N2LR

IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

3/12 Ap.6/92

BETWEEN FRITZ FEHLING

Appellant

NOT RECOMMENDED 2128

A N D WORKS CONSULTANCY LIMITED

Respondent

Hearing: 25 March 1993

Counsel: A G Whitcombe for Appellant
P A Wetherall for Respondent

Judgment: 13 APR 1993

JUDGMENT OF FRASER, J.

This is an appeal from a judgment of the District Court under the Residential Tenancies Act 1986.

Mr Emile Leaf occupied a house at Hari Hari as tenant of the respondent. Appellant wished to take over the tenancy and discussions took place between the parties. Appellant considered that a tenancy agreement had been concluded. Respondent denied that, saying that the discussions amounted to no more than negotiations and that it had decided not to proceed with the possible arrangement. It endeavoured to evict the appellant who took the matter to the Tenancy Tribunal which on 17 February 1992 ruled in his favour.

Respondent then served on the appellant 90 days notice to quit. Appellant took the matter back to the Tenancy Tribunal claiming that the notice to quit was retaliatory in terms of s 54 and ought to be set aside. The Tribunal found against him and he appealed to the District

Court. The Judge found that as well as the appeal about the notice as set out in his written application, appellant had also sufficiently raised at the hearing the question of exemplary damages and costs but these had not been expressly dealt with by the Tribunal. In the result he allowed the appeal and reheard the appellant's claim on all three matters but in respect of each of them found against the appellant.

The present appeal followed. The original notice of appeal was of a general appeal against the whole of the judgment but it was pointed out by the Judge in this Court before whom the file came that such appeals are available only on a question of law and the appellant was directed to state what the question of law was.

Subsequently a document was filed in which the appellant formulated four respects in which it was said the District Court Judge erred in law.

When the matter came before me, the appellant was represented by counsel, but almost at the end of the hearing, as Mr Whitcombe was making his submissions in reply to Mr Weatherall, the appellant intimated that he wanted to dispense with counsel and conduct the rest of the appeal himself. Mr Whitcombe sought leave to withdraw. As the appeal is solely on a question of law and the appellant had been granted legal aid so that counsel could be instructed by him, and all that remained was for his counsel to reply to the argument put forward on behalf of the appellant, I did not see how the appellant could possibly assist his own case in any way by taking over its conduct at that stage of the proceedings. I refused leave to withdraw and heard the

remainder of Mr Whitcombe's submissions in reply. Since then the appellant has filed a memorandum seeking leave to file further submissions and asking for another hearing. I decline to follow that course. There is no suggestion that any relevant matter of law has been overlooked or that anything further can be said on the legal issues raised.

The first ground of appeal is stated as follows:

> "That the learned Judge erred in finding that he was unable to award costs per s 98 of Residential Tenancies Act 1986 for the attendance of a witness for the appellant at a hearing of the Tenancy Tribunal."

The appellant had Mr Leaf at the Tribunal hearing for the purpose of testifying as to the tenancy but that was not in issue, the respondent accepting the earlier determination that there was a tenancy. Mr Leaf in the result was not called. The appellant sought witnesses expenses for him but the Judge held, in view of the restricted right to order costs in s 102, and the availability of expenses only for witnesses who had been summoned as provided for in s 98 that no order could be made in respect of Mr Leaf.

Although the formal ground for appeal specifies that the Judge was wrong in this respect that conclusion was not directly challenged in the submissions made on behalf of the appellant.

It was contended that the Tribunal staff, later the Tribunal and the District Court Judge ought to have seen that the appellant was properly aware of the position with regard to a witness summons.

Also under the heading of "costs" Mr Whitcombe submitted that the appellant ought to have been advised of

(1) the statutory prohibition against a landlord using force to enter or attempt to enter the premises in s 48(5) and the fact that a breach of that subsection is an offence which makes a landlord liable to imprisonment for a term not exceeding three months or a fine not exceeding $500, and (2) that pursuant to s 77(2)(n) the Tribunal or the Judge could have ordered the landlord to pay such sum by way of "damages and compensation" as might be assessed in respect of the breach of any express or implied provision of the tenancy agreement or any provision of the Act.

First, as to the Judge's determination that it was not open to the Tribunal or the Court to award witnesses expenses in respect of Mr Leaf, it is my view that the Judge correctly directed himself in law and properly applied the provisions of the Act. As noted no submission was made to the contrary on behalf of the appellant.

Secondly, as to the argument that the Tribunal staff, the Tribunal and the Judge ought to have advised the appellant of other possible respects in which he might claim, it must be noted that I am not conducting a review or enquiry into the public service provided by the Department or the Tribunal. My function here is to determine whether the Judge has erred in law in the manner in which he dealt with the appellant's appeal.

When the appellant came before the Judge he made three specific points, all of which were dealt with by the Judge in a fully reasoned judgment after hearing evidence from both sides. I do not think it can be said that he erred in law by failing to consider some other possible

approach to the claim which might possibly have been open to the appellant.

The second and third grounds of appeal are:

> "That the learned Judge erred in finding the respondent company had not committed unlawful acts."
>
> "That if the Court finds the respondent company acted unlawfully exemplary damages should be granted pursuant to s 109 of the Residential Tenancies Act 1986."

By s 38 of the Act a tenant is entitled to quiet enjoyment of the premises. By subs (2), the landlord is not to: *"...cause of permit any interference with the reasonable peace, comfort or privacy of the tenant..."* and by subsection (3) contravention of subsection (2) *"in circumstances that amount to harrassment of the tenant is hereby declared to be an unlawful act"*.

By s 109 application may be made for an order requiring any person to pay an amount in the nature of exemplary damages on the ground that that person has committed an unlawful act.

If on such an application the Tribunal is satisfied that the person against whom the order was sought committed the unlawful act intentionally, and that having regard to the intent of that person in committing the unlawful act, the effect thereof and the interests of the tenant against whom it was committed, and the public interest, it would be just to require the person against whom the order is sought to pay a sum, the Tribunal may make an order accordingly.

The Judge reviewed the evidence finding that the respondent's officer who had dealt with the matter, honestly believed information which had been passed on by others and also, on reasonable grounds, that there was no tenancy agreement and that he was acting entirely legally in exercising his right to remove a squatter. The Tribunal found that there was a tenancy agreement but the relevant facts for present purposes are the honesty and reasonableness of respondent's belief.

In the result the Judge concluded that there was no unlawful act and that a claim for exemplary damages had not been made out.

In my view the Judge has correctly stated and applied the law and there was evidence on which it was open to him to reach the decision which he did.

The next ground of appeal is:

> "That the learned Judge erred in finding notice given by the respondent company was not retaliatory pursuant to s 54 of the Residential Tenancies Act."

By that section a notice to quite is retaliatory if:

> ".... the landlord was motivated wholly or partly by the exercise or proposed exercise by the tenant of any right, power or authority or remedy conferred on the tenant by the tenancy agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy."

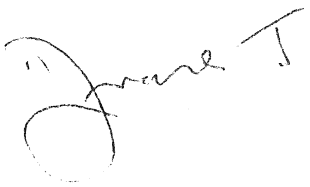
If on any such application the Tribunal is satisfied that the landlord was so motivated it shall declare the notice to be of no effect unless satisfied that the purported exercise by the tenant of any such right, power, authority or remedy or the making by the tenant of

any such complaint was or would be vexatious or frivolous to such an extent that the landlord was justified in giving the notice.

The primary question for the Judge was whether, as a matter of fact, the notice given by the landlord in this case was retaliatory within the meaning given to that word by s 54. This is obviously a question of fact and not of law. There is evidence on which it was open to the Judge to reach the conclusion which he did. No grounds have been made out for this Court to interfere.

The appeal is dismissed

Costs are reserved.



Solicitors:

Hannan & Seddon, Greymouth, for Appellant
Carruthers & Wetherall, Greymouth, for Respondent.