Smith come back with a cross claim for costs arising from the early vacation to which they had plainly agreed.

[36] Thus the award in favour of the tenants of $795.42 for "inadequate notice" must be quashed. And of course Ms Robertson's endeavour to recover 2 weeks "unpaid rent" is similarly doomed. Thus dealing with the issues returns the parties to their own original and performed at the time terms of compromise. Neither side has justification for any other conclusion.

[37] These determinations resolve matters under two of Ms Robertson's headings, those of unpaid rent and notice. I am thus left with the issue of –

**BREACH OF QUIET ENJOYMENT**

[38] First of all the pertinent provisions of the Act:

[39] Section 38(1) says that:

> *"The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through, or under the landlord or having superior title to that of the landlord."*

[40] Subsection (2) says that:

> *"The landlord shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use of the premises by the tenant."*

[41] And, for a purpose later identified, I include subsection (3) which says that:

> *"Contravention of subsection (2) of this section in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act."*

[42] Butterworths Land Law in New Zealand (Hinde McMorland & Sim) says at 5.066 that:

> *"The covenant for quiet enjoyment is an undertaking against interruption in the possession of the property leased. In this context the word 'quiet' is used in the sense of 'peaceful' and not in the acoustic sense: it does not mean that the landlord impliedly undertakes that the tenant will be free*

*from the nuisance of noise. The word 'enjoy' refers to the exercise and use of the right and having the full benefit of it, rather than deriving pleasure from it. There are two aspects of the covenant of quiet enjoyment: first a limited undertaking as to title; and secondly an undertaking against interruption of possession."*

[43] It is a common place to describe the covenant for quiet enjoyment as one whereby the tenant shall be entitled peaceably to hold and enjoy the demised premises during the term without interruption by the landlord or any claimant to a superior title. The already mentioned and well-regarded text says as much.

[44] If it had stood on its own, s.38(1) could be identified as simply the statutory embodiment of the usual ingredients of a contractual covenant for quiet enjoyment, or indeed that which would almost inevitably have to be implied anyway.

[45] But s.38(2) is a significant departure from usual confines. Its references to "comfort or privacy" as well as "peace" extend, for the immediate statutory purpose, the concept of "quiet enjoyment" so as to make the entitlement very much more like one where "quiet" carries its everyday auditory meaning.

[46] Alston's text Residential Tenancies, 3rd edn at 6.3 suggests that a stronger duty seems to be imposed on the landlord by subsection (2) than subsection (1) on its own. In the terms already discussed, I am inclined to agree. But I would opt for "wider" rather than "stronger".

[47] This issue, like that relating to state of premises and the matter of the contents, occupied much of the adjudicator's time as the parties gave evidence or, rather, argued back and forth before her.

[48] Dealing with this issue on appeal, I first revert to the adjudicator's reasons for her decision. She first of all, and very tidily, set something of the physical scene with this paragraph:

*"There is a common clothesline and a garden around the house that can be accessed through a gate from the studio area of the property. There was no letterbox at the start of the tenancy. Before this tenancy mail was delivered through the front door of the house for both premises. When Ms Robertson asked if she could come in the front door each day to collect the mail the tenants refused and delivered the mail to the landlord until she installed a letterbox. There is no separation of meters for power, water or gas although the studio has a gas bottle for cooking."*

[49] Turning specifically to the issue of breach of quiet enjoyment, she continued:

*"The premises were rented through Hot Property and the tenants were told that the landlord lived in the studio but was rarely home. They were not aware that the part of the premises rented to them was the 'family home'. Cath Williams, the letting agent from Hot Property, said that she had acted as letting agent for the past 5-6 years and that the landlord moved between the house and studio depending on which part was rented at the time.*

*The tenants claim that Ms Robertson frequently came into the garden around the house and did not seek consent. The tenants said they initially agreed to the landlord accessing the garden on one day*

*each week but there was no agreement made on the day on which access would occur. The tenants also complain that the landlord encroached on their privacy by sitting in her studio with the door open so as to look into their bedrooms, forcing them to close curtains.*

*The tenants claim that the 'even inside our privacy was encroached on as she was constantly prowling around the outside of the house during the day'.*

*Ms Robertson denied breaching the tenants' quiet enjoyment. She said that she thought that Ms Williams had made it clear to the tenants that the grounds and deck were shared. Ms Robertson said that she did not know why access to the garden had been an issue. She said that it was her property which she shared with the tenant. Ms Robertson said that she went into the garden on a daily basis during previous tenancies and there had been no issue of permission or needing to seek consent.*

*Section 38 of the Residential Tenancies Act provides that*

> *(1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord ...*
>
> *(2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.*

*Section 38(4) provides that any reference to premises in Section 38 includes facilities. Section 2 of the Act defines premises as any part of the premises and includes land. Facilities are defined in Section 2 as including land, recreational areas, lawns and gardens however, for the purpose of determining the landlord's right of entry, facilities are defined in Section 48 as excluding land or facilities.*

*Section 48 therefore allows the landlord entry to the land forming part of the tenancy without seeking permission of the tenants. Such a provision is necessary to allow the landlord to approach the front door and deliver notices, to ask permission to enter the premises and to carry out any work on the lawns or garden that is the responsibility of the landlord however the clear purpose of Section 38 is to prevent the landlord from exercising this right of entry so as to interfere with the peace and privacy of the tenant. The issue for the Tribunal is whether there has been access to the garden such that breached the rights provided for the tenant by Section 38.*

*Based on the evidence of the parties and Ms Williams, who stated that she understood that the garden around the house was part of the tenancy, I find that the tenants were entitled to quiet enjoyment of this garden area as it constituted part of the tenancy.*

*Ms Robertson has not disputed the tenants' claims that she accessed the garden with increasingly regularity during the tenancy. She simply claimed that she has a right to do so as it is her property and 'shared' with the tenant.*

*Ms Robertson has failed to understand the underlying premise of a residential tenancy agreement that is that, for the duration of the tenancy, the tenants have the right to vacant possession and quiet enjoyment of the premises despite the fact that they are not the owners of the premises.*

*I accept the tenants' evidence that they discussed and were prepared to agree to an arrangement whereby Ms Robertson would attend to the garden at certain times. There is no evidence that she made any such arrangement and I accept the tenants' evidence that her frequent visits to the garden caused a lack of privacy for them. Ms Robertson claimed that she had to access the clothesline that was in the tenants' garden area. It was open to her to make an arrangement with the tenants for use of the clothesline but she failed to do so.*

*I am unable to determine whether the landlord has breached the tenants' privacy by deliberately overlooking their bedrooms. The parties have different versions of this situation and there is no independent evidence that leads me to find that a breach has occurred in this manner.*

*I am satisfied however based on the parties' evidence on the mail delivery issue, that the question of privacy was raised early in the tenancy. Ms Robertson appears to have taken exception to the*

*tenants' request for quiet enjoyment and escalated rather than diminished her perceived need to attend to matters in the tenants' garden. The fact that she has disputed the claim of intrusion in to the garden area based on ownership rather than frequency of access leads me to this conclusion.*

*For these reasons I find that the landlord has breached the tenants' right to quiet enjoyment of the premises and that the tenants are entitled to compensation. Compensation has been set at $493 being 5% of the rent paid for 17 weeks, the duration of the tenancy. I am not satisfied that the breach amounts to harassment such that an award of exemplary damages is justified."*

[50] I have taken the somewhat unusual step of setting out to their full extent the reasons given by the adjudicator for the conclusion in respect of this part of the case. I have done that because, having considered the notes of evidence and Ms Robertson's arguments, I identify that as the best way to demonstrate to all concerned the care given this issue by the adjudicator.

[51] Having had the advantage of seeing and hearing the parties face to face, the adjudicator was well placed to sift and weigh the weight and worth of their evidence, and reach conclusions accordingly. Nothing that Ms Robertson had to say before me has caused me to have any doubt over whether the adjudicator took fair and full advantage of the benefit of directly hearing from, and in the process observing, the parties. To the contrary, the comprehensively and carefully expressed reasons point to every advantage having been taken in that respect.

[52] I have not had identified to me any kind of oversight or misapprehension as might justify intervention and re-assessment on appeal. In my consideration the breach of quiet enjoyment order has not been demonstrated to be wrong in fact and/or law. This, the final, aspect or element of the appeal is without merit and the adjudicator's conclusions in this area of the case will stand.

[53] Thus taking into account what Ms Robertson retrieved upon the rehearing the proper arithmetic now is:

**Payable by the tenants to the landlord**

| | |
|---|---|
| Damage to Futon | 280.00 |
| Rug cleaning | 100.00 |
| Replace plate | 4.95 |
| Subtotal | 384.95 |

**b) Payable by the landlord to the tenants**

| | |
|---|---|
| Breach of quiet enjoyment | 493.00 |
| Power | 84.00 |
| Sub total | 577.00 |

| | |
|---|---|
| Less | 384.95 |
| | $192.05 |

**SUMMARY**

[54] The award of $795.42 for inadequate notice is quashed. The sum payable by Ms Robertson to Messrs Smith and Stirling is accordingly reduced to $192.05.

Signed on 14 June 2004 at 2.05 ~~am~~/pm

(Roderick Joyce QC)
**District Court Judge**