

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 13 DECEMBER 2002

This is a determination of an application dated 15 November 2002 by the Landlord seeking an order for compensation pursuant to sections 121 and 122 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 20 Linsay Street, Katherine in the Northern Territory of Australia.

A Notice of Inquiry dated 4 December 2002 was posted to the parties. The inquiry was conducted via telephone link on 13 December 2002 during which evidence was taken from the Landlord’s agent (“the Landlord”). There was no appearance by the tenants (“the Tenant”).

On the basis of the documentary and oral evidence before the Inquiry, I find there is a tenancy agreement within the meaning of and subject to the provisions of the Act on the following terms:

Premises:	20 Linsay Street, Katherine
Commencement Date:	11 July 2001
Period:	Initially 6 months then extended to 10/07/02
Rent:	\$250.00 per week
Security Deposit	\$1,000.00

The Landlord claims compensation for the following:

• Local Court civil fees	\$ 80.00
• Re-keying locks to the premises	\$ 91.85
• Carpet cleaning	\$ 165.00
• Mowing and gardening	\$ 154.00
• Cleaning	\$ 275.00
• Section 121 compensation from 4 September to 24 September 2002	\$ 750.00
	TOTAL \$1,515.85

In support of his application, the oral and documentary evidence of the Landlord during the course of the Inquiry was as follows:

- The Landlord has obtained an order of the Commissioner dated 3 September 2002. This order gave the Landlord possession of the premises effective as at 11.00am on Tuesday 10 September 2002. In addition, the Tenant was ordered to pay the Landlord compensation being for unpaid rent and section 121 compensation up to and including 3 September 2002 in the amount of \$1,650.00. I note the reasons for decision given by the Commissioner dated 3 September 2002 indicates that the tenancy agreement terminated on 24 August 2002.

- The Landlord says the Tenant did not vacate the premises in accordance with the order on 10 September 2002. Accordingly the order was registered with the Local Court and a Bailiff attended the premises on 24 September 2002. Upon the Bailiff's attendance at the premises it was apparent that the Tenant had moved out and effectively abandoned the property. The Landlord says he has not seen or heard from the Tenant since that time. The Landlord took vacant possession of the premises on 24 September 2002.
- In support of his claim, the Landlord has submitted a copy of an ingoing condition report for the premises. This report is dated 10 July 2001 and has been signed by both parties.
- In relation to the outgoing inspection, the Landlord has also submitted a copy of the outgoing condition report on a document entitled "final inspection report" dated 24 September 2002. The Landlord says the outgoing inspection was completed on this date. They made no attempts to contact the Tenant and provide him with an opportunity to attend the outgoing inspection, as they did not know where he was and did not have any contact with him. Contrary to his earlier evidence, the Landlord then indicated that the agent responsible for the premises would have tried to phone the Tenant to attend the outgoing inspection. The Landlord says that he does not have any file notes of these attempts however knows this would have been done because it was "normal procedure". The Landlord says a copy of the outgoing condition report was not given to the Tenant again for the reason that the Tenant had not contacted the Landlord at all and he did not know where he was. The Landlord says he knows what his obligations are under the Act, however he did not comply with these obligations, as there was "no point" because they had possession of the premises.
- The Landlord has provided the Inquiry a copy of a Notice of Landlord's Intention to Retain Security Deposit dated 13 December 2002 ("the Notice"). In addition, the Landlord has provided a statutory declaration of the agent dated 13 December 2002, invoices from Cav's Mowing and Treelopping Services, Comley's Carpet Care and Cleaning Service and M.A. Rowbottom annexed to this declaration. The Landlord says the Notice of was completed on the morning of the Inquiry (13 December 2002). The Landlord says that they did not think that there was any point in doing the Notice because the Tenant had not contacted them at all since the vacation of the premises and they do not have a forwarding address for him. I note the Notice issued by the Landlord indicates that \$594.00 of the security deposit was to be retained for the purposes of gardening, cleaning the carpet as well as cleaning the premises. In addition the Notice seeks to retain \$406.00 for the purpose of any section 121 compensation.

THE SECURITY DEPOSIT

The first issue to consider is whether the Landlord is entitled to retain the Tenant's security deposit. I accept the Landlord's evidence that vacant possession of the premises was given to them on 24 September 2002. The Landlord during the course of the Inquiry referred to the premises as being abandoned however, I note that by virtue of the order of the Commissioner dated 3 September 2002, the tenancy agreement had terminated by force of a Notice to Remedy Unpaid Rent dated 13 August 2002. The finding of the Commissioner on 3 September 2002 was that the tenancy agreement had terminated on 24 August 2002.

In my view, given the tenancy agreement had terminated the Tenant cannot have been taken to have abandoned the premises but rather must be taken as having given the Landlord vacant possession of the premises. Abandonment normally refers to the situation where a Tenant relinquishes all of his rights to the premises. In the current circumstances, there was not a tenancy agreement on foot and the Tenant did not have any right to continue residing in the premises given the Commissioner's order of 3 September 2002. Accordingly, I find that the Tenant provided vacant possession of the premises effective 24 September 2002.

In order for the Landlord to retain the Tenant's security deposit, section 112 of the Act provides, my emphasis:

Section 112. When landlord may keep security deposit

- (1) Subject to this section, **a tenant is entitled to have his or her security deposit reimbursed at the end of the tenancy agreement.**
- (2) The landlord must, **within 7 business days after** the tenant gave up vacant possession of the premises or has, **in the opinion of the landlord, apparently abandoned the premises, reimburse to the tenant the amount of the security deposit, other than an amount that the landlord is entitled to retain, or to continue to hold, under this section.**

Penalty 20 penalty units.

- (3) **At the end of a tenancy agreement the landlord is entitled to retain so much of the security deposit paid by the tenant as is necessary to –**
 - (a) **make good damage** (other than reasonable wear and tear) to the premises or to ancillary property that occurred during the tenancy and that was caused by a tenant or a person for whose actions a tenant is liable under section 12;
 - (b) **replace ancillary property** lost or destroyed by the tenant or by a person for whose actions the tenant is liable under section 12;
 - (c) **clean the premises** or ancillary property **left unreasonably dirty by the tenant** or by a person for whose actions the tenant is liable under section 12;
 - (d) **replace locks altered, removed or added** by the tenant without the consent of the landlord;
 - (e) **pay for unpaid rent** or for unpaid charges for electricity, gas or water payable by the tenant under section 118;
 - (f) **pay an amount required to be paid under section 121;** or
 - (g) **pay money ordered by the Commissioner or a court** to be paid by a tenant but not paid.
- (4) **The landlord is not entitled to retain some or all of the amount of a security deposit for a purpose referred to in subsection (3)(a), (b) or (c) unless –**
 - (a) **a condition report in relation to the premises was accepted by the tenant under Part 5;** and

- (b) **if the tenant –**
 - (i) has given up vacant possession of the premises – a condition report has been provided to the tenant under section 110; or
 - (ii) **has, in the opinion of the landlord, apparently abandoned the premises – notice has been given to the tenant in accordance with section 110(3)** and, if the tenant demanded copies of the condition report within 7 days after notice was given to the tenant under that section, those copies have been given to the tenant.

- (5) Subject to section 113(2), **the landlord is not entitled to retain, or to continue to hold under subsection (6), part or all of a security deposit unless, within 7 business days after the tenant gave up vacant possession of the premises or has, in the opinion of the landlord, apparently abandoned the premises, the landlord has –**
 - (a) **given written notice** in the prescribed form, if any, **of his or her intention to retain or continue holding so much of the security deposit as is specified in the notice** for the purpose specified in the notice;
 - (b) **attached a copy of a statutory declaration** in the prescribed form, if any, **attesting to the truth of the claim that the retention or continued holding of the security deposit is required for the purpose specified** in the notice;
 - (c) **attached a copy of a statutory declaration attesting that the receipts, invoices or other documents attached to the declaration relate to –**
 - (i) **the matters in respect of which part or all of the security deposit is being withheld from the tenant;** or
 - (ii) **the amount of unpaid rent** owing under the agreement or money owing under section 121;
 - (d) **in the case of damage or unreasonably dirty premises** or ancillary property – **attached copies of receipts, invoices or other documents, including orders of the Commissioner or a court, specifying the amount required to make good the damage or clean the premises** or ancillary property; and
 - (e) **returned to the tenant the proportion of security not claimed by the landlord** or not to be held under subsection (6).

...

The Landlord is not entitled to retain the Tenant's security deposit, unless within 7 business days of the Tenant vacating the premises, they have given the Tenant a Notice of Intention to Retain the Tenant's Security Deposit in accordance with section 112(5) of the Act. In order to give notices under the Act, section 154 provides:

Unless otherwise provided by or under this Act, a notice required by or under this Act to be given to a person may be delivered personally to the person or sent by post addressed –

- (a) in the case of a natural person – to the person's last-known place of business or residence.

In addition, section 112(4) of the Act provides the Landlord is not entitled to retain any part of the security deposit to *inter alia* make good damage or to clean the premises unless an ingoing condition report has been accepted by the Tenant under Part 5 of the Act and the requirements of section 110 of the Act regarding an outgoing condition report have been met.

Section 110 provides, my emphasis:

- (1) A landlord may, **within 3 business days after a tenant has given up vacant possession of premises** to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report** and give both copies to the Tenant.
- (2) The **landlord is to fill out the condition report under subsection (1) in the presence of the tenant or a representative of the tenant** (who is not the landlord or the landlord's agent) **unless it is not practical to do so** or the tenant or the tenant's representative does not appear at the agreed time.
- (3) A landlord may, within 3 business days after forming the opinion that a tenant has apparently abandoned the premises to which a tenancy agreement relates –
 - (a) fill out and sign 2 copies of a condition report;
 - (b) give notice to the tenant at the last known address of the tenant (which may be the residential premises) specifying the place where the copies may be obtained; and
 - (c) at the request of a tenant made within 7 business days after giving notice under paragraph (b), give both copies to the tenant.
- (4) **A condition report is to –**
 - (a) **specify the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates;**
 - (b) **itemise, and specify the condition of, any fixture or chattel that is ancillary property; and**
 - (c) contain other prescribed information, if any.

Based on the ingoing condition report submitted to the Inquiry dated 10 July 2001, which is signed by both parties, I am satisfied that there is an accepted ingoing condition report for the purposes of Part 5 of the Act. I note on the ingoing condition report, the Tenant has marked modifications that he thought fit on the copy provided to the Inquiry.

These modifications have seemingly been accepted by the Landlord, as there is no indication on the ingoing condition report or in any evidence of the Landlord that any further amendments were required. Given my finding that the ingoing condition report has been accepted in accordance with Part 5 of the Act, the report submitted to the Inquiry is taken as being conclusive evidence of the condition of the premises insofar as it relates to the beginning of the tenancy (section 28 of the Act). I find no reason based on the evidence before the Inquiry to determine that this would otherwise be the case.

In relation to the outgoing condition report, on the basis of the evidence before the Inquiry, I find that although this was completed on 24 September 2002, I am not satisfied the Tenant was provided with an opportunity to attend the outgoing inspection. In addition the Landlord did not give the Tenant two copies of the outgoing condition report as required under section 110(3) of the Act within three business days of the Tenant vacating the premises. In addition, I find that the outgoing condition report submitted by the Landlord does not comply with section 110(4) of the Act, which requires that the condition report specify and itemise the condition of walls, floors and ceilings in each room of the premises.

It was also incumbent on the Landlord to give the Tenant a Notice of Intention to Retain the Tenants Security Deposit within 7 business days of being provided with vacant possession of the premises, in accordance with section 112(5) of the Act. 7 business days from 24 September 2002 would have expired on 4 October 2002. The Notice issued by the Landlord is dated 13 December 2002 and the Landlord has clearly not complied with this requirement. I note the evidence of the Landlord during the Inquiry was that they did not give the Notice to the Tenant earlier because they had no contact from him and did not know his whereabouts. That being said, the Act requires that the Notice must be given and prescribes by virtue of section 154 how such notices are to be given. In this case, the last known address of the Tenant would have been the address of the premises and it was incumbent on the Landlord to send this Notice to this address.

On balance, I am not satisfied that the Landlord has complied with the requirements of sections 110 and 112 of the Act. Therefore the Landlord is not entitled to retain the Tenant's security deposit in the amount of \$1,000.00 and must return it to the Tenant forthwith. I note the Landlord has sought to retain the security deposit for the purposes of section 121 compensation. The Act provides the Commissioner with limited ability to permit the Landlord to retain the amount for this purpose if the Commissioner is satisfied that the circumstance of the failure to give the Notice are such that the Landlord ought despite the failure be permitted to retain such an amount. There was no evidence given by the Landlord in this regard and I am not satisfied in the circumstances that the failure to give the Notice to the Tenant is such that the Landlord should be permitted to retain such an amount.

Accordingly, I order that the Landlord return to the Tenant his security deposit in the amount of \$1,000.00 forthwith.

COMPENSATION CLAIM

In considering the Landlord's application for compensation, the onus is on the Landlord to prove on the balance of probabilities that any loss or damage suffered is a result of the Tenant's breach of his obligations under the tenancy agreement or an obligation under the Act. I will consider each of the individual claims made by the Landlord individually.

Local Court civil fees

The Landlord claims the costs associated with having the order of the Commissioner given 3 September 2002 registered with the Court for the purposes of enforcement. In support of his claim, the Landlord has provided to the Inquiry a copy of the receipt number 613452 issued by the Office of Courts Administration dated 23 September 2002. I accept the evidence of the Landlord that the Tenant did not provide vacant possession of the premises on 10 September 2002 in accordance with the Commissioner's order. I am satisfied that they had to enforce the order in order to obtain possession of the premises and that the claim of \$80.00 by the Landlord is reasonable.

I order that the Tenant pay the Landlord compensation in the amount of \$80.00 being for the registration and enforcement of the Commissioners order dated 3 September 2002.

Re-keying the locks

The Landlord claims \$91.85 being the costs incurred as a result of having the keys to the premises changed. In support of his claim, the Landlord has provided the Inquiry with a copy of an invoice number 013512 from Semrite Constructions Pty Ltd dated 25 September 2002. The evidence of the Landlord is that the Tenant did not return the keys to the premises and the Bailiff had the keys to the premises changed when he took possession of it. I am satisfied that this claim is a result of the Tenant's breach of their obligation to return the keys to the premises to the Landlord and I am satisfied that the amount claimed by the Landlord is reasonable.

I order that the Tenant pay the Landlord compensation in the amount of \$91.85 being for the rekeying of the locks to the premises.

Carpet cleaning

The Landlord claims compensation in the amount of \$165.00 being for the cleaning of the carpets to the premises. The Landlord has submitted to the Inquiry a Tax Invoice by Comley's Carpet Care and Cleaning Service number 401 dated 30 September 2002. The evidence of the Landlord is that the house was not left in a "putrid state" however when he attended at the outgoing inspection it was clear that the Tenant had made no attempt to clean the premises. The Landlord says there were stains in the carpet and it was apparent that the carpet was soiled and needed more than a vacuum. The Landlord says the carpet was not left in a reasonably clean state and a normal vacuum would not have removed the soiling and stains present.

Upon being queried as to whether the condition of the carpet amounted to "reasonable wear and tear" the Landlord says that it has been five years since he has had his own carpet cleaned at home and his carpet is nowhere near as filthy as the carpet in the premises.

I note the ingoing condition report submitted by the Landlord indicates that at the commencement of the tenancy there were various stains on the carpet. The Landlord's response to this is that the stains were different to the overall grimy appearance of the carpet upon the Tenant's vacation of the premises.

The Tenant has an obligation under section 51(2) of the Act to return the premises at the end of the tenancy agreement to the Landlord in a reasonably clean condition. I accept the evidence of the Landlord in this regard and find that the Tenant has breached this obligation. I am satisfied that the carpet within the premises, namely in the hallway and the bedrooms required cleaning and the amount claimed by the Landlord is reasonable.

I order that the Tenant pay the Landlord compensation in the amount of \$165.00 being for the cleaning of the carpet.

Mowing and gardening

The Landlord claims \$154.00 being for the costs associated with mowing and tidying of the yard to the premises. In support of his claim, the Landlord has submitted to the Inquiry a copy of Tax Invoice number 040733 by Cav's Mowing and Tree Lopping Service Pty Ltd dated 4 October 2002. The evidence of the Landlord is that the yard was un-kept and the grass needed to be mowed. The Tenant had left "junk" and car bodies in the yard as well as assorted paraphernalia and rubbish which needed to be removed. The Landlord says the grass was in patches of approximately 30cm high. The Landlord says the mowing and tidying of the yard involved taking away the rubbish and debris scattered amongst the premises which would have amounted to about approximately 10 to 15 items. The Landlord says that the items had to be taken away in a truck although they could be carried by one person. The Landlord says the amount is reasonable because they have chosen a reputable company who has charged their standard rate to do the job.

I accept the evidence of the Landlord and find that the Tenant has breached his obligation to return the yard to the premises in a reasonably clean condition and in a reasonable state of repair. I find that the amount of \$154.00 claimed by the Landlord is reasonable in light of the various work that had to be undertaken. I order that the Tenant pay the Landlord compensation being for the mowing and cleaning of the garden.

Cleaning

The Landlord claims the cost associated with cleaning the premises. The Landlord has submitted an invoice by M.A. Rowbottom number 66 dated 4 October 2002 in support of his claim. The evidence of the Landlord is that the premises was a three bedroom standard ex-Commonwealth built, elevated house which is bigger than a normal sized Housing Commission houses. The premises had a kitchen and dining area, good size living room with toilet and bathroom.

The Landlord says that the premises showed all signs of a person having left without cleaning. Things had been taken out of the cupboards but the cupboards had not been wiped down. The cupboards were dusty, the bench tops were dirty, there was rubbish left in the house and the toilet was also dirty. The Landlord says all the floors in the premises were carpeted except for the dining and kitchen area however the 'lino' needed a wash as part of the cleaning exercise because it was clear upon his inspection of his property that this had not occurred.

The Landlord says that he does not know how much the cleaners charge per hour but the cost is reasonable because if he had of got other contractors in they can charge up to \$880.00 to clean a standard defence housing house. The Landlord says although this was not the worst house he has ever seen it certainly was not left in a reasonable condition. The Landlord also says the amount he has claimed is reasonable given his experience in the industry. The Landlord has owned his own real estate business for 10 years and has been in the industry for 12 years prior to that, during which he was involved in the industry in South Australia as well as in the Northern Territory.

I accept the evidence of the Landlord in this regard, which I found to be credible. I am satisfied that the premises was left in an unreasonably dirty condition and required cleaning. I am also satisfied that the amount claimed by the Landlord is reasonable.

I order that the Tenant pay the Landlord compensation in the amount of \$275.00 being for the costs associated with cleaning the premises.

Unpaid rent

The Landlord says that since the last Inquiry before the Commissioner of Tenancies on 3 September 2002 the Tenant has made no further payment of rent. In addition the Tenant has made no attempts to discharge the order given by the Commissioner on that date. The Landlord claims compensation under section 121 of the Act being the amount of rent that would have been payable had the Tenant vacated the premises in accordance with the order.

In support of his claim, the Landlord has provided to the Inquiry a copy of his rental ledger as well as an agent's screen dump which confirms that no payments have been received from the Tenant since 30 August 2002. I accept the rental ledger as being an accurate indicator of the amounts in fact paid by the Tenant. The Landlord effectively claims the amount that would have been payable in rent from 4 September 2002 (being the day after the last Inquiry before the Commissioner) to 24 September 2002 (being the date the Landlord was provided with vacant possession of the premises). This amounts to a period of 3 weeks which is the equivalent of ($\$250.00 \times 3 =$) \$750.00.

In terms of the Landlord's attempts to mitigate his loss, the Landlord indicated that he had spoken to the Tenant regarding vacating the premises on numerous occasions however this was unsuccessful. I accept that attempts were made by the Landlord to contact the Tenant. I find that the Landlord is entitled to section 121 compensation, being the amount of rent that would have been payable by the Tenant for the period the Tenant remained in possession of the premises after the termination of the tenancy agreement.

I order that the Tenant pay the Landlord compensation in the amount of \$750.00 being for section 121 compensation from 4 to 24 September 2002.

SUMMARY OF ORDERS

On the basis of the above, I order:

1. The Landlord must return the Tenant’s security deposit in the amount of \$1,000.00 to the Tenant forthwith.
2. The Tenant must pay the Landlord compensation in the amount of \$1,515.85 being for:
 - Registration and enforcement of Commissioner’s order \$ 80.00
 - Re-keying locks to the premises \$ 91.85
 - Carpet cleaning \$165.00
 - Mowing and gardening \$154.00
 - Cleaning of the premises \$275.00
 - Section 121 compensation from 4 to 24 September 2002 \$750.00

Dated this day of December 2002

Penny Turner
Delegate of the
Commissioner of Tenancies