

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES
INQUIRY – 24 JUNE 2003

This is a determination of an application dated 26 March 2003 by the landlord seeking an order for compensation pursuant to section 122 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 78 Priest Circuit, Gray in the Northern Territory of Australia.

A Notice of Inquiry dated 26 May 2003 was posted to the parties. The inquiry was conducted on 24 June 2003. The Landlord’s Agents appeared on behalf of the landlord (“the Landlord”). The tenants also appeared (“the Tenants”).

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:	78 Priest Circuit, Gray
Commencement Date:	18 September 2002
Period:	12 months
Rent:	\$250.00 per week
Security Deposit	\$1,000.00

The Landlord claims compensation in accordance with section 122 of the Act for the following:

• Unpaid rent from 29 January to 18 March 2002	\$1,550.00
• Cleaning of the spa	\$ 54.65
• Cost of readvertising the premises	\$ 100.00
• Steam cleaning of the carpets	\$ 60.00
• Costs for pest spraying	<u>\$ 159.50</u>
TOTAL	\$1,921.15

The Landlord also seeks to retain the Tenants’ security deposit of \$1,000.00 being for cleaning in the amount of \$200.00 and unpaid rent in the amount of \$800.00 as indicate by the Notice of Landlord’s Intention to Retain Security Deposit dated 26 February 2003.

I note at the outset of the Inquiry, the Tenants indicated that they would consent to orders that they pay for the steam cleaning of the carpets in the amount of \$60.00 and for the pest spray in the amount of \$159.50. Accordingly, it is not necessary to consider these claims.

The Documentary evidence

The documentary evidence of the Landlord submitted to the Inquiry was as follows:

- Notice of Landlord’s intention to Retain Security Deposit dated 26 February 2003;
- Statutory declaration of Inge Beller dated 26 February 2003;
- Undated document entitled “Addendum to Fax Sheet Re: 78 Priest Circuit, Gray”;

- Yellow Rose Cleaning Service tax invoice no. 209 for the cleaning of the carpet in the amount of \$60.00;
- Tax invoice of Calypso Pools and Spas no. 368 in the amount of \$51.65;
- Tax invoice, Northern Territory Pest and Weed Control no. N4227 in the amount of \$159.50;
- Ingoing/outgoing condition report dated 18 September 2002 and 25 February 2003 respectively;
- Tenancy agreement governing the parties dated 13 September 2002;
- Rental ledger dated 17 March 2003;
- Letter, Landlord to the Commissioner of Tenancies dated 4 April 2003.

The documentary evidence of the Tenants submitted to the Inquiry was as follows:

- Letter, the Landlord to the Tenants dated 18 December 2002;
- Ingoing/outgoing condition report dated 18 September 2002 and 25 February 2003 respectively;
- Fax, Landlord to Tenants dated 27 February 2003;
- Letter, Landlord to Tenants dated 26 February 2003;
- Letter, Tenants to Landlord dated 26 February 2003;
- Letter, Landlord to Tenants dated 25 February 2003;
- Notice to Remedy Unpaid Rent/Notice of Termination dated 4 February 2003;
- Tenant Invoice dated 10 February 2003;
- Tenant Invoice dated 28 January 2003;
- Memo, Tenants to Landlord dated 9 January 2003;
- Letter, Tenants to Landlord dated 1 November 2002;
- Document entitled in regard to rental property; 78 Priest Circuit, Gray, NT, 0820. Ms and Mr Tenant”;
- Statutory declaration, Quinton O’Hay dated 20 February 2003;
- Statutory declaration, Spring Lankford dated 19 May 2003;
- Statutory declaration, Tracy Lee Bell dated 17 May 2003;
- Statutory declaration, Heather Fotiades dated 21 May 2003;
- Statutory declaration, Merina Laycock-Bell dated 1 March 2003;
- Statutory declaration, Debbie Robertson dated 12 May 2003.

Vacation of the premises

I have reviewed all of this documentary material and also took evidence orally from both parties during the course of the Inquiry. Prior to considering the individual claims of compensation, it is necessary first to consider the circumstances of vacation of the premises and whether the Landlord is entitled to retain the Tenants’ security deposit.

The evidence of the Landlord during the course of the Inquiry in relation to this issue can be summarised as follows:

- The Tenants vacated the premises on 24 February 2003 and left the keys to the premises with one of the neighbours to the premises.
- The keys were collected by the Landlord on 25 February 2003.
- The Landlord says the Tenants left without advising them that they were vacating the premises and this was in breach of their tenancy agreement.
- The Tenants had agreed under their tenancy agreement, they would in the premises until 17 September 2003.
- The Landlord says that they sent the Notice to Remedy Unpaid Rent/Notice of Termination dated 4 February 2003 (“Notice of Termination”) as the Tenants were not paying their rent. However, the Landlord says that this Notice of Termination does not comply with the Act and effectively did not terminate the tenancy agreement.
- One of the Landlord’s agents, denies the Tenants assertions that she told them they could terminate their lease. She says she told the Tenants when they were having a number of dealings in relation to the repairs and maintenance issues to contact Consumer Affairs as they had to issue a notice in order to terminate the lease.

I note it was apparent from the Tenants’ written documentation and oral evidence that the Tenants allege that the Landlord had not complied with their obligation to repair during the course of the tenancy agreement. I note in passing, a number of these issues were irrelevant for the purpose of this inquiry which was to determine whether or not the Landlord is entitled to retain the Tenants’ security deposit for the purpose specified and/or compensation for the various amounts claimed. Accordingly, I have only summarised the evidence that is relevant for the purpose of this determination.

- The Tenants say that they were waiting on a number of maintenance repairs to be done on the premises. Despite many repeated requests by them this was not done and accordingly they stopped paying their rent.
- The Tenants say that she had contacted the Office of Consumer Affairs and was just about to issue a Notice to Remedy Breach in accordance with section 88 of the Act. However, at about this time, before they could issue the Notice to Remedy Breach, they received the Notice of Termination from the Landlord.
- The Notice of Termination indicated that they were to give up possession of the premises on or before the termination day, which was specified as being 25 February 2003.
- The Tenants also say that prior to receiving the Notice of Termination, she had a conversation with one of the Landlord’s agent, who effectively told her that it would be better if they all terminated the lease.
- As a result of the Notice of Termination and the conversation with the Agent, the Tenants moved out on 23 February 2003, which was the day before the termination day specified in the notice.
- In addition, the Tenants says they also moved out on this day because they were “fed up” with all the dealings that they had had with the Landlord about the deficiencies and the maintenance issues in relation to the premises.

The first issue to determine is whether the Notice of Termination has terminated the tenancy agreement governing the parties.

Section 87 of the Act governs the requirements for such a notice. These requirements are clear in its terms and in my view are mandatory requirements. One of the requirements of section 87 is that the Landlord must specify the “amount or rent that is outstanding and the period for which it is outstanding.” (section 87(2)(b)). Implicit in this is that the rent outstanding must be correctly specified.

I have considered the Notice and find that it does not comply with section 87 of the Act. I find the amount of rent outstanding and the period of rent outstanding has been incorrectly specified in the Notice of Termination. The Landlord in this instance has claimed the Tenants has more rent outstanding than is in fact the case. I note the evidence of the Tenants was that they relied upon this Notice of Termination and accordingly moved out of the premises. However, I am not satisfied that the Notice complies with section 87 of the Act and have no alternative but to find that the Notice of Termination did not validly terminate the tenancy agreement governing the parties.

I am also not satisfied that the Landlord’s agent told the Tenants that they could terminate the tenancy agreement. In these circumstances and based on the evidence from both parties, I find that the Tenants abandoned the premises on 24 February 2003. I note, the Tenants abandonment of the premises is probably understandable given the Notice of Termination effectively tells the Tenants that they have to vacate the premises on or before the termination day. However, given my findings in relation to the Notice of Termination, it is clear that by moving out of the premises in accordance with the defective notice, the Tenants effectively abandoned the premises.

I find that vacant possession of the premises was given to the Landlord on or about 25 February 2003 when they collected the keys to the premises from the neighbour.

Ingoing condition report

Section 25 of the Act governs the requirements for an ingoing condition report to be taken as being an accepted report under Part 5 of the Act.

The evidence of the Landlord in relation to this issue was as follows:

- The Tenants moved into the premises on 18 September 2002 and two copies of the ingoing condition report were given to the Tenants on this day, when they attended at the office of Flagstaff Realty to pay their bond and rent.
- The Tenants were advised that they had five working days to complete their report and return one of the copies to the Landlord.
- One of the Landlord’s agents, indicated she gave the Tenants an opportunity to attend the ingoing inspection. She spoke to one of the Tenants, to do the ingoing condition report on 17 or 18 September 2002. The Landlord initially recalled that the Tenant did not attend the ingoing inspection because she said she was working. The Landlord after hearing the Tenant’s response than conceded she could be mistaken and was probably getting confused with the outgoing inspection. The Landlord indicated that no file notes would have been kept of this conversation.
- The Landlord says that the Tenants then amended the original copy and returned it to them and they agreed with the amendments.

The evidence of the Tenants in relation to this issue was as follows:

- They moved into the premises on or about 18 September 2002 however the owners were still in the house. The Tenants deny that the ingoing condition report was given to them at the office and says that it was left in their letterbox. The Tenants say that at the time when they moved into the premises they were having a lot of personal difficulties, as her father was ill. Accordingly, they faxed a copy of the ingoing condition report as amended back to them.
- The Tenants say she got two copies of the ingoing condition report although she was never given an opportunity to attend the ingoing inspection however she has “no dramas with it”.

On the basis of the evidence before the Inquiry, I am not satisfied that the parties have accepted a condition report in accordance with Part 5 of the Act. In particular, I am not satisfied that the Tenants or their representative had been given an opportunity to attend at the ingoing inspection. I accept the Tenants version of events in this regard and do not find Ms Halliday’s account of what had occurred on 17 September 2002 as being credible. I also accept the Tenants assertion that the ingoing condition report was left in the Tenants’ letterbox. I note section 154 provides that notices required to be given under the Act, must be given either by post or by personally serving the Tenants. I find that the Landlord has not complied with this requirement as leaving the notice in the letterbox is not sufficient service for the purposes of the Act.

Outgoing condition report

The parties were in agreement as to the circumstances of the completion of this report. Accordingly I make the following findings:

- The outgoing condition report was completed on 25 February 2003. The Tenants were given an opportunity to attend the outgoing inspection however declined this opportunity due to work commitments.
- The Landlord completed the outgoing condition report and wrote to the Tenants by letter dated 26 February 2003 providing them with an extra opportunity to remedy the deficiencies in the premises.
- The Tenants availed themselves of this opportunity and accordingly it was not necessary to claim compensation for cleaning the premises.

The security deposit

Section 112 of the Act provides the circumstances in which a landlord is entitled to retain the tenant’s security deposit at the end of the tenancy agreement. The landlord can only retain the security deposit for certain purposes specified in section 112(3) of the Act.

Within seven business days of the tenant giving up vacant possession or abandoning the premise, section 112(5) of the Act requires the landlord to give the tenant written notice of his or her intention to retain or continue holding the tenant's security deposit for the purpose specified in the Notice. The landlord must attach to this notice a statutory declaration attesting to the truth of the claim that the retention or continued holding of the security deposit is needed for the purpose specified in the Notice. In addition, the landlord must attach a statutory declaration attesting that receipts invoices or any other documents annexed relate to the matters in respect of which part or all of the security deposit is being withheld from the tenant.

The landlord is not entitled to retain some or all of the security deposit for cleaning, replacing lost or destroyed property and/or cleaning the premises unless: a ingoing condition report was accepted by the tenant in accordance with Part 5 of the Act; and an outgoing condition report has been given to the tenant under section 110 of the Act (section 112(4)).

The evidence of both parties in relation to this issue can be summarised as follows:

- The Landlord says they sent the Tenants a Notice of Intention to Retain Security Deposit dated 26 February 2003 ("the Notice").
- Attached to the Notice was: two copies of the outgoing condition report; undated quote from Yellow Rose Cleaning; a rental ledger dated 17 March 2003; and statutory declaration of Inge Beller dated 26 February 2003.
- The Landlord says the Notice was given to the Tenants by posting it to the last known address.
- The Landlord says that initially when they conducted the outgoing inspection of the premises on 25 February 2003, it was apparent that they had to retain money from the security deposit for the purpose of cleaning. However, they gave the Tenants an opportunity to go back and remedy the deficiencies in the premises. The Tenants availed themselves of this opportunity, accordingly, it was no longer necessary for them to claim compensation for cleaning and the \$200.00 that they retained for this purpose they have applied to the unpaid rent.

The evidence of the Tenants in relation to this issue is that:

- They received a copy of the Notice and the ingoing condition reports along with the statutory declaration of Inge Beller, however, they say they did not receive the quote from Yellow Rose Cleaning and the Rental Ledger dated 17 March 2003 attached to that Notice.

On the basis of the evidence before the Inquiry, I do not accept the Landlord's evidence that she posted the Notice with a copy of the rental ledger dated 17 March 2003 attached. During the Inquiry I indicated to the Landlord that the ledger was dated 17 March 2003 and it appeared to me to be impossible for her to have sent this with the Notice when the Notice was issued and sent on 26 February 2003. The Landlord's agent's response to this was that she could not find the ledger that she sent to the Tenants on her file. I do not accept the Landlord's evidence at all in relation to this issue.

I also note my findings that the parties have not accepted an ingoing condition report for the purpose of Part 5 of the Act.

Accordingly, I am not satisfied that the Landlord is entitled to retain the Tenants' security deposit as they have not complied with section 112(5) of the Act.

I note in passing, the Landlord's Notice indicates that \$800.00 of the Tenants' security deposit was to be retained for unpaid rent and \$200.00 was to be retained for the purposes of cleaning. The Landlord indicated during the Inquiry that although the cleaning was no longer necessary, they were going to use the \$200.00 and apply it to the unpaid rent. This is not acceptable and is in breach of the Landlord's obligations to return the Tenants' security deposit. The Landlord must bear in mind that the security deposit is in fact the Tenants' money, which they hold on trust and can only use for specified purposes if they complied with section 112 of the Act. If the purpose that they have specified in the Notice of Intention to Retain the Tenants' Security Deposit becomes redundant the Landlord has an obligation to return that money to the Tenants. I find that the Landlord has breached this obligation which I note is a criminal offence and carries a penalty to a maximum of \$2,200.00.

In any event, during the course of the Inquiry the Tenants indicated that by consent they would be prepared if a compensation order was made in favour of the Landlord to utilise their security deposit for the purposes of unpaid rent.

THE COMPENSATION CLAIM

The Landlord claims unpaid rent up until the day before the owners took back possession of the premises on 19 March 2003. The Landlord says that the Tenants by abandoning the premises have breached their obligations to pay rent in accordance with the tenancy agreement. The Landlord says that the Tenants have effectively "broken their lease". In relation to the Notice of Termination that they issued, the Landlord says that this notice was issued because the Tenants were breaching their obligation to pay rent. Although this notice was not effective in terminating the tenancy agreement, it was clear that the Tenants had moved out of the premises, which is another breach of their tenancy agreement and this has caused the Landlord to suffer loss or damage.

The Landlord says consistent with their obligation to mitigate their loss they advertised the premises in the NT News on 28 February, 5 March, 7 March, 14 March and 12 March 2003. In addition, they advertised the premises in the office listings as well as in their front window listings.

The Tenants in response says that they relied on the Notice of Termination which told them they had to move out by 25 February 2003. Accordingly, they should not have to pay rent past this date.

The Tenants have effectively submitted that because they relied on the Notice of Termination which told them to move out by 26 February 2003, they should not be liable for the rent past this date. During the Inquiry, I explained to the Tenants that they had entered into a fixed term tenancy agreement until September 2003. The Landlord issued the Notice of Termination as they had breached their obligation to pay rent in accordance with that agreement. The Landlord had a right to terminate in accordance with section 87 and exercised this right. However, it was clear that the Landlord has suffered loss or damage past the termination date specified in the Notice and should be entitled to compensation for this amount. Theoretically, the Landlord is entitled to any loss or damage as a result of the Tenants breach of the tenancy agreement and it was apparent that the Tenants had breached this agreement by failing to pay their rent and also moving out of the premises. Effectively, the Tenants had broken their lease and I am satisfied that the Landlord should be entitled to a compensation order for the loss suffered as a result of that breach.

I accept that the Landlord has suffered loss in unpaid rent up to and including 18 March 2003. I am also satisfied that the Landlord has attempted to mitigate their loss.

According to my calculations, the unpaid rent up to and including 18 March 2003 amounts to \$1,550.00. I note during the Inquiry, the Tenants indicated that they consent to an order that their security deposit of \$1,000.00 be retained for this purpose.

The Landlord has also claimed the costs associated with advertising the premises. The evidence of the Landlord is that they placed five advertisements in the Northern Territory News at a cost of \$20.00 per add. I am satisfied that the Landlord has incurred these costs and the amount is reasonable. Accordingly, I make an order for this amount.

The Landlord has also claimed the costs of cleaning of the spa. The evidence of the Landlord in relation to this issue was that when the Tenants vacated the premises the spa was left in a reasonably clean condition. However, after moving out of the premises, the Tenants had the power switched off which meant that the filter was not running and the spa had gone green. The Landlord says they had written to the Tenants by letter dated 26 February 2003 indicating that it remained their responsibility to maintain the spa. The Landlord says they have attempted to mitigate this loss as if they had have had the power reconnected and hire a person to maintain the spa weekly it would have been a lot more expensive. It would have cost \$56.00 to reconnect the electricity and a weekly maintenance fee of \$45.00.

The Tenants evidence was that a professional as provided in their tenancy agreement has never showed them how to operate the spa. The spa was clean when they left the premises and the power was disconnected on 28 February 2003. In response, the Landlord indicated that they have no problems with the spa when the Tenants initially moved out however a three week period has passed since the Landlord was able to move back into the premises and by that time the spa had turned green.

I am satisfied that the Landlord has incurred loss or damage as result of the Tenants abandonment of the premises. I am satisfied that the spa was green and needed cleaning and that the Landlord attempted to mitigate their loss. I am also satisfied that the amount of \$51.65 is reasonable. Accordingly I make an order for this amount.

Summary of orders

I note that the Tenants requested some time to pay for the compensation orders. They indicated that they were only on a single income of \$1,100.00 per fortnight. Their expenses are as follows: rent being at \$300.00 per week, a car loan \$102.00 per week and tools at \$50.00 per week. One of the Tenants, Nicola Woods, indicated that she had a number of job interviews lined up and would be prepared to pay the amounts by instalments. However, she was not sure as to whether or not she would be successful in these jobs so the amount she could pay would depend on her obtaining employment. In response, the Landlord indicated that although they would be prepared to allow some limited time to pay, the Landlord is effectively "out of pocket".

I indicated to both parties I did not think it would be prudent to give an order that the Tenants pay by instalment, given the uncertainties with making the instalment order contingent upon one of the Tenants obtaining a job. Accordingly, I indicated I would exercise my discretion and allow the Tenants until Monday, 28 July 2003 to pay the amount of compensation.

On the basis of the above I make the following orders:

1. By consent of the Tenants, the Landlord is entitled to retain the Tenant's security deposit in the amount of \$1,000.00 being for unpaid rent.

2. The Tenant's are to pay the Landlord compensation in the amount of \$921.15 by Monday, 28 July 2003 being for:

• Unpaid rent up to and including 18 March 2003 (\$1,550.00 - \$1,000.00 (security deposit)) =	\$550.00
• Cleaning of the spa	\$ 51.65
• Readvertising of the premises	\$100.00
• By consent of the Tenants, for steam cleaning of the carpets	\$ 60.00
• By consent of the Tenants, for pest spray	<u>\$159.50</u>
TOTAL	\$921.15

Dated this day of July 2003

Penny Turner
Delegate of the
Commissioner of Tenancies