

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 16 JANUARY 2004

This is a determination of an application dated 9 December 2003 by the Landlord, seeking an order for compensation pursuant to section 121 or 122 of the *Residential Tenancies Act (NT)* (“the Act”). The application is made in respect of the premises being 14 Creswell Street, Tiwi in the Northern Territory of Australia.

A Notice of Inquiry dated 5 January 2004 was posted to the parties. The Inquiry was conducted on 16 January 2004 during which evidence was taken from the Landlord, by telephone (“the Landlord”). The Tenant also appeared (“the Tenant”).

On the basis of the documentary and oral evidence before the Inquiry I find that the Tenancy Agreement within the meaning of and subject to the provisions of the Act on the following terms:

Premises:	14 Creswell Street, Tiwi 0801
Commence Date:	31 December 2001
Period:	1 year then periodical
Rent:	\$200 per week
Security Deposit:	\$800

The determination of this matter, from the outset, has presented a number of difficulties. This matter had been the subject of a previous determination by the Commissioner of Tenancies whereby, inter alia, an order for possession was made on 7 November 2003 to be effective at 9.00am 14 November 2003. It is the events arising after and from that previous order which has brought the Landlord back before the Commissioner seeking further compensation for unpaid rent, costs of securing the premises with a bailiff and enforcing the order through the Local Court.

The Landlord’s Evidence

The Landlord gave evidence that following the Inquiry of 7 November 2003, an agreement was reached with the Tenants whereby the Tenants would be allowed to move their belongings from the premises over the weekend of the 15-16 November, and would handover the keys at 10am Tuesday 18 November. On 13 November the Landlord said that she telephoned a Tenant and that during the conversation she said that the Tenants told her they were having problems finding a new premises and were awaiting the weekend newspaper. The Landlord said that she then proceeded to Darwin by car to lodge the “paperwork” by Monday 17 November. On 17 November the Landlord said that she telephoned a Tenant at approximately 9am from Mataranka. She stated that in that conversation the Tenant told her that they were still having difficulties getting a removal truck and had two applications pending at other properties. She said that the Tenant offered her money in order to stay for some extra days in the Premises. The Landlord stated that she told the Tenant that she would contact them back if any payment would upset the proceedings.

The Landlord said that she did not tell the Tenant that she was driving to Darwin from Cairns. The Landlord also said that she did not telephone the Tenant back "at that time". The Landlord said that she then rang the Tenancies Unit at the Department of Justice and made a decision to follow through with arranging a bailiff and a court order. On her evidence the Landlord continued travelling to Darwin in order to get a bailiff and court order before the close of business. The Landlord stated that she left Katherine at approximately 11.40am. On her evidence she stated that, after arriving in Darwin she went immediately to the Local Court to get the Commissioner's order registered (which appears from the Court's tax invoice to have been done at approximately 2.50pm) and organised a bailiff and locksmith. She said that she attempted to telephone the Tenants without success throughout that afternoon and evening. The landlord said that her telephone calls were an attempt to get in contact with the Tenants and presented an opportunity to cancel the bailiff and locksmith if not required. However, the Landlord did not attend the property on the 17 November 2003 to see whether the Tenants were still in possession (ie. whether the property had been vacated), she assumed that they were. The Landlord gave evidence that a friend had keys to the premises but that she had been unable to contact her friend to get them.

On the following day, Tuesday 18 November 2003, the Landlord attended the premises early in the morning and left a note on the door. She stated that she returned at approximately 10am to collect the keys as had previously been agreed. At 11am the bailiff gained entry to the premises and thereafter the locksmith attended and the locks were changed (although I note the receipt for locks indicated that they were purchased from K-Mart at 12.30pm, I assume the locks were fitted after that time). On the Landlord's evidence, property of little value remained (lawnmower, an electrical appliance, cleaning materials and rubbish). The Landlord said that at 5pm the Tenants arrived at the premises and took their remaining property and effectively vacated the property.

The Landlord said that she had a legal right to do what she did, she held a belief that the Tenants were still in possession of the Premises despite an agreement to vacate by the end of the weekend. The Landlord claims unpaid rent whilst the Tenants were in possession from 8 November to 18 November 2003 (\$314.28), bailiff fees and civil court fees (\$192.00) and locksmith/lock fees (\$95.28)

The Tenant's Evidence

The Tenants gave evidence that on 17 November they had been looking for a new premises to lease. The Tenants said that on the 17 November they did not speak to the Landlord at 9am. The Tenants said that at approximately 12.30pm a Tenant telephoned the Landlord and asked for more time in order to vacate the premises. The Tenants state that during that conversation the Landlord said that she would get back to them and did not mention anything about a bailiff or court order. The Tenants presumed that they could move out on the 17th and come back on the 18th at 5 pm after work to return the keys. The Tenants gave evidence that as part of the agreement to vacate the premises it was agreed that they would meet the Landlord, or a representative of the Landlord, on Tuesday 17th to return the keys, to clean up the premises and to possibly undertake a final inspection. The Tenants admit that they were not at the Premises at the agreed time of 10am and offered no reasonable explanation for that (other than one tenant was at work). They stated that they should not have to pay for a bailiff. The Tenant stated that they vacated on 17 November at approximately 10.30pm. Further the Tenant stated that they had attempted to contact the Landlord on her mobile phone with no success. The mobile phone number is a number which the Tenants had been given by the Landlord on an earlier occasion.

On Tuesday 18th November the Tenants stated that they had to attend work and could not attend the Premises as agreed, but that they returned at approximately 3.30pm to complete cleaning and moving the lawns. At that time the keys were returned to the Landlord.

Determination – Section 121 Outstanding Rent Compensation

It was not in dispute, either by the Tenant or the Landlord that rent should be paid by the Tenants whilst the Tenants were in possession after the order of possession was made. The only issue in contention was the date on which the Tenants gave up possession. On the evidence before me I find that the date of vacant possession was Monday 17 November 2003. I am satisfied that the Tenants vacated the premises on that date. Despite the Tenants retaining the keys on that date, I find that that was not indicative of continuing possession, given that under the agreement to move out on the weekend, the implication was that the Landlord had not expected the keys to be returned until after vacant possession had been given. On the Landlord's evidence she had not expected to see the Tenant's until Tuesday morning when she expected to get the keys back. Further, on the evidence presented, the Landlord had access to another set of keys from a friend in Darwin. I find therefore, that the Tenant is to pay an amount of compensation (pursuant to s 121) to the Landlord equivalent to ten days rent for the period 8 November to 17 November 2003 inclusive, a total amount of \$285.71.

Determination – Section 122 Court, Bailiff and Locksmith Compensation

Section 122 of the Act provides that compensation can be awarded for damage suffered by a party as a result of another party's failure to either comply with terms of a tenancy agreement or the Act. Section 122(3) sets out the factors which must be taken into account in deciding an amount of compensation. In particular, s 122(3)(e) states "whether an action was taken by the applicant to mitigate the loss or damage." It is necessary therefore to take into consideration whether reasonable steps had been taken by the Landlord to reduce any damages that may be awarded against the Tenants.

There is no doubt that, in this matter, the Landlord's claim for court fees, bailiff fess and locksmith fees are sufficiently related to either the Tenants' breach of the tenancy agreement or failure to comply with the Act. As such, I am satisfied, that the Landlord, prima facie, should be entitled to claim for such losses, but the claim is subject to the duty to mitigate. The duty to mitigate essentially encompasses a duty not to act unreasonably and what is unreasonable depends on the circumstances of each particular case.

On the evidence before me I am not satisfied that the Landlord acted reasonably in mitigating all of the losses claimed. There was evidence of at least one telephone conversation between the Landlord and Tenants where the topic of the Tenants continued presence at the Premises was discussed and the Landlord indicated that she may call them back if it was alright. I do not find such assurances particularly acceptable, especially given evidence of the communication difficulties between the parties. Further, neither at that time, nor at any other, was an indication given by the Landlord to the Tenants that she would be enforcing orders through the courts, employing bailiffs and locksmiths. For whatever reasons subsequent telephone communication failed between the two parties. In those circumstances it would have been reasonable for the Landlord, considering that she had arrived in Darwin, at least, at 2.50pm, to attend the Premises on the Monday and to attempt to contact the Tenants in person. Alternatively it would have been reasonable for the Landlord to attend the premises to determine whether it had been vacated as had originally been agreed.

This would have been possible even after she had registered the order and arranged for the bailiff. It is my opinion that it could have been done. In my view it was not unreasonable to have done so, and had the Landlord done so, she would have found the Tenants either in the process of vacating the premises, or that the premises had been vacated. I find the Landlord's efforts on the Tuesday morning in relation to the leaving of a note on the premises door to be a poor attempt at communicating with the Tenants, given that, on the evidence which I have accepted, the Tenants vacated the premises on the night before.

Although there was evidence that the Landlord had access to another set of keys to the premises, I find that she was justified in engaging a locksmith to gain entry (and by replacing the locks) to the premises after the Tenants had failed to meet at the agreed time, and had failed to return the keys. Had the Tenants appeared at 10am and returned the keys it may have been a different matter. Further I note that s 106 of the Act allows a Landlord to enter upon a premises in order to take possession if the premises are abandoned. That can be done without a Court order (or even without an order of the Commissioner) if the premises are abandoned or vacated voluntarily. Therefore, it was unreasonable for the Landlord to obtain a court order without first physically checking if the premises had been abandoned or vacated. I therefore dismiss the Landlord's application for compensation pursuant to 122 for court and bailiff fees on the basis of a failure to mitigate the loss claimed. However, I uphold the claim for \$95.28 locksmith/lock compensation.

Accordingly, I order that:

1. The Landlord's application for s 122 compensation in relation to court and bailiff fees is dismissed.
2. The Tenant is to pay the Landlord compensation in the amount of \$95.28 for s 122 compensation in relation to locksmith/lock expenses.
3. The Tenant is to pay the Landlord compensation in the amount of \$285.71 for s 121 compensation.
4. Any further claim for compensation is adjourned to a date to be fixed upon further application and notice to the parties.

Dated this 18th day of March 2004

Craig Smyth
Delegate of the
Commissioner of Tenancies