IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKAORIORI ROHE

CIV-2021-435-12
[2022] NZHC 923

BETWEEN	KATHERINE RAUE Applicant
AND	HARCOURTS HAMILL REALTY LTD First Respondent
	JUDITH GUNN Second Respondent

Hearing: 4 April 2022, further material received on 5 May 2022

Counsel: Ms Raue in person, with Mr Mihaka
K D Perry and A N Wainstein for First Respondent
J R Parker for Second Respondent

Judgment: 18 May 2022

JUDGMENT OF ELLIS J

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[1] On either 19 February or 19 April 2021 the District Court dismissed Ms Raue's appeal from a decision by the Tenancy Tribunal (the Tribunal) dated 10 August 2020 terminating her tenancy.[1]

[2] On 22 June 2021 Ms Raue filed an application for leave to appeal the 19 April decision out of time.[2]

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[1] The reason for the confusion around these two "decisions" will become evident later in this judgment.

[2] On the assumption that it is the 19 April 2022 decision that is the actuating one, her appeal was just under a month late.

The issue

[3] The issue for determination by the Court is whether granting leave to appeal out of time would be in the overall interests of justice.[3] In this case, the merits of Ms Raue's proposed appeal are not only central to, but (in my view) determinative of, that question. Before getting to that point, however, it is necessary to set out the rather complex background to this matter in some detail.[4] Some detail is also useful as a means of checking whether the various matters raised by Ms Raue before me have, in fact, been addressed in the Tribunal and/or the District Court.

Background

[4] At the end of October 2019 Ms Raue became the tenant of a property in Reading Street, Greytown. Harcourts Hamill Realty Limited (Harcourts) manages the property on behalf of the owner, Judith Gunn. Miss Gunn is elderly and lives in a rest home. Although she is mentally alert and has legal capacity, she has debilitating physical ailments, difficulties with using her phone and no access to computers. At the time in question she had executed an enduring power of attorney (EPA) in favour of her brother, Roger Gunn.

[5] From the outset, Ms Raue was of the view that the property was substandard, particularly in light of the weekly rent of $330, which she says was almost 40 per cent higher than the $200 she had previously paid for renting another property. She also contends that the property was not clean when she moved in, nor properly maintained subsequently. She says the property was effectively uninsulated, had a leaking roof and dangerously rotten steps leading to the deck. She says Harcourts were required to—but did not—provide her with a list of all "identifiable hazards and risks" as required by one of the terms and conditions in the lease.

[6] At an early stage there was also an unfortunate dispute over a demand for a rent payment said by Harcourts to be overdue and about contractors sent by Harcourts to the property.

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3 *Ellis v R* [2019] NZSC 83 at [15].
4 This background was not, it must be said, set out in any particularly coherent way by the any of the parties and has taken some time to piece together.

[7] I interpolate at this point that Ms Raue seems to me to be a vulnerable person who struggles to deal well with stressful situations or with conflict. Her written communications with Harcourts over the (disputed) overdue rent and access to the property quickly became heated—even inflammatory—in their terms. Ms Raue then tried to avoid engaging with Harcourts at all, saying that she would deal instead directly with Miss Gunn. But Harcourts reiterated to her that they were Miss Gunn's agent and that she needed to deal with (and pay rent to) them. The consequences of her continued refusal to do so have been played out in the form of these proceedings ever since.

[8] As I understand it, Harcourts filed its first application for termination of the tenancy on 26 February 2020, on the sole ground that Ms Raue was harassing and abusing the property manager and refusing to allow access for maintenance and inspections. Before that application was heard, however, Harcourts filed a second application, seeking termination on the basis of non-payment of rent. At the time the second application was filed, it seems Ms Raue was some $3,252.86 (almost 70 days) in arrears.

[9] The applications first came before the Tribunal on 5 June 2020. The Tribunal noted that where rent is overdue for more than 60 days, the Residential Tenancies Act 1986 (the RTA) provides that termination can only be refused if the Tribunal is satisfied that the tenant is making reasonable endeavours to pay the rent, and if, after balancing the respective interests, the termination is not justified.[5] The Tribunal noted:

> It is not possible to make a finding that Ms Raue is making reasonable endeavours to pay the rent, as none has been paid for so long. It is also not currently possible to make a finding that the tenancy should continue on the basis of weighing the respective interests, given the extent of the arrears and the obstruction to Harcourts in their management of the tenancy.

[10] During the 5 June hearing, however, Ms Raue made an oral cross-application relating to various alleged breaches of the RTA and the lease by the landlord, including

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[5] The reference to 60 days by the Tribunal was mistaken. Section 55(1) of the RTA states that the threshold for termination is arrears of at least 21 days. Nor is the Tribunal's statement of the s 55(2) "defence" entirely accurate. Importantly, however, neither of these mistakes disadvantaged Ms Raue.

the matters I have already mentioned above.[6] The Tribunal thought that the possibility of set-off therefore arose, which might diminish the rent owing. The Tribunal decided that an evidential hearing would be required. It also noted that:

> Ms Raue stated that she would start paying rent at $200.00 per week. There is no provision in the Act enabling Ms Raue to withhold rent, in spite of the matters in dispute. Rent remains due at $330.00 per week. With the consent of Harcourts, and in light of the matters raised, an order has been made requiring weekly rent payments to begin again immediately, at $200.00 per week.

[11] The matter was adjourned to enable the parties to marshal their evidence, subject to the interim order that Ms Raue was to pay her rent from that date onwards, at the reduced ($200) rate. Miss Gunn was also joined as a party to the proceeding.

[12] The Tribunal hearing resumed on 17 July 2020. As I understand it, Ms Raue had not filed any evidence in support of her cross-application at that point. But she advised the Tribunal that she had put aside six weeks' rent at the reduced $200 rate as directed but did not want to pay it to Harcourts because she disputed that they had the power to act for Miss Gunn. More particularly, she disputed the validity of the EPA.

[13] But the Tribunal had by then been provided with copies of the management agreement (in favour of Harcourts) and the EPA (in favour of Roger Gunn). It was satisfied that Harcourts were Miss Gunn's duly appointed agent, and the landlord to whom rent was payable.

[14] The Tribunal was plainly concerned, however, that Ms Raue should be afforded a further opportunity to put things right. Rather than granting the termination application at that point, the Tribunal made further interim orders. Having noted that, by 28 July 2020, Ms Raue would have accrued $6,600 in rental arrears it ordered:

(a) Ms Raue was to make a payment of $1,200 to Harcourts on or before 28 July 2020;[7]

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6 The Tribunal recorded that Ms Raue had become distressed and overwhelmed during the hearing and had left before it was completed.

7 The Tribunal made it clear that this date was set to give Ms Raue time to transfer the funds she had set aside to Harcourts.

(b) if Ms Raue remained in occupation of the property, she was to make weekly payments of $330 (being the regular rent payable under the tenancy agreement) with the first such payment to be made on or before 29 July 2020;

(c) if Ms Raue failed to make either of these payments within two working days of the specified dates:

  (i) the tenancy would automatically terminate, entitling the landlord to immediate possession of the property; and

  (ii) the sum of $1,200 would be payable immediately.

[15] On 31 July, Harcourts was instructed to file an application for eviction on the basis that Ms Raue had not complied with these orders.[8]

[16] On 5 August, however, Ms Raue had a bank cheque for $1,800 made out to Miss Gunn and had it delivered to her by some means (for reasons I do not need to go into, it was not, I think, delivered by Ms Raue personally). It seems Harcourts was not aware of this payment until later.

[17] On 10 August, the Tenancy Tribunal heard Harcourts' eviction application. At the hearing of that application, Ms Raue sought a rehearing of the termination application and a stay of enforcement. She also spoke of having made a payment of $1,800 to Miss Gunn but provided no evidence of that. As just noted, Harcourts appears at that stage to have been unaware of it. And it was, of course, not in accordance with the Tribunal's previous direction that any payment be made to Harcourts, as Miss Gunn's agent.

[18] So the eviction application was granted and Ms Raue's applications were declined. Ms Raue was served with the eviction notice—and was evicted—that same day.

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8 On 3 August, an attachment order was issued requiring Ms Raue to pay $30 per week towards the judgment debt.

[19] On 24 August, Ms Raue appealed the Tribunal's decision not to grant a stay of enforcement to the District Court. On 4 September, Judge Touhy issued a minute saying that because the order had already been executed the question of a stay was moot.

[20] On 29 September, the Tribunal noted that the District Court had not issued a stay of proceedings and made further directions relating to the conduct of the remainder of Harcourts' claim and of Ms Raue's cross-claim.[9] The Tribunal directed that the competing claims were to proceed to a further hearing at a time to be notified. The Tribunal directed that, in the meantime:

> (a) [Harcourts] are to leave the goods in the property for a further two weeks and undertake reasonable endeavours to make an arrangement for Ms Raue to remove them herself within that timeframe;
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> (b) If it is not possible to make such an arrangement, then Harcourts may elect to remove the goods into safe storage. The goods are not to be sold before the next hearing. Harcourts is to release these goods to Ms Raue at her request. Harcourts may recover from Ms Raue the reasonable costs of transportation and storage but may not withhold the goods as a lien for the payment of rent arrears or costs.
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> (c) If the goods remain in storage at the next hearing, a further order regarding their future will be made at that time.

[21] Ms Raue had also appealed the termination decision itself. Her appeal first came before Judge Harrop on 19 November 2020. In a minute of that date, the Judge noted that Ms Raue (who had again left the District Court conference/hearing before its conclusion after becoming distressed and angry) claimed that she had paid her rental arrears and that she continued to challenge the legitimacy of Harcourts' agency and Miss Gunn's EPA.

[22] Judge Harrop recorded that, because Ms Raue's grievances about the tenancy had not yet been dealt with by the Tribunal, the District Court did not have jurisdiction to address those matters on appeal. As to the matters referred to in the previous paragraph, he said:[10]

> [12] It ought to be a straightforward matter for Ms Raue to prove that she has made all of the payments she was required to make. Either payment has

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9 [2020] NZTT Masterton 4240994, 29 September 2020.

10 Emphases added.

> been made and received or it has not. There is no doubt that rental payments were made prior to 5 March and it should be a simple matter for Ms Raue to prove that all other rental payments required of her were made after that date. It is an objectively verifiable fact, proof of which should easily be able to be provided to the court through banking records. Harcourts have set out what payments they say were made and received by them. They say the payments stopped on 5 March.
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> [13] Accordingly in order to advance this issue, I direct that Ms Raue file and serve on Harcourts **by 15 December 2020** an affidavit attaching proof of the payments she says have been made since 5 March 2020 by her personally to Harcourts.
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> [14] *As a separate issue, there is obviously a dispute about whether or not Miss Gunn was personally handed a bank cheque for $1,800 on 5 August 2020 as Ms Raue says occurred but Harcourts says did not occur. This is very much a subsidiary issue because even if Ms Raue is right about that, it would not provide a basis for her appeal to succeed unless she can prove that there were no other arrears outstanding for more than 21 days as at 10 August. If there were other such arrears the Tribunal was still left with no choice but to terminate the tenancy.*
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> [15] I discussed this with Ms Jones during the hearing and she is prepared to obtain an affidavit from Miss Gunn setting out what, if anything, occurred in relation to that alleged payment.
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> [16] In view of the challenge that Ms Raue makes to the legitimacy of the power of attorney given by Miss Gunn I also direct that the affidavit from Miss Gunn confirm the legitimacy of that power of attorney. That affidavit is also to be filed, and served on Ms Raue, by **15 December 2020.**
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> [17] Following the filing of that evidence *the court is to set the matter down for a further appeal conference. If Ms Raue has not provided the evidence she says she can provide that there were no arrears of rental as at 10 August 2020, then I would expect the judge presiding at that conference to dismiss the appeal without a further hearing. There is no point in having an appeal hearing if it is clear the appeal cannot succeed because the Tribunal had no choice but to terminate the tenancy.*

[23] Ms Raue did not, however, provide an affidavit attaching proof of payments as directed by Judge Harrop. It seems tolerably clear that—apart from providing proof of the $1,800 bank cheque—she was unable to do so because she had not in fact made any weekly payments of $330 that the Tribunal directed were to recommence on 29 July 2020.[11]

[11] It may be that Ms Raue considers that the first payment due on 29 July 2020 was incorporated in the $1,800 bank cheque (but still at the reduced $200 rate). If so—and even putting to one side the fact that the $1,800 cheque was drawn late and made out to the wrong person—it unfortunately does not constitute compliance with the Tribunal's clear direction.

[24] Miss Gunn also did not file an affidavit as directed by the Judge, although it seems Roger Gunn may have done so. His affidavit was not, however, part of the material before me.

[25] As directed by Judge Harrop there was a further appeal conference on 19 February 2021 before Judge Tompkins.[12] It seems Ms Raue did not appear. After the hearing of the leave application (and at my request) I was provided with the record of that hearing. It states:

> **DECISION**
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> 19/02/2021
>
> Ms Hamill and Ms Jones for Respondent.
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> There has been email contact between the parties recently, but no explanation as to why Ms Raue is not present today.
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> Ms Raue has not complied with Judge Harrop's direction (Paragraph 13 of minute of 19th November 2020); the affidavit referred to in paragraph 16 of that minute has been filed - the cheque was not cashed.
>
> Accordingly, appeal dismissed as encapsulated by paragraph 17 of Judge Harrop.
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> (signed)
> Tompkins DCJ

[26] For reasons that are not clear to me Judge Tompkins then issued a further "memorandum" two months later which, in its entirety, states:[13]

> [l] Application for rehearing of Tenancy Tribunal appeal to District Court dismissed due to non-appearance at original hearing, absence of prior notice of non-appearance at that hearing, and absence of proof of any payments to Harcourts, and absence of proof of payment of rent arrears, as directed by Judge Harrop.

[27] It is this decision that Ms Raue now seeks to appeal to this Court.[14]

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12 This is the date referred to in the submissions filed by counsel for Harcourts.

13 Neither the 19 February nor the 19 April documents could be said to take an orthodox "judgment" form; neither (for example) have MNC numbers.

14 Whether it is the document dated 19 April or the document dated 19 February that is regarded as the relevant decision makes no difference to Ms Raue's present application for leave.

[28] Before turning to the question of leave, it is useful to complete the relevant narrative. The competing claims by Harcourts (for rental arrears) and Ms Raue (in relation to her cross-claims) were the subject of a further Tribunal hearing on 9 April 2021. On that day the Tribunal ordered Ms Raue to collect her goods from storage (whence they had been moved by Harcourts) by 16 April 2021, and that if she did not do so the landlord could dispose of them.[15]

[29] Following a resumed hearing on 21 May, the Tribunal released its final determination of remaining matters.[16]

[30] As far as rent arrears were concerned, the Tribunal noted that Ms Raue's bank cheque for $1,800 had not been banked but was now in the landlord's possession. It directed that that amount be applied as a credit to the overdue rent—which by then totalled $6,252.86—reducing the arrears to $4,452.86.

[31] Ms Raue's cross-claims were summarised by the Tribunal (at [21]) as follows:

> a. Renting a property in an inadequate state of repair.
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> b. Tenancy agreement included unenforceable clauses, a failure to meet insulation requirements.
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> c. Failure to provide a log of property hazards prior to occupation.
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> d. Failure to respond to communication.
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> e. Providing misinformation about the state of the property.
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> f. Failing to undertake maintenance.
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> g. Retaliatory notice after complaining about maintenance.
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> h. Failure to provide an affidavit about a power of attorney.
>
> i. Breach of privacy.
>
> j. Depriving tenant from obtaining her belongings.
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> k. Rent exceeding market rate.

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15 On 21 May 2021 the Tribunal recorded that it had received advice that Ms Raue had complied with that order and had uplifted her goods.

16 [2021] NZTT Masterton 4274042, 4240994 and 4260511, 21 May 2021.

[32] The Tribunal considered these claims on the merits, as best it could. A significant impediment to Ms Raue's position in relation to a number of them was her prior refusal to engage with Harcourts about them or with the relevant statutory processes and, in relation to some complaints, the fact that the tenancy had been terminated (a decision that the Tribunal was unable to revisit). The alleged non-compliance with the District Court direction that Miss Gunn file an affidavit was noted to be a matter outside the Tribunal's jurisdiction. As well, the Tribunal noted that Ms Raue had declined to make any submissions on the privacy issue and had, again, become distressed and left the hearing before it was completed.

[33] Nonetheless, the Tribunal found in favour of Ms Raue in relation to the insulation claim; Harcourts had accepted that the new statutory insulation requirements had not been met at the time Ms Raue moved in. The Tribunal awarded her exemplary damages of $200 (for a misleading insulation statement) and $1,000 (for substantive breach of the statutory insulation requirements). These amounts were also set off against the rent arrears, leaving a total amount of $3,252.86 owing by Ms Raue.

[34] Lastly, the Tribunal made a direction that, in light of Ms Raue's claim that certain items belonging to her remained at the Reading Street address, she could attend the address on 31 May 2021, between 10 and 11 am to collect them. I am not sure whether she did so.

The application for leave

[35] Ms Raue seeks leave to appeal out of time from Judge Tompkins' decision dismissing her appeal against the Tribunal's August termination decision.

[36] I begin by acknowledging that, relatively speaking, Ms Raue's proposed appeal was not filed significantly out of time. Equally, it was not just a few days late. But in any event it is the merits of her intended position on appeal that ultimately counts against the grant of leave here.

[37] As noted by both the Tribunal itself and later by Judge Harrop, the Tribunal was *required* by s 55(1) of the RTA to terminate the tenancy if the rent was, at the date

on which the application was filed, 21 days or more in arrears. The only potentially applicable exception is that contained in s 55(2): where the Tribunal is satisfied that the breach has been remedied (where it is capable of remedy), the landlord has been compensated for any loss arising from the breach, and it is unlikely that the tenant will commit any further breach of a kind to which the section applies.[17]

[38] In the present case it seems clear that—notwithstanding Ms Raue's very significant arrears as at 17 July[18]—the Tribunal was willing to give Ms Raue both time and the opportunity to take steps that might form a foundation for an application of the s 55(2) exception. Unfortunately:

(a) Ms Raue did not pay $1,200 to Harcourts on or before 28 July 2020, as directed by the Tribunal; and

(b) although the $1,800 bank cheque can, to some extent, be seen as reflecting the Tribunal's order (that Ms Raue pay rent of $200 per week from 5 June until 28 July) the cheque was not drawn until after the date specified by the Tribunal (even taking into account the permitted leeway of two days) and nor was it made out, or given, to Harcourts, as directed.

[39] So in terms of the Tribunal's orders made on 17 July, these omissions or defaults automatically triggered termination of the tenancy. Given the amount of her arrears—and the absence of any foundation for an application of the exception—there can be nothing unlawful about that.

[40] In the District Court, Judge Harrop was also prepared to give Ms Raue time, and the opportunity, to show that the required payments had been made. Had she been able to do so, her appeal might well have succeeded. But even if she had placed evidence before the Court about her (late) $1,800 payment (which she did not) there

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[17] Another exception is where the tenancy relates to "unlawful residential premises" under s 78A. That section is not engaged here.

[18] At the time Harcourts' second termination application was made, Ms Raue was in arrears by around 70 days—well over the 21 day threshold. By the time of the 17 July hearing her arrears amounted to around $6,000 (125 days).

were other arrears that (as noted earlier) Ms Raue does not even now seek to argue that she has paid. If that is the case then there was, quite simply, no wriggle room in light of the mandatory terms of s 55(1) and the very limited exception in s 55(2). And significantly, even after the Tribunal's later set-off of the exemplary damages for the landlord's insulation breaches, a considerable arrears debt remains.

[41] Moreover, Ms Raue made it clear at hearing before me that she seeks by way of relief a restoration of her tenancy. It is impossible to see how that could be an available option now. Ms Raue was evicted almost two years ago. Presumably the property has been lawfully tenanted by others since that time. Even were there jurisdiction to do so (which I doubt), I can see no prospect of a Court making orders that would disturb such a tenancy. The current tenants (whoever they might be) are not parties to these proceedings.

Result

[42] Although it is impossible not to have sympathy for Ms Raue and the position she finds herself in, it is simply not possible to conclude that her proposed appeal has any realistic prospect of success. The interests of justice do not favour the grant of leave and leave is declined, accordingly.

Rebecca Ellis J

Solicitors:
Heaney & Partners, Auckland for First Respondent
WCM Legal, Wellington for Second Respondent