

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 14 MAY 2004

This is a determination of an application dated 10 April 2004 by the Tenant, seeking an order for the return of the security deposit pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 1696 McKinnon Road, Berrimah in the Northern Territory of Australia.

A Notice of Inquiry dated 28 April 2004 was posted to the parties. The Inquiry was conducted on 14 May 2004 during which evidence was taken from the Tenant, and his partner, (“the Tenants”) and the Landlords (“the Landlords”).

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: 1696 McKinnon Road, Berrimah

Commencement Date: 10 November 2002

Period: Periodical

Rent: \$250.00 per week

Security Deposit: \$1000.00

APPLICATION FOR RETURN OF THE SECURITY DEPOSIT

This is a determination of an application by the Tenants in relation to a dispute arising from the retention of \$1000 of the security deposit by the Landlords. The Tenants in their application stated that the “landlord has made false and unreasonable verbal claims against the bond without any written notice having entered the premises without my consent or presence”.

There was no dispute between the parties as to the amount of the security deposit which the Tenants paid in the sum of \$1,000.00. Evidence given by the Tenants of rental receipt no. 22 dated 10 November 2002 confirmed that the amount of \$1,000 was paid by the Tenants for the security deposit.

The Landlords claimed that they retained the security deposit for the following purposes:

- Cleaning of premises – mould in bedrooms, mould on most of the walls, lots of cobwebs and hotplates needed cleaning. The Landlords advised that they spent a lot of time cleaning the premises after the Tenants vacated the premises;
- Carpet – stains on carpet. New carpet was put into the premises on 15 November 2002. Upon the Tenants vacating the premises there were a lot of stains on the carpet that can not be removed;
- 2 holes above hot plates that need to be fixed;

- Paint on concrete in carport and on bricks; and
- Repairs – broken light switch in lounge and 2 broken fly screens.

In response, the Tenants advised:

- Cleaning – Mould - the Tenants spent at least 1 – 2 weeks cleaning the premises before vacating. They removed the mould before vacating and advised that in their new premises, they are experiencing the same problems with mould.
- Carpets - Tenants advised that there is no argument with the carpet. There were stains on the carpet and they had tried to steam clean the marks off the carpet, however the power was disconnected so they were unable to steam clean the carpets prior to vacating. They obtained a quote to steam clean the carpets in the sum of \$35.00. The Tenants advised that they had been in the premises for over 2 years and they also had small children.
- Paint on concrete in carport – Tenants admitted to spray painting in the carport area, thus leaving black paint in that area. The Tenants tried to remove the paint but it did not work. The Tenants obtained a quote for pressure cleaning the concrete in the sum of \$90.
- 2 holes above hotplates – the Tenants admitted to drilling the 2 self tapper holes above the hotplates, but thought it to be minimal damage.
- Evidence was not lead during the Inquiry regarding the broken light and broken fly screens. Accordingly after the Inquiry, the Delegate contacted the Commissioner of Tenancies unit to seek the Tenants’ response. The Tenants advised that one of the fly screens was already ripped when the Tenants moved into the premises and the other was ripped by the Tenants’ dog. The Tenants advised that the fly screen that had been damaged by their dog was fixed prior to vacating. The Tenants further advised that they had no recollection of the broken light switch in the lounge.

The Landlords advised that they did not complete an ingoing or outgoing condition report. The Landlords further advised that they did not have any photographs or other evidence to support their claims. Throughout the Inquiry, I advised the Landlords that I had great difficulty with them being able to retain the security deposit because of the following reasons:

- The Landlords had not completed an RT8 form “Notice of Landlord’s Intention to Retain Security Deposit”, nor completed a statutory declaration attaching relevant receipts, invoices or other documents supporting their claim, as required by section 112 of the Act.
- The Landlords had no evidence in the form of invoices, receipts or photographs to support their claims for cleaning and repairs.
- In addition to completing the RT8 form and statutory declaration, for a Landlord to be able to retain the security deposit and claim for damage, cleaning and repairs, an ingoing and outgoing condition report must be completed as required by section 25 and 110 of the Act. The Landlords admitted that an ingoing and outgoing condition report had not been completed for this purpose.

For the benefit of both parties, but in particular, the Landlords, I set out the circumstances where a Landlord may retain the Tenants security deposit. Retention of a Tenants security deposit is dealt with by section 112 of the Act. Section 112 provides, my emphasis:

“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 first point to note is that s.112(1) of the Act provides that prima facie, the Tenants are entitled to have their security deposit reimbursed at the end of the tenancy agreement.

Secondly, under section 112(2) of the Act, the Landlords must within seven (7) business days after the Tenants have vacated the premises, reimburse to the Tenants the amount of the security deposit, other than an amount that the Landlords are entitled to retain under section 112. Before a Landlord is entitled to retain any or all of the security deposit he or she must give written notice to the Tenant of the intention to do so and the reasons for retention of the security deposit. In addition, he or she must provide a Statutory Declaration in support of that Notice and it must enclose invoices, receipts or other documents to support the retention of the security deposit. Based on the evidence before the Inquiry it is clear that the Landlords have not met these requirements.

Thirdly, section 112(4) of the Act makes it clear that the Landlords are not entitled to retain any part of the security deposit to make good damage, replace ancillary property or clean the premises unless a condition report has been accepted by the Tenants under Part 5 and the Tenants have been given a condition report upon vacating the premises in accordance with section 110. Again, based on the evidence before the Inquiry, the Landlords have not met these requirements.

There are consequences for the Landlords if they have not provided such ingoing and outgoing condition reports. For the purpose of an ingoing condition report not being accepted by the parties, section 51(5) of the Act states:

“51(5) **If a condition report was not accepted by the landlord and the tenant in relation to the premises or ancillary property under Part 5 –**

- (a) the tenant is to be taken to have complied with the term of the agreement specified in subsection (1); and
- (b) if the tenancy agreement has terminated or the tenant has, in the opinion of the landlord, apparently abandoned the premises – the premises or ancillary property are to be taken to have been at the time when the tenant took possession of the premises under the tenancy agreement, in the condition they are at the end of the tenancy agreement.”

The result is that section 51(5) of the Act essentially operates as a deeming provision, in that, the tenant is taken to have complied with the terms of the tenancy agreement under section 51(1) and (2) and more significantly, that the condition of the premises is taken at termination of the agreement to be the condition of the premises when the tenant took possession of it at the beginning of the tenancy agreement.

Section 51(1) and (2) states:

“51. Cleanliness and damage

- (1) It is a term of a tenancy agreement that a tenant –
- (a) will not maintain the premises and ancillary property in an unreasonably dirty condition, allowing for reasonable wear and tear;
- (b) must notify the landlord of any damage or apparent potential damage to the premises or ancillary property, other than damage of a negligible kind;
- (c) must not intentionally or negligently cause or permit damage to the premises or ancillary property;
- (d) if the premises are a unit within the meaning of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of that Act;
- (e) if the premises are a building lot within the meaning of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of that Act; and
- (f) if the premises are a lot within the meaning of Part IVB of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of that Act.
- (2) It is a term of a tenancy agreement that at the end of the tenancy the tenant must give the premises and ancillary property back to the landlord –
- (a) in reasonable state of repair; and
- (b) in a reasonably clean condition,
allowing for reasonable wear and tear.”

Accordingly, as no ingoing condition report was accepted by either the Tenants or the Landlords in accordance with Part 5 of the Act, I find that by virtue of section 51(5) of the Act, the Tenants are essentially deemed to have complied with their obligations under section 51(1) of the Act. I further find that the Tenants have maintained the premises in a reasonably clean condition; in a reasonable state of repair; and are taken not to have intentionally or negligently caused or permitted damage to the premises.

In addition, in accordance with section 51(5)(b), the premises at the end of the tenancy agreement is deemed to be the condition of the property at the beginning of the tenancy.

Further, on the basis of the evidence before the Inquiry, it is clear that the Landlords have not complied with the requirements of section 112 of the Act. It therefore follows that the Landlords are not entitled to retain any of the security deposit in the sum of \$1,000. The Landlords must therefore return the security deposit to the Tenants forthwith.

Be that as it may, during the Inquiry the Tenants have consented to payment of the following amounts to the Landlords:

- | | |
|-------------------------------------|-----------------|
| • Steam cleaning of the carpets | \$35.00 |
| • Pressure cleaning of the concrete | \$90.00 |
| • Rent for 1 day (13/3/04) | <u>\$35.00</u> |
| | <u>\$160.00</u> |

As mentioned above, the Tenants admitted to causing the damage to the carpet and the stains in the carport. The Tenants obtained quotes/estimates to steam clean the carpet (\$35) and to pressure clean the concrete (\$90). During the Inquiry, the Tenants agreed to pay these sums.

In relation to the payment of rent, the Tenants and the Landlords agreed that the date of vacation was Friday, 12 March 2004. However, during the Inquiry, the Tenants admitted that they went back into the property on 13 March 2004 to finalise the cleaning. The Tenants agreed that as they were still using the premises to finalise the cleaning, that 1 day's rent was owed to the Landlords. During the Inquiry, the Tenants agreed to pay the amount of \$35.00 to the Landlords.

I wish to emphasis to the Landlords that had it not been for the Tenants consenting to the payment of \$160, the Landlords would not be entitled to retain any money from the security deposit. This is for the simple reason that the Landlords have failed to comply with their obligations under the Act.

I further point out to the Landlords that they have breached section 112(2) of the Act (refer above). Such breach can carry a penalty of up to 20 penalty units or \$2,200. Whilst I do not believe that this is a matter for the Commissioner of Tenancies to pursue, I trust that the Landlords are now aware of their obligations under the Act, and that future breaches of the Act will not occur.

Finally, there were some allegations made by the Tenants during the Inquiry (and on their application to the Commissioner of Tenancies) that the Landlords entered the premises without permission. According to the evidence of the Tenants, the Landlords removed a fence on Monday, 15 March 2004. However, on the evidence before me, I am satisfied that the Tenants had vacated the property on Saturday 13 March 2004, and accordingly, the Landlords were entitled to vacant possession of the premises on Sunday, 14 March 2004 and were entitled to remove the fence on the Monday.

Accordingly, I order that:

1. The Landlords are not entitled to retain the Tenants security deposit in the amount of \$1,000.00 and must, subject to order 2, return the security deposit to the Tenants forthwith.
2. By consent of the Tenants, the Landlords are entitled to retain from the security deposit a total amount of \$160.00 being \$35 for steam cleaning of the carpets, \$35.00 for 1 day's rent and \$90 for pressure cleaning of the concrete.

Dated this 20th day July 2004

Tearangi Faith Woodford
Delegate of the
Commissioner of Tenancies