

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 3 DECEMBER 2002

This is a determination of an application dated 19 November 2002 by the landlord, seeking an order for possession pursuant to section 104 and 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 1/15 Annear Court, Tipperary Waters in the Northern Territory of Australia.

A Notice of Inquiry dated 25 November 2002 was posted to the parties. The inquiry was conducted on 3 December 2002 during which evidence was taken from the Landlord’s agent, and the Landlord who appeared by telephone (“the Landlord”). The Tenant also attended (“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:	1/15 Annear Court, Tipperary Waters NT 0800
Commencement Date:	20 December 2001
Period:	Two Years
Rent:	\$400.00 per week
Security Deposit	\$1,600.00

I note the tenancy agreement is encompassed in a written agreement dated 20 December 2001 and signed by both parties. In addition, the Landlord’s agent indicated that the application was only for unpaid rent and section 121 compensation in the amount of \$9,800.00.

The Tenant essentially asserted during the course of the inquiry that there had been a variation to the written tenancy agreement. The evidence of the Tenant in this regard can be summarised as followed:

- In mid-May or June 2002 he had an oral agreement with the Landlord that he would pay the outstanding rental arrears by 20 December 2002 as he was awaiting on re-financing.
- The Tenant says this agreement occurred between him and the Landlord over a beer, when the Landlord attended at the premises a couple of days before leaving for Europe.
- The Tenant effectively asserts that the Landlord is reneging on this oral agreement because he has sold the premises.
- The Tenant says he will pay the rental arrears, but he is waiting on his re-financing arrangements, which has been scheduled to occur on 18 December 2002.

- The Tenant says the fact that the Landlord has not sought to terminate the tenancy until now given that he has been in arrears since May 2002 indicates that this agreement did in fact occur.

The evidence from the Landlord's agent was that she was not aware of any such agreement. The Landlord had instructed her to issue the notice of termination, although they allowed him extra week after the termination day on 11 November 2002 to pay the outstanding arrears before lodging the application before the Commissioner.

It was necessary to obtain evidence from one of the landlords, who appeared by telephone and gave evidence that:

- The Tenant has not paid his rent since May 2002.
- No such oral agreement occurred with the Tenant in June 2002 as he was in Europe.
- The Landlord denies that there was any agreement with the Tenant to the effect that the Tenant had until 20 December 2002 to pay his rent.
- The Tenant has a signed written tenancy agreement and the Landlord says he would not have agreed to defer payment to December 2002. The Landlord says is a businessman and would not have agreed to effectively give the Tenant an interest free loan up to December 2002, when the Landlord pays interest on the property at 6 or 7%.
- The Tenant had seen the Landlord a couple of days before he left for Europe in June 2002 and had assured him that he would pay his outstanding rent. The Tenant told the Landlord that he would pay the outstanding rent by the next couple of weeks.
- The Landlord says he was away in Europe for two and a half months and on his return the Tenant still had not paid the rent arrears. In addition, the Landlord says the Tenant promised him on numerous occasions that the rent arrears would be paid, the Landlord took the Tenant on his word for an extended period of time but this did not occur.

Based on the evidence from both parties in relation to the alleged variation of the tenancy agreement, in terms of credibility, I prefer the evidence of the Landlord in this regard. I find it difficult to comprehend as a matter of commerciality that the Landlord would have agreed to a defer payment of approximately \$10,000.00 of rental arrears until 20 December 2002. I accept the evidence of the Landlord that there was never any agreement between the parties that the rent owed by the Tenant could be paid by 20 December 2002. Accordingly, I find that there was no such variation of the tenancy agreement and the terms of the agreement governing the parties are as encompassed in the written tenancy agreement dated 20 December 2001.

In considering an application for possession, I must be satisfied that the tenancy agreement has been terminated in accordance with the Act (section 104(2)). Section 87 is the relevant provision which provides, my emphasis:

- (1) If a tenant breaches a tenancy agreement by failing to pay rent and the rent has been in arrears for not less than 14 days, the landlord may give the tenant a notice in accordance with subsection (2).
- (2) A notice is to be signed by the landlord and **is to specify** –
 - (a) the address of the premises to which the notice relates;
 - (b) the **amount of rent that is outstanding and the period for which it has been outstanding**; and
 - (c) that the amount is not paid before a day specified in the notice (in this section called the “rent payment day”) that is more than 7 days after the date the notice is given –
 - (i) the tenancy is terminated on the day, later than rent payment day, specified in the notice as the day on which the tenancy terminates (in this section called “termination day”); and
 - (ii) the tenant is to give up vacant possession of the premises to the landlord on termination day.
- (3) If the rent is not paid by the rent payment day, the tenancy is terminated on the termination day.

Section 87 creates a statutory procedure under which, landlord’s can by notice terminate a tenancy agreement for a tenant’s failure to pay rent. In my view, the purpose of notices issued under section 87 (“section 87 notice”) is to give the tenant an opportunity to remedy the unpaid rent by telling them how much they owe and the period for which it is owed. If the rent is not remedied by the specified rent payment day, than by virtue of the Act, the tenancy agreement is terminated. Accordingly, a section 87 notice also operates as the substantive mechanism by which the tenancy agreement is terminated in the event that rent is not paid by the rent payment day.

The legislature has seen fit to prescribe the information that must be contained in a section 87 notice. In my view, the requirements of section 87 are clear in its terms and are mandatory requirements, which must be interpreted strictly consistent with the intent and operation of the Act. I note, the Act does not provide any ability for the Commissioner to amend notices of termination for substantial compliance with some, but not all of the requirements of section 87 of the Act.

One of the fundamental principles of statutory interpretation is that the legislation is to be interpreted literally, giving effect to the ordinary and natural meaning of the words used by the legislature, adopting an interpretation consistent with the purpose of the legislation in the event of any ambiguity.

It is clear section 87(2)(b) of the Act requires the amount of rent outstanding and the period for which such rent has been outstanding to be specified. Implicit in this is that both the amount and period of rent outstanding is correctly specified. I note in calculating the amount and period of rent outstanding, section 40 of the Act provides:

“The rent payable under a tenancy agreement accrues from day to day”

The Landlord has issued a Notice to Remedy Unpaid Rental and Notice of Termination dated 31 October 2002 (“the Notice”). I find that the rental payments due to the Landlord was more than fourteen (14) days in arrears at the time that the Landlord by his Agent issued the Notice. I find the Notice was posted to the Tenant on 31 October 2002 in accordance with section 154 of the Act.

The amount of rent outstanding is specified in the Notice as being \$9,800.00 being for period from 15 May to 5 November 2002 with \$200.00 on account. According to my calculations the amount and period of rent outstanding has been incorrectly specified and should be \$9,742.86 being for period 19 May 2002 to 5 November 2002 inclusive. This was calculated as follows:

From 20 December 2002 (commencement of the tenancy agreement) to 5 November 2002 (being the end date of the period specified by the Landlord on the Notice) amounts to a period of 45 weeks + 6 days

Amount of rent payable during this period
= $\$400 \times 45 + (400/7 \times 6) =$ \$18,342.86

Amount of rent in fact paid by the Tenant prior to the Notice being issued as indicated from the Landlord’s ledger = \$ 8,600.00

Therefore amount of rent outstanding
= $(\$18,342.86 - 8600.00 =)$ \$ 9,742.86

This amounts to a period of 24 weeks and 2.5 days, which is the equivalent of a period from 19 May 2002 to 5 November 2002.

I find that the amount of rent outstanding at the time the Notice was issued should have been \$9,742.86 and the period of rent outstanding should have been from from 19 May to 5 November 2002.

I find the Landlord has incorrectly specified the amount and period of rent outstanding and I am not satisfied the Notice complies with section 87(2)(b) of the Act. It follows, I am not satisfied the tenancy agreement has been validly terminated.

On the basis of the above, I order that the Landlord’s application dated 19 November 2002 be dismissed.

Dated this 3rd day of December 2002

Penny Turner
Delegate of the
Commissioner of Tenancies