

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 5 NOVEMBER 2004

(RT0405-233)

This is a determination of an application dated 12 October 2004 by the Tenant, seeking an order for compensation pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 7 Brown Street, Fannie Bay in the Northern Territory of Australia.

A Notice of Inquiry dated 28 October 2004 was posted to the parties. The inquiry was conducted 5 November 2004 during which evidence was taken from the Landlords Agency, (“the Landlord”). The tenant appeared on behalf of himself and his wife (“the Tenant”).

These particular premises and this particular tenancy agreement has been the subject of at least two prior inquiries before the Delegate of the Commissioner, on each occasion myself being the delegate, and I have also heard at one stage from Mr Tony Pickering of KG Young & Associates in relation to the situation involving these premises and this tenancy.

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:	7 Brown Street, Fannie Bay
Commencement Date:	12 June 2004
Period:	12 Months
Rent:	\$330.00 per week
Security Deposit	\$1,320.00

As I mentioned earlier in these reasons, this particular dispute between the parties has been before the Delegate of the Commissioner on a number of occasions in the past prior to this inquiry in respect of various aspects arising out of the tenancy. I therefore do not need to go into great factual detail in relation to the circumstances leading up to this application by the Tenants, which is an application for the delegate to determine a dispute between the parties in relation to retention of part of the security deposit by the Landlord once the Tenant had vacated the possession of the premises and handed possession to the Landlord.

The parties entered into a tenancy agreement to commence on or about 12 June 2004 and to terminate on 11 June 2005. The essential components of the tenancy agreement have been summarized by me earlier in these reasons.

For some reason, at some point of time in mid 2004, the Landlord and/or his agents arranged for Maurice Kelly & Associates P/L Consulting Engineers to inspect the premises. I am not certain as to whether that inspection was arranged specifically in relation to a realized termite problem in the premises or whether it was a general report, but in any event the report revealed significant termite damage to the roof and surrounding wall areas of the kitchen of the premises and the condition of the premises clearly made them dangerous and uninhabitable in accordance with the provisions of the Act.

The evidence was clear that the termite damage was to the roof above the kitchen area and the walls of the kitchen and this rendered the premises in these areas unsafe and uninhabitable in that if the ceiling of the kitchen were to collapse, then everything that was in the bathroom directly overhead would presumably fall and crash into the kitchen areas, creating a very dangerous situation for anybody who might be in the kitchen at that time.

I accept the evidence by the Landlord that a proposition was put to the Tenants that they inhabit the position of the premises other than the kitchen and the bathroom and that this was accepted by the Tenants. However, I further accept that the owners of the premises referred the matter to their solicitor and they were advised to have the Tenants vacate the premises because of possible legal liabilities arising out of the dangerous condition of the premises.

Accordingly, a Notice to Terminate the lease and give up vacant possession of the premises was issued on 3 September 2004 on behalf of the Landlord advising of termination of lease under section 86(a), division 2 of the Act, which provides the Landlord may terminate a tenancy by 2 days notice in writing if the premises have become uninhabitable. Vacant possession of the premises was required by 6 September 2004.

The matter came before the Delegate of the Commissioner on 7 September 2004 and determined that the Notice to Terminate was valid and that the premises were dangerous and uninhabitable. At the hearing of this inquiry, the Tenant inquired of Mr Pickering as to the security deposit and Mr Pickering assured the Tenant that the security deposit would be returned to the Tenants. In their response as part of this inquiry, the Landlord's agent confirms that Mr Pickering gave that response, subject to the normal terms and conditions, that there be no outstanding rental owing at the time that the premises were vacated and that the property was to be left in a clean and acceptable state. I do not recall Mr Pickering making that clear to the inquiry on 7 September 2004 and if the Landlord is suggesting that such matters should be implied, then I do not accept that proposition.

It should be noted at this stage that the Tenant was resisting giving up possession of the premises because they were particularly suitable to the Tenants for a number of reasons. Brown Street, Fannie Bay is in an attractive area and is close to all amenities including the Parap Shopping Centre and markets, the Parap Primary School, Darwin High School (a bit of a trek, but within 15 minutes), Fannie Bay Shopping Centre, Fannie Bay Race Course and if one requires a little bit exercise, there is nothing quite as enjoyable as an evening bicycle ride along the bike track that runs along to East Point. One only has to consider the number of people and families that enjoy the picnicking and barbecuing facilities along East Point to understand that this is a desirable area in which to have ready access to all of these amenities. Additionally, it was extremely suitable for the Tenant in relation to his business. He runs a "smoko van", in that he would drive a van selling foods and drinks to a particular, very busy store nearby and would sell his wares to the customers going into and going from this particular store, and that is how he makes his living. That store was within, I would say, a 10 minute drive of Brown Street, Fannie Bay and so it was convenient for the Tenant to operate his business from that particular site and then to drive home and park his vehicle in the yard at the premises at 7 Brown Street, Fannie Bay.

On or about Thursday 9 September 2004, the Tenants found suitable premises in Karama. The Tenants could not provide a security deposit for these new premises until the return of the balance of the security deposit from the Landlord in this case, but the Landlord refused to return the balance of the security deposit until a final inspection had been carried out and that they were satisfied with the condition of the premises at the time that the Tenants were to vacate.

The Tenants attempted to obtain finance from elsewhere to pay the security deposit on the new premises at Karama, but they could not do that until Monday 13 September 2004 and in the meantime the premises at Karama had been let to another person.

The Tenants found further suitable premises, but these premises failed to pass a swimming pool inspection and it would take some 2 weeks to allow the owner to make repairs to the swimming pool and so there was further delay.

On Thursday 16 September 2004, the Tenants located yet another property and filed an application and were successful. This was approved on Friday 17 September 2004 and at 4:00pm on that date they signed the rental agreement and took possession of the property.

In the meantime, the Landlord had taken out a further application under the Act under sections 121 and 122 of the Act and this inquiry was heard immediately and it was ordered that vacant possession must be given to the Landlord's agents by 9:00am on Thursday 23 September 2004.

On Friday 17 September 2004, the Tenants lived at the new address and have remained there since. Thereafter the Tenants only returned to the premises at 7 Brown Street to gather possessions and effect vacant possession in favor of the Landlord. The Tenants readily admit that at the time that they vacated, the only cleaning that they did was to sweep the floors and hose down the concrete.

On Wednesday 22 September 2004 at 9:00am vacant possession was given to KG Young & Associates Pty Ltd.

By document dated 27 September 2004, the Landlord's agents issued a notice of the Landlord's intention to retain security deposit. This was addressed to the Tenant's and claimed to retain some of the security deposit on three bases. The first was ancillary property which had been lost or destroyed and had been stored in a shed and that claim was in the sum of \$200.00. There was a further claim for \$160.00 in relation to cleaning and although no quotations or receipts were profited at any inquiry, I accept the evidence that \$160.00 is probably a reasonable amount to clean up the yard and so forth of the premises, even though they have only been tenanted for a short period of time. Finally, the notice of intention to retain security deposit claimed the sum of \$771.43, being unpaid rent from 4 September 2004, the date that rent had been paid up to when these disputes arose until 21 September 2004, which was the day before vacant possession was given to KG Young & Associates Pty Ltd on Wednesday 22 September 2004.

At the hearing of this final inquiry the Tenant accepted these figures but disputed liability for payment.

I will summarize the financial position as follows:

1. The Claim for \$200.00 in respect of the property in the shed has been withdrawn by the Landlord for various reasons;
2. The claim for \$160.00 remains;
3. The claim for rental from 4 September to 21 September 2004 in the sum of \$771.43 is maintained by the Landlord. I do not lose contact with the fact that this rental was calculated on the basis of \$300.00, which is a \$30.00 reduction from the normal rental that was payable by the Tenants pursuant to the provisions of the tenancy agreement.

On all these facts and circumstances, I find that at the time the tenancy agreement was in existence between the Landlord and the Tenant the premises were unsafe and uninhabitable. The Tenant has suggested in submissions to the inquiry that the Landlord at the time of entering into the Tenancy Agreement was in breach of section 47 of the Act. This provides a Landlord must not enter into a tenancy agreement unless the premises and an ancillary property to which the agreement relate or would relate are habitable and meet all health and safety requirements specified under an Act that apply to residential premises or ancillary property. There may be an argument that the Landlord was in fact in breach of that section at the time that the tenancy agreement was entered into. It might also be argued that the condition of the premises, having been referred to the Tenants and that they occupy the premises on a certain basis, and that proposition having been accepted, that the Tenant has accepted the breach of the Act by the Landlord. These are uncertain propositions and arguments and they are not part of this inquiry and I do not propose to make any further comments in relation to section 47 of the Act.

The Tenants remained in possession of the premises until they handed vacant possession to KG Young & Associates on 22 September 2004. According to the documentation they paid rent up until 4 September 2004. The Landlord claims rental, at a reduced rate admittedly, for the period 4 September 2004 until 22 September 2004. It is my finding that it is both unreasonable and unconscionable that the Landlord should expect the Tenants to pay any rental for occupying the premises from 4 September 2004 until vacant possession was given up on 22 September 2004. I accept that the Tenants did all that they could to find alternative premises between early September 2004 until they found those premises in late September 2004. They had to live somewhere whilst they were finding these new premises and for the Landlord to terminate the agreement and demand vacant possession within 48 hours on the basis that the premises are unsafe and uninhabitable and to receive an order that such a notice is valid, but for a number of good reasons the Tenants remain in possession, then to demand rental payments for that period is both unreasonable and unconscionable. Accordingly, I disallow the claim by the Landlord to retain the sum of \$771.43 in respect of unpaid rental. As far as the cleaning is concerned, I accept, as did the Tenant, that cleaning did need to be done in the yard and the photographs are evidence of the extent of the cleaning that was required. However I accept the proposition put by the Tenant that to even live on the premises in any circumstances was dangerous and unsafe, the very reasons relied upon by the Landlord to terminate the agreement, and that they wanted to spend as little time at the premises as possible, given the unsafe nature and the age of their children. Accordingly, I find that the Landlord is not entitled to retain any monies in respect of cleaning of the premises following vacation by the Tenant on 22 September 2004 and I order that the Landlord is not entitled to reclaim the sum of \$160.00 in respect of the cleaning as referred to in the notice of intention to retain security deposit.

Accordingly, the current situation is that the \$200.00 has been withdrawn, the Landlord is not entitled to retain the \$160.00, the Landlord is not entitled to retain \$771.43 and at the time that the Tenants gave possession to KG Young & Associates Pty Ltd, the sum of \$188.57 was returned to the Tenants. Adding those figures together gives a total of \$1,320.00, which is the full amount of the security deposit. In those circumstances, I formally order that the Landlord is to refund to the Tenant the balance of the security deposit and that is the sum of \$1,131.43.

Dated this 14 day of March 2004

Garry Schneider
Delegate of the
Commissioner of Tenancies