

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES
INQUIRY – 8 AUGUST 2003

This is a determination of an application dated 8 May 2003 by the Tenant seeking an order for the return of security deposit pursuant to s 113 and an order for the repayment of rent paid in advance pursuant to s 43 of the *Residential Tenancies Act* (NT) (**the Act**). The application is made in respect of premises being Lot 2405, 868 Stuart Highway, Pinelands in the Northern Territory of Australia (**the Premises**).

A Notice of Inquiry dated 6 June 2003 was posted to the parties however, due to a request for an adjournment from the Landlord the Inquiry was not substantially heard until 15 July 2003. At that Inquiry evidence was taken from the Tenant and from a representative of the Landlord.

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

Premises:	Lot 2405, 868 Stuart Highway, Pinelands NT 0828
Commencement Date:	19 December 2002
Period:	Fortnightly periodic
Rent:	\$300.00 per fortnight
Security Deposit	\$300.00

Application for return of the security deposit

There was no dispute between the parties as to the amount of security deposit which the Tenant had paid, and the Tenant was able to produce a relevant receipt for \$300.

In response to the Tenant's application the Landlord presented a document to the Inquiry which purported to be an "incoming" and "outgoing" condition report for the Premises. This document, I was told, was created by the Landlord's caretaker. The document consisted of one page of hand written notes comprising two paragraphs. The first paragraph purported to be a summary of the ingoing condition of the Premises, and is undated and unsigned by either the Landlord or the Tenant. The second paragraph purported to be a summary of the outgoing condition report for the Premises and is dated 23 March 2003. However, neither is there is a signature by the Landlord or the Tenant in relation to that paragraph. The fact that the report is unsigned does not assist me in concluding that it had been accepted by either party, either at the "incoming" or "outgoing" stage. Further, at the Inquiry, the Tenant gave evidence that she had never seen this document before and I accept that evidence.

The Landlord also raised a number of issues including allegations of criminal conduct by the Tenant in relation to theft of the Landlord's property. This Inquiry is not the appropriate venue to deal with such allegations, it is a matter better left for the police to deal with.

However, the Landlord also made a number of claims in relation to damage purported to have been done by the Tenant to the Premises, including damage to a washing machine stand pipe, a screen door and to a bedroom window. No formal application had been made by the Landlord (pursuant to s 122 of the Act) for compensation for that damage, although I conclude that the claims of damage (and theft) formed the basis of the Landlord's refusal to return the security deposit to the Tenant (and the rent monies paid in advance – see later).

The Act provides circumstances in which a landlord may keep, or must return, a security deposit at the end of the tenancy agreement. Relevantly, s 112 states that a tenant is entitled to have his or her security deposit returned at the end of the tenancy agreement subject to the provisions of that section. Those provisions allow a landlord to retain so much of the security deposit as is necessary, inter alia, to make good damage to the premises, to replace ancillary property lost or destroyed by the tenant, to clean the premises, to replace locks, to pay for unpaid rent or utility bills. However, a landlord is not entitled to retain the security deposit to make good damage, to replace property or to clean the premises unless an ingoing condition report has been accepted by the tenant and an outgoing condition report has been sent to the tenant (in accordance with s 112(4)). Further, there are other requirements in relation to giving written notice and the provision of receipts for damage and cleaning that must be made under the Act (refer s 112(5)).

On the evidence presented to the Inquiry I find that the Landlord has not complied with s 112 of the Act in relation to retention of the Tenant's security deposit. I am satisfied that the Tenant never received a copy of either condition report. In these circumstances the Tenant is entitled to have her security deposit returned in full. The Act places a high importance on the provision of condition reports, and in particular the "ingoing" condition report. It does so in order to prevent potential problems similar to those which have arisen in this determination. The importance of condition reports (and their acceptance by the parties) is exemplified by the operation of s 51(5) of the Act, which states that if an "ingoing" condition report is not accepted by the Landlord and the Tenant the premises are deemed to be in the same condition at the start of the tenancy as at the end.

Application for return of rent paid in advance

In relation to this aspect of the Tenant's application it is necessary to make some preliminary comments as to the progress of the matter, as there was some confusion brought about by the Tenant's initial withdrawal of her application.

The Tenant had originally made a written application for the return of rent paid in advance and she provided all relevant receipts to the Inquiry on 15 July 2003. At that Inquiry, due to an administrative mistake on my behalf, the Tenant was misled into withdrawing her application and withdrew it orally. Her application was not dismissed nor was it finally determined, a decision was reserved. Further, the Tenant made no subsequent formal withdrawal of the application in writing in accordance with s126(4) of the Act.

Within a few hours of the adjournment of the Inquiry the mistake was realised. The parties were contacted by telephone and informed of the mistake and of the need to have the matter brought back before an Inquiry to rectify the error. An order was subsequently sent to the parties relisting the matter for further Inquiry on 24 July 2003.

On the 24 July 2003 the Landlord's representative by telephone, at the last minute, requested a further adjournment in order to seek legal advice. The Landlord did not appear at the Inquiry, but the Tenant did, and she requested that I reconsider her application for the return of rent paid in advance. I agreed that I would consider her application subject to submissions from the Landlord in that respect. I subsequently adjourned the matter *sine die* in anticipation of bringing the matter back at a time convenient for the Landlord. No further communications were received from the Landlord, and the matter was further set down for Inquiry on 8 August 2003. In fairness to the Landlord, a letter was sent advising that the Tenant was pressing her original claim for the return of rent monies paid in advance, and further the letter explained that the purpose of the Inquiry was to allow the Landlord to make submissions in that regard.

On 8 August 2003 I received written submissions from the Landlord outlining reasons why the Tenant's application should not be granted and I have taken those reasons into consideration.

Notwithstanding that the Tenant orally withdrew her original application, the circumstances of that withdrawal are such that I am of the opinion that there is no impediment to prevent me from determining it, and I move on to do so now.

In order to fully appreciate this application it is necessary to briefly recount the facts as given in evidence before the Inquiry. Evidence was given that the Tenant returned to the Premises on the morning of 23 March 2003 and discovered that the bedroom windows of the Premises had been "smashed in". The Tenant said that she contacted the Landlord (and the police) in relation to the damage, soon after it was discovered. Further, the Tenant gave evidence that temporary repairs had not been made by 6.00pm that evening and that she had concerns for her safety in remaining in the Premises overnight. She subsequently vacated the Premises.

It is not necessary for the purpose of the determination of this application to arrive at any definite conclusions in relation to the events of 23 March, but for the fact that the Tenant vacated the property essentially abandoning it.

A letter dated 23 March 2003 (which from its contents was apparently written on 24 March) from the Tenant to the Landlord, was tendered to the Inquiry. In that letter the Tenant outlined her reasons for vacating the Premises and outlined her desire to terminate the tenancy agreement effective from 24 March 2003. I am satisfied on the evidence provided to the Inquiry that the Tenant had paid rent in relation to the Premises in advance up to and including 23 April 2003.

The Act provides for the return of rent monies paid in advance. Section 43 specifically provides that if rent is paid in advance and the tenancy is terminated before the end of the period for which the rent has been paid, a landlord must, as soon as reasonably possible, refund to the tenant the appropriate proportion of the amount paid as rent in advance. However, the amount to be paid back should not include any amounts which may be applied towards other liabilities of the tenant incurred in accordance with the Act. For the purpose of s 43 it is therefore necessary to determine when the tenancy agreement terminated and whether there are any other liabilities of the Tenant to the Landlord under the Act.

Section 82 of the Act specifies the only circumstances in which a tenancy agreement can be terminated. Relevant to this determination, a tenancy can only be terminated if the landlord or tenant terminates the tenancy (pursuant to the Act) or if the premises are abandoned before the end of an agreement.

The circumstances in which a tenant may terminate an agreement are set out within Division 3, Part 11 of the Act, and include situations where a premises becomes, flooded, unsafe or inhabitable (s 92), where a breach has not been remedied by the landlord after notice (s 93) and termination of a periodic tenancy without grounds (s 94).

It is clear from the Tenant's letter dated 23 March 2003 that she gave the Landlord reasons for terminating the agreement. I take this letter to be an attempt by the Tenant to give relevant notice to the Landlord of her intention to terminate the agreement. Such a notice is provided for by s 92 of the Act, which states that a Tenant may terminate a tenancy by two days notice in writing to the Landlord, if continued occupation of the premises is a threat to the health or safety of the Tenant. Notice must be given in accordance with s 101. However, two days notice was not given, nor were the requirements of s 101 complied with. Section 101 requires a notice to contain the address of the Premises to which it relates. The notice did not contain any such address. This may seem harsh given that it may have been obvious to the Landlord and the Tenant that the letter was referring to the Premises. However, s 101(3) states that a notice of termination that does not comply with the section is of no effect, that is, the Act expressly states that there must be strict compliance with the requirements for notice. I find that as the letter does not comply with s 101 it does not act as a notice of termination and therefore notice was not given in accordance with s 92.

Alternatively s 94 of the Act provides that a tenant may terminate a periodic tenancy without specifying grounds for the termination by giving 14 days notice to the Landlord in accordance with s 101. Again, as the notice does not comply with the strict requirements of s 101, it cannot be considered a notice for the purposes of s 94. Therefore, the letter of 23 March 2003 does not operate as a notice allowing the Tenant to terminate the tenancy under the Act.

However, on the basis of oral evidence before me and the contents of that letter, I find that the Premises were effectively abandoned on 23 March 2003. That abandonment operates to terminate the tenancy on the next date upon which rent was due and payable (s 82(1)(c)). On the basis of the evidence, the next date that rent was due and payable was 27 March 2003, and I find that the tenancy agreement was terminated on that date.

Notwithstanding that the tenancy agreement was terminated by abandonment it was the Tenant who terminated the agreement, effectively without grounds and without valid notice. It is my opinion that if a Tenant is allowed to terminate a periodic tenancy by abandonment the purpose of s 94 would be rendered superfluous, at least in circumstances where there is abandonment within 14 days before the start of the next period. An abandonment operates as a termination by the tenant without grounds and without notice. I therefore find that a liability arises through s 94, whereby the landlord is entitled to 14 days compensation in the event of an abandonment of a periodic tenancy by a tenant. That is a liability created by the Act and therefore should be taken into consideration in any order for the repayment of rent that has been paid in advance. It is also my opinion that the 14 day period should operate from the date that the Landlord had notice of the abandonment, which in these circumstances, according to the evidence, was effectively 24 March 2003.

Returning to the issue of repayment of rent paid in advance and s 43 of the Act, I find that as the tenancy terminated on 27 March 2003 the Tenant is not entitled to repayment of rent money paid up to that date. Only rent paid in advance after the date of termination may be recovered under s 43, which leaves the period 27 March to 23 April 2003 (four weeks rent equating to \$600.00) to which the Tenant may claim.

On the evidence presented to the Inquiry, I find that the Tenant is entitled to be repaid the four weeks rent paid in advance (\$600) subject to her liability in relation to the issue of the 14 days notice following abandonment (discussed above). As previously stated, the 14 days takes effect from 24 March 2003. On that basis, the Landlord is already in receipt of three of those 14 days, namely 24 to 26 March, which leaves a balance of 11 days rent that would have been owed by the Tenant to the Landlord. That 11 day period equates to an amount of \$235.71.

I therefore find that in relation to repayment of rent monies paid in advance, the Tenant is owed \$600.00. Further the Tenant has an outstanding liability to the Landlord in the amount of \$235.71. If the two amounts are off-set, there is an outstanding balance of \$364.29 due to the Tenant as rent that had been paid in advance, and that amount should be repaid by the Landlord.

Conclusion

I find that the Landlord is not entitled to retain the Tenant's security deposit on the basis that the Landlord has not complied with the statutory requirements (s 112) of the Act in relation to retention of security deposits. Therefore, the Landlord should return to the Tenant an amount of \$300.00 being the amount of the security deposit.

I further find that the Landlord must pay to the Tenant an amount of \$364.29 for rent paid that was paid in advance after the tenancy had terminated. This amount takes into consideration that although the Tenant had paid 4 weeks in advance (an amount of \$600.00), there is an off-set due to a liability to the Landlord, equivalent to 14 days rent as a consequence of the Tenant abandoning and thereby terminating the periodic tenancy.

Accordingly, I order that:

1. The Landlord is to return to the Tenant, the Tenant's security deposit in the amount of \$300.00.
2. The Landlord is to pay to the Tenant the amount of \$364.29 being the repayment of rent monies paid in advance up until and including 23 April 2003, pursuant to s 43.
3. Any further claim for compensation is adjourned to a date to be fixed upon further application and notice to the parties

Dated this day of September 2003

Craig Smyth
Delegate of the
Commissioner of Tenancies