**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-404-001118**
**[2017] NZHC 2661**

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| BETWEEN | DESMOND WILLIAM COOK |
| | Appellant |
| AND | HOUSING NEW ZEALAND CORPORATION |
| | Respondent |

Hearing: 19 October 2017

Counsel: Appellant in person
K Muirhead for respondent

Judgment: 31 October 2017

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**JUDGMENT OF KATZ J**

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*This judgment was delivered by me on 31 October 2017 at 1:00pm*
*Pursuant to Rule 11.5 High Court Rules*

*Registrar/Deputy Registrar*

Solicitors: Meredith Connell, Auckland

Copy to: D Cook, Appellant

## Introduction

[1] Desmond Cook appeals a decision of Judge G M Harrison, in the District Court at Auckland, in which his Honour dismissed Mr Cook's appeal against a decision of the Tenancy Tribunal ("Tribunal"). In the Tribunal Mr Cook had claimed, unsuccessfully, that his right to quiet enjoyment of his Housing New Zealand Corporation ("HNZ") unit had been breached.

[2] Any party to an appeal from a decision of the Tribunal to the District Court can only take a further appeal to the High Court on a question of law.[1] HNZ says that Mr Cook's appeal does not raise a question of law. In any event, HNZ says, Mr Cook's appeal grounds are entirely without merit.

## Background

[3] In 2016 Mr Cook was a tenant in one of four adjoining HNZ units.[2] He lived in Unit 1, nearest the road. At the rear of the complex are parking spaces for four vehicles. There is a sign over the car parks stating, "Tenants Parking Only". The four parking spaces are not allocated to any particular unit.

[4] Mr Cook did not park in one of the four parking spaces at the rear of the complex. With the agreement of HNZ, Mr Cook, who has a number of serious health issues, parked right outside his unit. To Mr Cook's considerable annoyance, however, the tenants in Units 3 and 4 repeatedly used more than one of the four available parking spaces, including allowing non-tenants to park in one of them. Mr Cook's evidence was that this made it difficult for him to turn his vehicle around, meaning that he had to back out rather than driving out of the driveway forwards. He complained repeatedly to HNZ, but was dissatisfied with their responses.

[5] Section 45(1)(e) of the Residential Tenancies Act 1986 ("Act") provides that a landlord shall take all reasonable steps to ensure that none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort, or

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1 Residential Tenancies Act 1986, s 119(1).
2 He has since moved to another HNZ property.

privacy of the tenant in the use of the premises. In addition, s 38 of the Act provides that:

> **38 Quiet enjoyment**
>
> (1) 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.
>
> (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.
>
> (3) Contravention of subsection (2) in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.
>
> …

[6] Mr Cook sought $50,000 in compensation from HNZ for its alleged breach of these provisions.

[7] The Tribunal held that Mr Cook had failed to establish that HNZ had permitted a breach of his reasonable peace, comfort or privacy in the use of the premises. It dismissed his claim for compensation.

[8] The Tribunal also addressed Mr Cook's concern that his repeated requests for copies of emails made of his telephone calls to the HNZ call centre had not been met. Mr Cook had told the Tribunal he needed those emails to establish that he had made numerous complaints about the parking at the premises. The Tribunal noted, however, that both HNZ and the Tribunal itself accepted that Mr Cook had indeed made the telephone calls he claimed to have made. The failure to provide the emails did not, in itself, constitute a breach of Mr Cook's reasonable peace, comfort or privacy in the use of the premises.

[9] Mr Cook appealed to the District Court. By the time of the District Court hearing the emails that Mr Cook had requested from HNZ had been provided to him. The Judge therefore allowed those documents to be produced as fresh evidence on appeal. He concluded, however, that there was nothing in them to suggest that the adjudicator had erred. The Judge declined to allow Mr Cook to adduce other

documents in evidence that had not been put before the Tribunal, including photographs, trespass notices and police statements.

[10] The Judge dismissed Mr Cook's appeal to the District Court. He found that the adjudicator had arrived at the correct decision and that Mr Cook had not been able to demonstrate that she had erred in any way. Mr Cook's inability to turn his car around did not amount to a breach of Mr Cook's right to quiet enjoyment. Further, any complaint about a failure by HNZ to respond promptly to Mr Cook's request for copies of emails was outside the ambit of the Act. Rather, it should be dealt with in accordance with the provisions of the Official Information Act 1982. Costs were awarded to HNZ, on a 2B scale basis.

**Appeal to High Court**

[11] Mr Cook's notice of appeal to this Court identifies the following broad grounds of appeal:

(a) the appeal should have been heard by Judge M E Sharp, who was familiar with the relevant background, rather than Judge Harrison;

(b) Judge Harrison did not take into account Mr Cook's evidence in reaching his decision; and

(c) Judge Harrison declined to admit into evidence further documents relevant to the appeal, including trespass notice papers, police statements and photos.

[12] In terms of remedy, Mr Cook seeks a "rehearing" before Judge Sharp "so that all evidence can be taken into account and accepted and so that a proper judgement can be given by [her]".

[13] As I have already noted, Mr Cook can only appeal to this Court on a question of law. On appeal on a question of law under s 119 of the Act:[3]

> ... this Court is not to substitute its own views for that of the lower Court; instead the Court must consider whether the decisions under appeal reveal a misinterpretation and/or misapplication of the statutory powers in the [Act], and if not, whether what has been decided is so misconceived that it is an unlawful decision …

**Should Mr Cook's appeal be allowed?**

[14] Mr Cook had a strong preference for Judge Sharp to hear his appeal. In his view she had a better understanding of the background due to having had some involvement in previous disputes between Mr Cook and HNZ. Mr Cook did not identify any factors, however, that would have made it necessary or appropriate for Judge Harrison to formally recuse himself. It was accordingly not an error of law for Judge Harrison to hear the appeal, despite Mr Cook's preference for another Judge. At the risk of stating the obvious, litigants do not have a right to choose the Judge who will hear their case.

[15] Nor can it be said that Judge Harrison disregarded Mr Cook's evidence in reaching his decision. His Honour clearly did have regard to Mr Cook's evidence. Indeed he appears to have accepted Mr Cook's key evidence, including that other tenants used more than one car park and that this made it difficult for Mr Cook to turn his car around in the driveway/car park. Mr Cook's inability to turn his car around did not, however, amount to a breach of Mr Cook's right to quiet enjoyment. The Judge clearly took account of Mr Cook's evidence and his submissions, but was not persuaded by them. The Judge reached a conclusion that was open to him, and did not err in law in doing so.

[16] Mr Cook's final challenge focussed on the Judge's refusal to admit various further documents into evidence for the purposes of the appeal. As previously noted, the Judge did admit the HNZ emails. He declined, however, to admit into evidence various other documents that were available at the time of the Tribunal hearing, but had not been adduced in evidence before the Tribunal.

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3 *Anderson v FM Custodians Ltd* [2013] NZHC 2423, (2013) 15 NZCPR 123 at [32].

[17] I have reviewed the additional documents that Mr Cook wished to put into evidence. They include trespass notices that he issued to other tenants (relating to their use of the car parks), statements made by Mr Cook to the police regarding other tenants, directions made by Judge K G Smith on 29 April 2016, photographs, and notes of a legal discussion before Judge M E Sharp on 29 September 2016.

[18] The Judge did not err in law in declining to exercise his discretion to admit those documents into evidence. Further, there is nothing in those documents that, in my view, would have altered the outcome of the appeal. The documents were either irrelevant or, to the extent that they were relevant, largely reinforced facts that were not in dispute relating to the car parking habits and behaviour of other tenants of the units.

[19] Mr Cook has failed to establish any error of law on the part of the Judge and his appeal must accordingly be dismissed.

**Costs issues**

[20] Although Mr Cook's notice of appeal does not challenge Judge Harrison's costs award, he subsequently filed two memoranda (dated 8 and 26 June 2017) in which he does purport to challenge Judge Harrison's decision to award costs against him. Mr Cook also submitted that he should not be required to pay costs in respect of this appeal.

*Costs in the District Court*

[21] Mr Cook argues that it was unreasonable for Judge Harrison to have awarded costs against him, given his limited means and medical issues. Mr Cook is a beneficiary. Further, he suffers from significant health issues, as evidenced by various medical letters he produced to the Court. Quite simply, Mr Cook says he is not in a position to meet an award of costs.

[22] Judge Harrison's costs decision provides:

> The claim by Mr Cook has no merit at all. Litigants in person are to be treated no differently from litigants that are legally represented. The usual rate is that the unsuccessful litigants pay costs to the successful party. The costs sought by HNZ are appropriate. Mr Cook is ordered to pay Housing New Zealand costs of $3650.00

[23] A costs award is discretionary. Accordingly, an appellate court should not interfere with a costs decision unless satisfied the Judge acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter or was plainly wrong.[4]

[24] I accept Ms Muirhead's submission that his Honour's decision is a straightforward application of orthodox costs principles. In particular, the courts will normally order the party who fails with respect to a proceeding to pay costs to the party who succeeds.[5] Further, there is no general principle that an unsuccessful lay litigant will be treated any differently with respect to costs.[6] There is also force in Ms Muirhead's submission that Mr Cook must be taken to have been aware of the potential costs consequences of commencing a civil proceeding, having commenced several proceedings against HNZ in recent years.[7]

[25] I am not satisfied that the Judge acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter or was plainly wrong. The costs appeal must therefore be dismissed.

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4 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15]; citing *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17,286 (CA) at [13]-[15]

5 District Court Rules 2014, r 14.2(1)(a).

6 *Blair v Attorney-General* HC Rotorua CIV-2005-463-308, 16 February 2006 at [7].

7 Including *Cook v Housing New Zealand Corporation* DC Auckland CIV-2013-004-803, 19 December 2013 (which Mr Cook unsuccessfully appealed to the High Court in *Cook v Housing New Zealand Corporation* [2014] NZHC 683, before unsuccessfully seeking leave and special leave to appeal respectively in *Cook v Housing New Zealand Corporation* [2014] NZHC 1261 and *Cook v Housing New Zealand Corporation* [2014] NZCA 504); *Cook v Housing New Zealand Corporation* [2015] NZDC 12494; and *Cook v Housing New Zealand Corporation* [2016] NZDC 676 (which Mr Cook unsuccessfully appealed to the High Court in *Cook v Housing New Zealand Corporation* [2017] NZHC 1781, before unsuccessfully seeking leave to appeal in *Cook v Housing New Zealand Corporation* [2017] NZHC 2405).

*Costs in the High Court*

[26] At the conclusion of the appeal hearing I heard submissions from the parties as to costs. HNZ sought costs for the appeal on a 2B scale basis, in the event that the appeal is dismissed. Mr Cook submitted that, given his impecuniosity and health issues, he should not be required to pay costs.

[27] Mr Cook clearly has a very strong sense of grievance regarding his "treatment" by HNZ. I have no doubt that his feelings on that topic are entirely genuine. In his view the Tribunal came to the wrong decision, and the District Court has failed to correct that. He advanced his arguments in this Court courteously and comprehensively. It became clear, however, that what Mr Cook was really seeking was a full "merits-based" review of the decisions of the Tribunal and District Court. That is simply not available on a second appeal to this Court. Rather, the focus must be squarely on whether the lower court or Tribunal has erred in law. The matters raised by Mr Cook did not, and could not, amount to errors of law.

[28] The resources of the High Court are finite. There is a strong public interest in effective use of the resources of the courts, and the finality of litigation. Litigants who are unhappy with decisions of the Tribunal have been provided with a right to have a full merits-based review of the relevant decision by the District Court. Parliament has mandated, however, that the right of further appeal to the High Court is a very limited one, focussed on questions of law only. There is no general right of further appeal to this Court.

[29] Mr Cook (either deliberately or inadvertently) disregarded the requirement that any appeals to this Court must be on issues of law only, and attempted to, in effect, secure a second "merits-based" re-hearing of his case. His appeal failed. There is no reason why costs should not follow the event. HNZ has been put to considerable expense in opposing the appeal. It is appropriate that Mr Cook be required to contribute to the costs of that, in accordance with the usual costs principles.

**Result**

[30] The appeal is dismissed.

[31] Mr Cook is to meet HNZ's costs of the appeal, on a 2B scale basis.

**Katz J**