

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 7 & 14 DECEMBER 2004

(RT0405-153)

This is a determination of an application dated 14 September 2004 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 Unit 4, 10 Taylor Street, Alice Springs in the Northern Territory of Australia.

A Notice of Inquiry dated 26 November 2004 was posted to the parties. The inquiry was conducted by telephone on 7 and 14 December 2004 during which evidence was taken from Yvonne Clissold and Maria Boehn of Frampton First National (“the Landlord”) and “the Tenant”.

The Landlord claims unpaid rent up to and including 12 August 2004 as a result of the Tenant’s breach of his obligation to pay rent in accordance with tenancy agreement. The Landlord purported to terminate the tenancy by notice to terminate dated 1 July 2004 giving 42 days notice in accordance with section 89 of the Act. The notice states that the Tenant was required to give up vacant possession on 12 August 2004. On 13 August 2004 the Landlord also sent to the Tenant a notice of intention to retain the Tenant’s security deposit for the unpaid rent.

The Tenancy Agreement

At the Inquiry the Tenant disputed the Landlord’s compensation claim on the basis that there was no tenancy agreement governing the parties. The Tenant says although there was a written fixed term tenancy agreement governing the parties in December 2000, at the expiration of the agreement, the parties did not negotiate any new tenancy agreement, there is no tenancy agreement in existence and therefore no obligation on him to pay rent.

The Landlord sought to rely upon section 83 of the Act which deems the circumstances in which a fixed term tenancy becomes a periodical tenancy agreement. Section 83 provides, my emphasis:

A fixed tenancy agreement continues to apply to the premises on the same terms on which it applied immediately before the day the term ends, but as a periodic tenancy, **if –**

- (a) the tenancy agreement does not provide for the continuance of the tenancy after the day the term ends;
- (b) a notice of termination has not been given under this Act in relation to the premises;
and
- (c) the tenant remains in occupation of the premises after the day the term ends.

The parties had a written tenancy agreement dated 23 June 2000 which covered the period 23 June 2000 to 22 December 2000 (“the fixed tenancy agreement”). The fixed tenancy agreement provided relevantly that the weekly rent was \$170.00 to be paid weekly in advance and that the Tenant had provided a security deposit of \$680.00 for Unit 4, 10 Taylor Street, Alice Springs NT (“the premises”).

The Tenant submits that clause 49 of that fixed tenancy agreement specifically provides:

If the Tenant remains in occupation of the Property with the written consent of the Owner after the expiration of the term hereby created, the parties are deemed to have entered into a periodical tenancy in accordance with the Law on the terms and conditions (other than the clause relating to the term of the tenancy) of this agreement.

The Tenant says that essentially the fixed tenancy agreement that had governed the parties provided for the continuance of tenancy after the date the term ends for the purpose of section 83(a) of the Act and the written consent of the owner was required for a periodical tenancy to apply. The Tenant submits as the fixed tenancy agreement provided for the continuance of the tenancy after the expiration of the fixed term, section 83 of the Act does not apply. In addition the Tenant says that because clause 49 of the fixed tenancy agreement was not exercised, there is no tenancy agreement governing the parties and therefore no obligation on him to pay any rent.

The Landlord on the other hand relies on section 20, section 84, section 35 and section 19(4) of the Act to assert that the periodical tenancy is in existence. Essentially the Landlord is asserting that clause 49 of the fixed tenancy agreement is an attempt to contract out of the Act and is void to the extent that there is any inconsistency (section 20), accordingly section 84 of the Act applies. In the alternative, the Landlord asserts based on numerous documentation which was provided to the Inquiry that a tenancy agreement can be implied being a periodical tenancy on the same terms and conditions outlined in the written fixed term tenancy agreement that governed the parties up to 22 December 2000.

I do not accept the Landlord's argument that clause 49 of the fixed tenancy agreement is an attempt to contract out of the Act. Section 83(a) of the Act clearly envisages that parties in any tenancy agreement can provide for the continuance of a tenancy after the expiration of any fixed term. The parties in this matter have clearly done this as is apparent from clause 49 of the fixed tenancy agreement. It is common ground between the parties that clause 49 has never been exercised. The issue is therefore what occurs when the parties do not exercise the continuation provision after the expiration of the fixed term.

Upon a strictly literal interpretation having no regard to the purpose of section 83, the Tenant's assertion that section 83 does not apply because the fixed tenancy agreement provided for the continuation of the tenancy after the term ends has some merit. The provisions of section 83 are clearly conjunctive and the provision is only effective if subsections (a), (b) and (c) are met. That being said, the intention underlying section 83 seems to me to ensure that parties who enter into fixed term tenancy agreements, which expire but the tenant remains in occupation of the premises are governed by some form of residential tenancy agreement and are subject to the regulation and protections of the Act. In my view, the purpose of the provision, consistent with the objectives set out in section 3 of the Act, is to promote certainty between the parties, in particular to ensure that both parties are governed by the minimum terms set out in the Act and a remedy should any dispute arise.

It seems to me that to interpret section 83(a) as literally as the Tenant submits that I should would undermine and usurp the statutory intent and the purpose of the provision where the continuation provision has not been exercised by the parties. In order to achieve the purpose of the provision it seems to me necessary to imply into section 83(a) that any provision for the continuation of the tenancy after the expiration on the fixed term must be exercised and if it is not exercised then there is in effect no provision for the continuance of the tenancy after the expiration of the fixed term.

Such an interpretation would in my view achieve the objectives of the Act to ensure the parties are governed by some minimum form of tenancy agreement in the event that the Tenant remains in occupation of the premises.

Even if I am wrong about my interpretation of section 83 of the Act, in my view a periodical tenancy can be implied by the Tenant's conduct in his having paid some rent since the expiration of the fixed term in December 2000 (as is apparent from the Landlord's rental ledger which was submitted to the Inquiry), the Landlord's reliance on the rent being \$170.00 per week and the various correspondence by way of monthly inspections, rental arrears and notices to remedy unpaid rent issued by the Landlord up until this date. I find that the Tenant continued assertions that there was no tenancy agreement governing the parties quite incredible. I accept that the Landlord was attempting to give a good account of what had occurred between the parties and preferred her evidence to that of the Tenant.

It is also apparent from the numerous documentation that was given to the Inquiry by the Landlord that the parties as at 26 February 2004 had agreed to alter the period of the periodical tenancy to a monthly periodical, where the calendar rent payments would be due on the 6th of every month commencing on 6 April. The rent was specified in that letter as being \$736.67 per calendar month (which is calculated based on \$170.00 per week). The Tenant himself in a letter to Ms Doreen Cope, the Property Manager dated 24 February 2004 acknowledges this arrangement.

I reject the Tenant's assertion that there was no tenancy agreement governing the parties. 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: Unit 4, 10 Taylor Street, Alice Springs NT

Commencement Date: 23 December 2000

Period: Weekly Periodical until 5 April 2004

Monthly Periodical from 6 April 2004

Rent: \$170.00 per week until 5 April 2004

\$736.67 per calendar month, payable on the 6th of every month (based on \$170.00 per week) from 6 April 2004

Security Deposit \$680.00

(herein referred to as "the tenancy agreement")

The Landlord's Notice to Terminate

Having been satisfied that there is a periodical tenancy governing the parties the Landlord attempted to terminate the Tenancy without giving a reason, by Notice to Terminate dated 1 July 2004 ("the Notice"). The date specified for the Tenant to give up possession of the premises is specified as 12 August 2003.

The Landlord must pursuant to section 89 of the Act give 42 days notice of the termination of the periodic tenancy. The Notice was posted to the Tenant on 1 July 2004. I find in accordance with section 25 of the *Interpretation Act* (NT) that the Tenant would have received the Notice in the ordinary course of post on or about 5 July 2004 and service of the Notice is deemed to have been effected on that date. The Notice required the Tenant to vacate the premises on 12 August 2004. The Landlord has only given the Tenant (from 6 July to 12 August) 38 days have has not given the requisite 42 days notice under the Act. Accordingly, I find that the Landlord's Notice was invalid and did not effectively terminate the tenancy agreement.

Unpaid Rent

In any event it is apparent from the evidence before the Inquiry that the Tenant vacated the premises on 11 August 2004 and has effectively abandoned the premises. I am satisfied that the Tenant has breached his obligation to pay the Landlord rent calculated at \$736.67 per calendar month, based on \$170.00 per week up to and including 11 August 2004. The Landlord is therefore entitled to an order for the unpaid rent which for the convenience of calculations can be calculated as follows:

23 June 2000 (the date the Tenant entered possession of the premises) to
11 August 2004 (the date the Tenant gave up vacant possession of the
premises) = 215 weeks and 6 days.

Rent payable
= 215 x \$170.00 per week plus (170 ÷ 7) x 6 = \$36,695.71

Rent paid by the Tenant (being the
sum of the amounts paid indicated
in the Landlords rental ledger) = \$33,975.71.

Therefore the unpaid rent by the Tenant
= (\$36,695.71 – 33,975.71) = \$2,720.00.

Retention of the Security Deposit

The Landlord has also sought to retain the Tenant's security deposit by Notice of Intention to Retain Security Deposit dated 13 August 2004 for unpaid rent. On the basis of the notice, the attachments and the statutory declaration of the Landlord dated 13 August 2004, I am satisfied that the Landlord has complied with the requirements of section 112(5) of the Act and is entitled to retain the Tenant's security deposit of \$680.00 for the purpose of unpaid rent.

Accordingly, taking into account the amount of the security deposit retained by the Landlord for this purpose, I find that the Tenant owes the Landlord unpaid rent in the amount of (\$2,720.00 – 680.00 =) \$2,040.00.

SUMMARY OF ORDERS

On the basis of the above 1 order:

1. The Landlord can retain and distribute the Tenant's security deposit in the amount of \$680.00 for the purpose of unpaid rent.
2. The Tenant is to pay the Landlord compensation in the amount of \$2,040.00 being for unpaid rent up to and including 11 August 2004.

Dated this 11th day of January 2005

Penny Turner
Delegate of the
Commissioner of Tenancies