

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA298/2022
[2023] NZCA 508**

BETWEEN

KATHERINE RAUE
Applicant

AND

HARCOURTS HAMILL REALTY LTD
First Respondent

JUDITH GUNN
Second Respondent

Court: Gilbert and Katz JJ

Counsel: Applicant in person
K D Perry and A N Wainstein for First Respondent
J R Parker for Second Respondent

Judgment: 20 October 2023 at 2:00 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of the time to apply for the allocation of a hearing date and file the case on appeal is declined.**
- B The applicant must pay each of the respondents' costs calculated for a standard interlocutory application on a band A basis, and usual disbursements.**
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REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Ms Raue applies for an extension of time to file her case on appeal and apply for the allocation of a hearing date.¹ The respondents, Harcourts Hamill Realty Ltd and Miss Gunn, oppose the application.

Background

[2] Ms Raue was a tenant in a residential property owned by the second respondent, Miss Gunn. Harcourts managed the property, as Miss Gunn's agent.

[3] Harcourts applied to the Tenancy Tribunal to terminate Ms Raue's tenancy on the basis of non-payment of rent.² At the time of the application Ms Raue was alleged to be \$3,252.86 (almost 70 days) in arrears.³

[4] Harcourts had previously filed an application to terminate the tenancy on the basis that Ms Raue was harassing and abusing their property manager and refusing to allow access for maintenance and inspections.⁴ Ms Raue then avoided engaging with Harcourts at all, saying that she would deal instead directly with Miss Gunn.⁵ Miss Gunn, however, is elderly and lives in a rest home. Although at the relevant time she was mentally alert and had legal capacity, she suffered from debilitating physical ailments, difficulties with using her phone and had no access to computers.⁶ Miss Gunn had therefore executed an enduring power of attorney (EPA) in favour of her brother, Roger Gunn.⁷ It appears that Harcourts may have been engaged by Mr Gunn. The Tribunal (which had been provided with a copy of the EPA and Harcourts management agreement) was satisfied that Harcourts were Miss Gunn's duly appointed agent.⁸

¹ Court of Appeal (Civil) Rules 2005, r 43.

² *Raue v Harcourts Hamill Realty Ltd* [2022] NZHC 923 [judgment under appeal] at [8].

³ At [8].

⁴ At [8].

⁵ At [7].

⁶ At [4].

⁷ At [7].

⁸ At [13].

[5] The Tribunal made various interim orders on 17 July 2020 to give Ms Raue an opportunity to “put things right”.⁹ Having noted that by 28 July 2020 Ms Raue would have accrued \$6,600 in rental arrears, the Tribunal ordered her to make a payment of \$1,200 to Harcourts by that date and to also commence making weekly payments of \$330 (the normal rent payable under the tenancy agreement), with the first such payment to be made to Harcourts on or before 29 July 2020. The Tribunal further ordered that if Ms Raue failed to make either of these payments within two working days of the specified dates:¹⁰

- (a) the tenancy would automatically terminate, entitling the landlord to immediate possession of the property; and
- (b) the sum of \$1,200 would be payable immediately.

[6] There is no dispute that the payments ordered by the Tribunal were not made within the required time frame. As a result, on 31 July 2020, Harcourts was instructed to file an application to evict Ms Raue from the property.¹¹ The Tenancy Tribunal heard that application on Monday 10 August 2020.

[7] Several days prior to the eviction application hearing, on Wednesday 5 August 2020, Ms Raue arranged for a bank cheque for \$1,800 to be delivered to Miss Gunn, presumably at her rest home.¹² This was contrary to the Tribunal’s order that payment be made to Harcourts. Harcourts was not aware of this payment until some time later.¹³

[8] The eviction application was granted by the Tribunal on Monday 10 August 2020 (the Eviction Decision) and Ms Raue was evicted later the same day.¹⁴

⁹ At [14]

¹⁰ At [14]

¹¹ At [15].

¹² At [16]

¹³ At [16]

¹⁴ At [18].

[9] Ms Raue appealed the Eviction Decision to the District Court.¹⁵ Her appeal was dismissed on either 19 Feb or 19 April 2021,¹⁶ after Ms Raue had failed to appear and/or comply with a direction from the Court to provide an affidavit to support her position.

[10] A further Tenancy Tribunal hearing took place on 9 April 2021 and resumed on 21 May 2021.¹⁷ That hearing addressed the quantification of rental arrears, in light of various cross-claims brought by Ms Raue alleging, amongst other things, that the property was inadequately insulated.¹⁸ The Tribunal issued its determination on these issues on 21 May 2021 (the Arrears Decision). It determined that the total rental arrears were \$4,452.86.¹⁹ Ms Raue succeeded in her cross-claim regarding inadequate insulation, however. This resulted in a damages award in her favour of \$1,200.²⁰ Setting this off against the total rental arrears, the balance owing by Ms Raue to the landlord was \$3,252.86.

[11] It appears that Ms Raue appealed the Arrears Decision to the District Court. Ms Raue applied to the District Court to have the orders in the Arrears Decision stayed pending determination of her appeal against the Arrears Decision appeal, but this was declined.²¹ One of the factors weighing against a stay was the Judge's view that, on the information before the Court, the appeal was likely to be unsuccessful.²² It appears that Ms Raue's appeal of the Arrears Decision may not have been pursued further, as there is no record of a substantive judgment being delivered.

[12] On 22 June 2021 Ms Raue filed an application in the High Court seeking leave to appeal, out of time, the District Court decision dismissing her appeal from the Eviction Decision.²³ Appeals under the Residential Tenancies Act 1986 to the High Court are allowed on points of law only.²⁴

¹⁵ Residential Tenancies Act 1986, s 117(1).

¹⁶ *Raue v Harcourts Hamill Realty Ltd* DC Masterton CIV-2020-035-000098, 19 February 2021. The April memorandum is replicated in the judgment under appeal, above n 1, at [26].

¹⁷ *Raue v Hamill Realty Ltd* [2021] NZTT Masterton 4274042, 4240994 and 4260511.

¹⁸ At [21].

¹⁹ At [18].

²⁰ At [58].

²¹ *Raue v Harcourts Hamill Realty Ltd* [2021] NZDC 11974.

²² At [28].

²³ Judgment under appeal, above n 2, at [2].

²⁴ Residential Tenancies Act, s 119(1).

[13] Ellis J considered that Ms Raue’s appeal did not have any realistic prospect of success as, in the circumstances of Ms Raue’s case, the Tribunal was *required* by s 55(1) of the Residential Tenancies Act to terminate the tenancy if the rent was, at the date on which the application was filed, 21 days or more in arrears.²⁵ The only exception that could potentially apply was that contained in s 55(2) which provides that:

- (2) The Tribunal may refuse to make an order under subsection (1) if, but only if, it 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 this section applies...

[14] Ellis J acknowledged that Ms Raue had (belatedly) made a payment of \$1,800 to Miss Gunn on 5 August 2020. That payment did not, however, comply with the Tribunal’s orders as it was not made within the required time frame and was made to Miss Gunn rather than Harcourts.²⁶ Termination of Ms Raue’s tenancy was therefore automatically triggered.²⁷ Ellis J further observed that Ms Raue did not subsequently provide the District Court with evidence of the \$1,800 payment she had made, despite an opportunity to do so.²⁸ Even if she had, however, “there were other arrears that...Ms Raue does not even now seek to argue that she has paid”.²⁹ As noted above, the Arrears Decision quantifies the sum owing at \$3,252.86. Ellis J concluded that there was:³⁰

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.

Leave was accordingly declined.³¹

²⁵ Judgment under appeal, above n 2, at [37] and [42].

²⁶ At [38]

²⁷ At [39]

²⁸ At [40].

²⁹ At [40].

³⁰ At [40].

³¹ At [42].

[15] On 16 June 2022, Ms Raue filed a notice of appeal in this Court in respect of Ellis J's decision.³² Ms Raue had until 16 September (three months from the date of filing her notice of appeal) to file her case on appeal and seek the allocation of a hearing date.³³ A short extension was granted by the Registrar, to 23 September 2022,³⁴ but the case on appeal was not filed by that date. Ms Raue's appeal was therefore deemed abandoned.³⁵

[16] This Court may grant an extension (or in this case, a further extension) to file a case on appeal within three months after the initial three month period for filing a case on appeal ends.³⁶ Ms Raue was informed by the Registry that she had until 18 January 2023 to seek a further extension of time.³⁷ She filed an extension application on the final day of that period.

Should an extension of time to file the case on appeal be granted?

[17] Against this background, we consider whether Ms Raue's extension application should be granted.

Legal principles

[18] When determining applications for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules (2005) (the Rules), the following considerations are relevant:³⁸

- (a) the length of the delay;

³² There is an appeal as of right under s 56(1)(a) of the Senior Courts Act 2016 to appeal the decision refusing to grant an extension of time in the High Court: *Simes v Tennant* [2005] 17 PRNZ 684 at [47]. This decision was decided under s 66 of the Judicature Act 1908 but confirmed in *TFD v JDN* [2022] NZCA 503 at [2] as the position under the Senior Courts Act.

³³ Court of Appeal (Civil) Rules, r 40(2)(a).

³⁴ Rule 5A(1)(c)(ii).

³⁵ Rule 43(1).

³⁶ Rules 43(2) and 43(3).

³⁷ Unfortunately the Registrar made a calculation error due to the holiday period, and the correct date was 17 January. To ensure that Ms Raue was not prejudiced, the Registrar granted a further five-day extension pursuant to r 5A(1)(c)(ii). We therefore treat Ms Raue's extension application as being within time.

³⁸ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]; and *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4].

- (b) the reason for the delay;
- (c) the conduct of the parties, particularly the applicant;
- (d) any prejudice to the respondents; and
- (e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

[19] The overarching consideration is the interests of justice.³⁹

The length and reasons for the delay and the conduct of the applicant

[20] The extension application was filed at the eleventh hour, on the last date available to make such an application. This was six months after the notice of appeal had been filed, and three months after the time period for filing a case on appeal provided for in the Rules had expired. As the respondents note, delay on the part of Ms Raue, and repeated failures to comply with orders and directions made by both the District Court and the Tribunal, are an ongoing feature of this litigation. In addition, Ms Raue did not file her notice of appeal in the High Court within time. In this Court Ms Raue requested an extension of time to file submissions in support of her extension application, which was granted by the Registrar on 20 February 2023. After the respondents' submissions were filed, Ms Raue sought extensions from the Registrar, twice, for the filing of her reply submissions. Those extensions were granted, but no reply submissions were filed within the extended timeframe (or at all).

[21] Ms Raue's submissions deal only briefly with the reasons for her delay in filing the case on appeal. Ms Raue says that she is the carer of an elderly man who has faced significant housing issues after his home was damaged by a cyclone and he was relocated to unsuitable emergency accommodation. This caused him to be hospitalised with serious health issues. As a result, Ms Raue says:

...I have been somewhat curtailed from my other activities because I have had to invest more time helping him deal with his own landlord and his own tenancy dispute...

³⁹ *Mawhinney v Auckland Council* [2020] NZCA 26 at [8].

[22] This explanation does not, in our view, provide an adequate explanation for the significant delay in filing the case on appeal. As the respondents note, despite Ms Raue's personal commitments, during the initial three-month period after filing her notice of appeal she was able to apply for dispensation of security for costs and also subsequently seek an (unsuccessful) review of the Registrar's decision to decline that application. She has also been able to assist the elderly man she cares for to pursue his own tenancy dispute.

[23] This appeal is narrow in scope, reflecting that appeals under the Residential Tenancies Act to the High Court are allowed on points of law only.⁴⁰ The key issue (and likely the sole issue) on appeal would be whether Ellis J erred in her analysis of s 55 of the Residential Tenancies Act. The case on appeal would likely only require the inclusion of a fairly limited number of documents.

[24] In our view, Ms Raue should have been able to file her case on appeal within the permitted three-month period. However, even three months later, when Ms Raue sought an extension on 18 January 2023, there was no suggestion that she had taken any steps towards preparation of the case on appeal, including seeking further information or advice from the Registry (if required) or the solicitors for the respondents regarding the proposed contents of the case on appeal. When seeking a further extension Ms Raue did not indicate to the Court that, if such an extension were granted, she would be in a position to file the case on appeal promptly. Rather, she simply sought an extension for an unspecified further period.

[25] We acknowledge Ms Raue's personal commitments as the carer for an elderly man. We are not persuaded, however, that those commitments provide an adequate explanation for her delay in filing the case on appeal.

Prejudice to the respondents

[26] The respondents submit that there is a pattern of delay on the part of Ms Raue. They further submit that continuing this appeal would unduly burden both respondents in time and expense. Counsel for Miss Gunn note that she is an elderly woman living

⁴⁰ Residential Tenancies Act, s 119(1).

in a retirement home. They say that her limited savings are “disappearing” as a result of this ongoing litigation.

The prospects of success on appeal

[27] The issue in Ms Raue’s appeal to this court (if an extension is granted) will be whether Ellis J erred in not granting Ms Raue an extension of time to pursue a High Court appeal. More specifically, this Court will be required to consider whether Ellis J was wrong to conclude that Ms Raue’s appeal did not have any realistic prospect of success because the Tribunal was required by s 55(1) of the Residential Tenancies Act to grant the eviction application and terminate Ms Raue’s tenancy.

[28] In her submissions in support of the extension application, Ms Raue refers to various alleged failures of the Tenancy Tribunal and the District Court. She also claims that the respondents have made statements that are untrue. Ms Raue submits that the property was substandard and not adequately insulated. As a result, she says, the rent was set too high, and she overpaid, rather than being in arrears as the Tenancy Tribunal found. These issues, however, are relevant to the merits of the Arrears Decision (which is not part of this appeal) rather than the Eviction Decision.

[29] The key submission made by Ms Raue which is relevant to the Eviction Decision is that the Tribunal should not have evicted her, as she (belatedly) made a payment of \$1800 towards the arrears. She also provides various reasons why that payment was late.

[30] As we have noted above, appeals under the Residential Tenancies Act to the High Court are allowed on points of law only. In this context, Ellis J’s view that Ms Raue had no realistic prospect of establishing that the Tribunal was not legally entitled to make the decision it did, pursuant to s 55 of the Residential Tenancies Act, was determinative of Ms Raue’s application for leave in the High Court. Ellis J’s reasoning on this issue is set out at [13] and [14] above. We find that reasoning compelling.

[31] Ms Raue’s belated payment of \$1,800, after the eviction process had already been set in motion, was addressed by Ellis J, and does not undermine her analysis.

At the time of the eviction hearing Ms Raue's rent was very significantly in arrears. She could not therefore rely on the limited exception in s 55(2) of the Residential Tenancies Act. The Tribunal was therefore required to end the tenancy. Accordingly, even if we were to grant Ms Raue the extension she seeks, she appears to have little or no realistic prospect of establishing on appeal that Ellis J erred in not granting her the requested extension of time to bring an appeal.

[32] We further note that the remedy that Ms Raue seeks from the High Court (if given an extension of time to bring an appeal) is restoration of her tenancy.⁴¹ As Ellis J observed, it is impossible to see how this could be an available remedy now, given that Ms Raue was evicted in August 2020 and the property has presumably since been lawfully tenanted by others, who are not a party to Ms Raue's proceedings.

The significance of the issues raised

[33] The appeal does not involve matters of general or public importance. On the contrary, it relates to a specific tenancy between Ms Raue and Miss Gunn.

Conclusion

[34] The scope of the appeal is relatively narrow. Preparing the case on appeal should have been a relatively straightforward task, even taking into account that Ms Raue is self-represented. This matter has been ongoing since 2020. Further delay is prejudicial to the respondents, especially Miss Gunn, who is elderly and of limited means.

[35] Our assessment is that the appeal has little or no realistic prospect of success. Further, it is extremely unlikely that Ms Raue could ultimately obtain the relief she seeks from the High Court (restoration of her tenancy). Ms Raue's submissions focus, to a significant extent, on findings made by the Tribunal in the Arrears Decision. Ms Raue's proposed High Court appeal relates to the Eviction Decision, however, and would not afford her an opportunity to challenge findings made in the Arrears decision.

⁴¹ Judgment under appeal, above n 2, at [41].

[36] Accordingly, we are not persuaded that a further extension of time should be allowed for Ms Raue to file her case on appeal and seek the allocation of a fixture.

Costs

[37] The respondents (who are separately represented) each seek costs on a band A basis. It is submitted that not only is Miss Gunn out of pocket due to Ms Raue's non-payment of the rental arrears found by the Tribunal to be owing, but the respondents are further out of pocket due to the fact that no costs orders have been made in relation to the various unsuccessful applications made by Ms Raue throughout the course of these proceedings (including before the lower Courts).

[38] The respondents have both filed helpful submissions and the second respondent has provided a bundle of authorities. The expense they have been put to has only been necessary because Ms Raue failed to file her case on appeal within time and, as a result, had to seek an indulgence from the Court. In the circumstances, a costs award in favour of the respondents is appropriate.

Result

[39] The application for an extension of the time to apply for the allocation of a hearing date and file the case on appeal is declined.

[40] The applicant must pay each of the respondents' costs calculated for a standard interlocutory application on a band A basis, and usual disbursements.

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