

# REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

## INQUIRY – 18 OCTOBER 2005

(RTO506-118)

This is a determination of an application dated 31 August 2005 by the Tenant, seeking an order for return of the amount of security deposit retained by the Landlord, pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being Unit 3, 8 Abbott Crescent Malak in the Northern Territory of Australia.

A Notice of Inquiry dated 20 September 2005 was posted to the parties. The inquiry was conducted on 18 October 2005 during which evidence was taken from the Agents for the Landlord, Ms Frances Tudor-Stack, property manager, and Ms Ann Russell, director, of Darwin Rental Specialists (“DRS”), (“the Agents”), spouse of Landlord, via telephone link, and “the Tenant”.

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 3, 8 Abbott Crescent Malak, Northern Territory

Commencement Date: 18 March 2005

Period: 6 months, expiring 17 September 2005

Landlord:

Tenant:

Rent: \$180 per week

Security Deposit \$720.00

This is the Tenant’s application pursuant to section 113 of the Act, for return of the whole of the amount of the security deposit retained by the Landlord, following the Tenants early vacation of the premises on 30 August 2005.

Prior to the Inquiry, by letter dated 19 September 2005 to the Commissioner, the Landlord authorised “..... to act on my behalf for all matters relating to the ...property leased through Darwin Rental Specialists.” The Inquiry proceeded by way of telephone link up with ..... in Melbourne, who advised me that she thought her husband was “doing” the Inquiry. I advised her that the landlord had provided written authority for her to represent him during the Inquiry, and the day prior, (17 October), he had contacted the Commissioner’s office and had given ..... telephone number, for the purpose of her representing him at the Inquiry, in accordance with his written authority. I then asked..... if she was prepared to represent her husband during the Inquiry. She agreed that she would. During the Inquiry it also became evident that ..... had dealings with the Agents during the tenancy and had on occasions acted in relation to the tenancy, with her husband’s knowledge and approval.

..... was then advised that the other parties to the Inquiry were also present, they being, the Tenant, and Ms Tudor-Stack, and Ms Russell, both of DRS, the Agents. .... objected to the Agents being present, on the basis, she said, that DRS had not acted in the Landlord's best interests in relation to this matter as well as other matters, not relevant to this Inquiry. The Tenant advised me that the Agents had knowledge of the matters material to her application and the Agents agreed with the Tenant. After hearing each of the parties on this issue, and considering the material on the file, including the Notice of Landlord's Intention to Retain Security Deposit and accompanying statutory declaration, both originating under the hand of the Agents, I determined that the Agents had material knowledge of the events surrounding the application and directed in accordance with section 141(1)(k) of the Act, each of the DRS employees answer questions put to them during the course of the proceedings and give evidence of those matters.

The Inquiry then proceeded and evidence was taken from the parties, however, one matter calls for comment in relation to the taking of evidence during the Inquiry and relates directly to the Landlord's advocate, ..... During the Inquiry, ..... had to be reprimanded on several occasions to allow other witness to give their evidence without interruption and for talking over the top of witnesses. She was twice reminded that the Inquiry was a legal proceeding, however, she chose to disregard the warning, and continued to disrupt the Inquiry, finally disconnecting herself from the proceeding by hanging up the telephone line. The Inquiry proceeded in her absence.

Section 140 (2) of the Act provides that, "*A person must not – (c) misbehave before the Commissioner,...or interrupt proceedings before the Commissioner.*" A person who does so is liable to a penalty of 100 penalty units, (\$11000.00 at present).

Although, in this instance, I make no formal finding in relation to her disruptive behaviour, it is necessary to state that consequent upon her disruptive behaviour and ultimate withdrawal from the Inquiry, and in fairness to the Landlord in particular, I deemed it necessary to allow the parties further time in which to produce any evidence upon which they wished to rely. This necessitated the matter being further delayed, having been twice adjourned at the request and convenience of the Landlord, due to family circumstances, which necessarily took precedence.

### **The Tenancy Agreement**

The tenancy agreement was for a term of six months. It began on 18 March 2005 and was to expire on 17 September 2005 (the "Tenancy"). A security deposit with respect to the premises in the amount of \$720.00 was held by the Agents on behalf of the Landlord, on trust.

On 11 July 2005 the Tenant wrote to the Agents advising, amongst other matters, that she would vacate the premises on 30 August 2005, 18 days earlier than expiration of the Tenancy (the "Letter"). A copy of the Letter was provided to the Inquiry. The Letter was received by the Agents and the notice of early termination and the date of vacation are not in issue. In the Letter, the Tenant asked that she be released from paying rent following early vacation.

The evidence before me in relation to the issue of early termination of agreement, is that after initially trying to contact the Landlord by mobile phone, the Agents made inquiry of the Landlord in writing (email) on 29 July 2005, as well as advising the Landlord of his duty to mitigate his loss and that the Agents had advertised the premises as being available for rent on 30 August 2005. The Landlord replied in writing (email) on 4 August 2005, stating that he would not agree to the Tenant's request. He wrote "...we are not prepared to release the tenants (sic) from their contractual legal obligations any earlier than the date stated in the initial lease agreement." He went on to state, "We proposed (sic) that the current tenant (sic) either remains in the property until such time (sic) that the current lease expires, or payout the remaining balance of the lease as it stands." The Agent communicated the Landlord's response to the Tenant and advised her that she was obliged to pay the rent to the expiration of the Tenancy, or until a new tenant was found, whichever was the earlier.

The Tenant duly vacated the premises on 30 August 2005, and that same day, Ms Tudor-Stack, performed an outgoing inspection of the property. She gave oral evidence that she found that the property to be in excellent condition and commented that the Tenant was an exemplary tenant. She said that the only damage to the property was a broken plastic knob on an air-conditioner, which the Tenant had previously advised, had broken off in her hand when she attempted to turn the air-conditioner on. The Agents also produced a copy of an email to the Landlord dated 7 September 2005 in which was written, "*The interior of the property was found to be very clean, the gardens tidy and in the same condition as at the commencement of the tenant's lease.... The tenant had not replaced the knob for the lounge room air conditioner which had broken when she attempted to turn the knob. \$2.60 has been held for the replacement of the knob from the tenant's security deposit as well as \$461.43 for the rent owing from 31 August 2005 – 17<sup>th</sup> September 2005. The appropriate forms have been issued to the tenant.*"

### **Notice of Landlord's Intention to Retain Security Deposit**

As a consequence of the inspection and the early vacation by the Tenant, and on instructions from the Landlord, the Agents issued Notice of Landlord's Intention to Retain Security Deposit, ("RT8") and accompanying statutory declaration, both dated 30 August 2005.

In relation to a landlord retaining a security deposit at the end of a tenancy, section 112 provides (my emphasis);

- (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 has given up vacant possession of the premises or has, in the opinion of the landlord, apparently abandoned the premises – a condition report has been given to the tenant under section 110.*
- (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).
- (6) If, in the opinion of the landlord, the tenant has abandoned the premises, the landlord may continue to hold on trust for the tenant as much of the security deposit as is necessary to ensure that the deposit will be available for payment to the landlord in accordance with section 122 as compensation for –
- (a) loss of the rent that the tenant would have been liable to pay under the agreement if he or she had not abandoned the premises; and
  - (b) loss caused to the landlord in securing new tenants for the premises.
- (7) Subject to subsection (9), an amount of a security deposit held by a landlord under subsection (6) is to be held on trust for the tenant until –
- (a) the Commissioner determines the distribution of the security deposit under section 122; or
  - (b) if the Commissioner is satisfied that all losses referred to in subsection (6) may be calculated in relation to the tenancy to which the deposit relates – the Commissioner determines the distribution of the deposit on the application of the tenant under this Act.
- (8) The landlord is not entitled to claim under section 122 part or all of the amount of the loss referred to in subsection (6) unless –
- (a) the Commissioner receives an application to determine the distribution of the tenant's deposit; or
  - (b) the loss is claimed under section 122,
- as soon as practicable after the loss can be calculated and in any case within 3 months from the date on which the tenant apparently abandoned the premises.
- (9) If the landlord ceases under subsection (8) to be entitled to claim part or all of the amount of the loss referred to in subsection (6), the tenant is entitled to as much of the security deposit as the landlord continued to hold on trust for the tenant under subsection (6) and section 116 applies accordingly.

### **The claim for cost of replacement of the air conditioner knob**

I find that the RT8 was validly issued and served in accordance with section 112. Valid ingoing and outgoing condition reports were produced, attesting to the state of the premises at the beginning and end of the Tenancy, with the air-conditioner knob being the only contentious issue and one issue of the Tenant's Application.

In relation to this issue, the Tenant gave evidence during the Inquiry, that the air conditioner knob was plastic and that it simply broke off in her hand when she attempted to turn on the air conditioner unit. Ms Keen gave evidence that the unit itself was fairly new, having been installed for some 18 months, but with approximately only 11 months of usage. She stated that she failed to see how normal use and pressure could result in the breakage of the knob.

However, the accompanying statutory declaration to the RT8 did not have attached to it a receipt or invoice for the air conditioner knob, the amount claimed being \$2.60, as required by section 112. When a landlord claims upon a security deposit for damage, section 112(5)(b) and (d) of the Act require the statutory declaration to have attached copies of receipts or invoices relevant to each specific claim for damage. The purpose of attaching the receipt or invoice is so that the tenant is fully apprised of the claim, including the cost of repair or replacement.

Section 113(2) provides, *“Despite section 112(5), the Commissioner may permit a landlord to retain an amount of a security deposit for a purpose specified in section 112(3)(d), (e), (f) or (g), although the landlord has not given the tenant a notice under section 112(5) for that purpose, if the Commissioner is satisfied that the circumstances of the failure to give the notice are such that the landlord ought, despite the failure, be permitted to retain such an amount.”*

As this is a claim outside the terms of section 113(2), I have no discretion in which to allow the claim, despite my view that the Tenant was fully aware of the nature of the item claimed and cost of replacement. Therefore, I find that the Landlord is not entitled to retain the cost of the air conditioner knob and that the amount claimed in respect of which and retained from the security deposit, (\$2.60), be refunded to the Tenant and order accordingly.

In any event, even if there was a discretion under the Act, I would not have allowed the claim, as upon consideration of the evidence from both parties, including the evidence of the Agent that the Tenant had been in all respects, an exemplary tenant, as well as the fact that the knob was plastic, and that the air conditioner had some amount of usage, I prefer the evidence of the Tenant to that of the Landlord. Accordingly, I find that the breakage of the air conditioner knob, was due to fair wear and tear, a claim for which, is expressly precluded by section 112(3)(a) of the Act, and excluded pursuant to clause 3 of the Addendum to the Lease.

**The claim for refund of amount held in lieu of rental payments to end of tenancy.**

The Tenant also claims return of the amount held in lieu of rent from the security deposit, being \$461.43, on the basis that the Landlord failed to mitigate his loss in accordance the Act, by entering into a new tenancy from 31 August 2005. Prior to considering the issue of mitigation, I turn to the issue of the management agreement between the Landlord and DRS.

**The Management Agreement.**

..... on behalf of the Landlord raised, as an issue, the purported severing of the management agreement between the Landlord and DRS. This was raised, she said, because it went to the issue of mitigation of loss. It was her view that if DRS were not the Landlord’s agents, then his refusal to accept any suitable prospective tenant procured by DRS to begin tenancy on 31 August, meant that the Landlord could not be said to have failed to mitigate his loss.

..... firstly gave evidence that after the Tenant had given notice of her intention to vacate the premises, DRS had severed the management agreement between themselves and the Landlord, and she pointed to an email dated 9 August 2005 from the Agents to the Landlord in support of that assertion. The email raised issues of insurance. It did not sever the management agreement, nor purport to. In fact, as the correspondence between the parties shows, both parties continued to deal with each other in their respective capacities as Agent and Landlord, until 24 August, when the Landlord wrote to the Agent making it clear that following 17 September 2005, i.e., the expiration of the original term of the tenancy, that DRS would no longer be managing the premises on his behalf. The Landlord stated further that DRS were to ensure “...*the keys to the property be available for collection from your office, by 0900 hrs, September 18, 2005.*”

..... gave evidence that DRS had not severed the agreement between the parties, nor purported to, however, she was aware through communications in late August, that it was the Landlord’s intention not to continue with the management agreement following 17 September 2005.

..... then said that regardless, the Landlord had severed the management contract between himself and DRS, as he had apparently entered into a management agreement with LJ Hooker in Darwin for management of the subject premises and that DRS knew this to be the case. When asked by me, ..... was unable to advise the date of commencement of the management agreement with LJ Hooker, nor could she locate a copy of the agreement among the paperwork she had with her, despite taking time to look for same during the Inquiry.

..... gave evidence that DRS had not received any documentation from LJ Hooker advising that the company had taken over management of the premises, nor request for keys, nor transfer of the security deposit to the premises, which she said, was the usual business practice among property agents, when management changed hands.

..... also pointed out that written notice was needed to sever the agreement with DRS. She provided a copy of the agreement of which clause 9 provides, “*This agreement shall remain in force unless cancelled by either party giving the other one month’s notice in writing to that effect*”. ..... gave evidence that prior to the Landlord’s email of 24 August, he had not sought to definitively terminate the agreement.

At the close of the Inquiry, all parties were allowed a further seven days in which to provide any further documentation upon which they intended to rely. In response, by letter dated 26 October 2005, the Landlord wrote to the Commissioner and provided a Statutory Declaration attesting to certain matters, one of which was the purported management agreement with LJ Hooker.

Despite the Landlord attesting that, “*On or about 17th August 2005, I received a facsimile of the Residential Property Management Agreement from L.J.Hooker, which I completed and sent back by facsimile.*”, that document (if it exists), was not produced to the Inquiry. I also note that other than the preceding sentence, the Landlord did not attest to its existence, or its acceptance by LJ Hooker. However, he does attempt to explain the lack of documentation in his letter to the Commissioner, whereby he states, “*a number of original documents are filed down there (Melbourne), to which I am unable to gain access to.*” One of which, I assume, is the purported agreement with LJ Hooker and of which, ..... could not locate during the Inquiry.

The question remains why the Landlord did not simply request a copy of the agreement directly from LJ Hooker and provide that to the Inquiry in support of his claim, given both he and ..... insistence of its existence and relevance to the proceeding, particularly as the Landlord claims in his letter that “...LJ Hooker had a suitable tenant, however before a tenancy agreement was signed this tenant had to travel interstate for a family medical emergency. Subsequently the property remained untenanted for the seventeen days until Ms O’Halloran’s tenancy agreement expired.” (A matter further expanded upon in his Statutory Declaration).

The Landlord also attests in paragraph 4 of his Statutory Declaration that his wife agreed to ..... apparent verbal statement on 15 August 2005 that DRS were no longer able to represent the Landlord. Even if this was accurate, ..... was not a party to the agreement between DRS and the Landlord, and could not terminate the agreement, verbally or in writing.

Of further note to this issue is that the keys to the premises were not retrieved from the DRS until 27 September 2005. On the evidence of Ms Tudor-Stack, the keys were retrieved by a person other than an employee of LJ Hooker. She believed that person to be a friend of the Landlord. A copy of the key register was produced as evidence of the date of collection.

### **Mitigation of Loss**

In accordance with the law, it is incumbent upon a landlord to mitigate loss consequent upon breach by a tenant. The breach in the instant case, is the Tenants failure to pay rent until the end of the tenancy, due to her unilateral early termination of the agreement. Section 120 of the Act provides;

*“The rules of the law of contract about mitigation of loss or damage on breach of a contract apply to a breach of a tenancy agreement.”*

In *Young v Lamb* (No 2) 2001 NSWSC 1014, a case about a commercial tenancy, Austin J, referred to three rules with respect to mitigation of loss:

- (a) the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong (*British Westinghouse Co v Underground Railway [1912] AC 673, 689 per Viscount Haldane LC;*)
- (b) where the plaintiff takes reasonable steps to mitigate the loss to him, he can recover for costs incurred in so doing; and
- (c) where the plaintiff takes steps to mitigate the loss to him, and the steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's actions.

The Court then considered the standard which the plaintiff must observe when acting to mitigate his loss and referred to *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, at paragraph 187, in which the Court of Appeal of New South Wales said, (my emphasis):

***"A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less....The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which (TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130). ....Where the assessment of damages relates to a commercial operation, the question relates to what the plaintiff "would do in the ordinary course of business": Sacher Investments at 9; Wenkart v Pitman (1998) 46 NSWLR 502.***

In this matter, the Tenant contends that the Landlord did not act reasonably, in failing to accept one of the prospective tenants found for him by his Agent, or herself, and thereby, failed to mitigate the loss in accordance with section 120 of the Act.

With respect to the question of mitigation of loss, the Agents provided evidence that upon notification by the Tenant that she would vacate the premises 18 days earlier than the end of the lease, DRS on behalf of the Landlord, advertised the premises in the newspaper as being available for rent on 31 August, as well as on their DRS web page and the DRS rental availability list. As a result of the advertising, DRS had identified four applicants which they deemed suitable as prospective tenants, with each applicant willing to lease the premises for a 12 month term in accordance with the Landlord's requirements. Those applications were produced during the Inquiry.

In relation to securing a new tenancy, Ms Tudor-Stack's evidence is that she had contacted the Landlord by telephone on 15 August and advised that she had four suitable applicants, each willing to begin a 12 month tenancy on 1 September 2005 and that the Tenant would pay rent from 31 August to 1 September 2005, (effectively one day's rent). She said that the Landlord responded by stating that the Tenant was to pay rent up to the end of the lease. Ms Tudor-Stack said she advised the Landlord that such action may prejudice any claim that he had mitigated his loss. She said that the Landlord replied to the effect that he was only willing to accept a new lease to commence from 18 September 2005 and directed that DRS immediately stop advertising the property as available.

..... gave evidence that on being advised of the substance of the conversation with the Landlord by Ms Tudor-Stack, she wrote to the Landlord requesting that he confirm whether or not he would accept one of the applicant tenants, or alternatively, whether he would not accept any of the applications, as well as to confirm his instructions to Ms Tudor-Stack, that DRS were not continue to advertise the premises. A copy of that email (15 August) was produced at the Inquiry, along with an email of 16 August, in which Ms Russell confirmed the Landlord's instructions.

Ms Tudor-Stack and the Tenant gave evidence that the Tenant herself had a friend who wished to tenant the premises. It was the Tenant's evidence that her friend had been willing to rent the premises from 30 August 2005, i.e. immediately upon vacation by the Tenant. Ms Tudor-Stack advised the Landlord of this applicant by email of 30 August 2005. The Landlord responded by email dated 5 September stating "...we are more than happy to consider all suitable applicants, commencing from September 18, 2005. As stated in my wife's conversation with Anne, at this stage we remain interested in re-letting the property. The contentious issue remains our feelings of being pressured to cancel a binding contract prior to the agreed date of termination without even an explanation!"

During the Inquiry, by way of response, ..... stated that none of the applicants were suitable. However, when asked why, she said she could not at present recall, other than one applicant had a dog and the Landlord did not want a dog on the premises. Ms Tudor-Stack gave evidence that there was an applicant who had a dog, however, the dog in question was disability assistance dog and in her view, rejection of an otherwise suitable applicant on that basis, would be grounds for a discrimination claim under the *Anti-Discrimination Act* and that the Landlord knew this to be the case. By way of response, ..... simply insisted that the Tenant should not be able to break the tenancy, regardless of her reasons and that the Tenant was obligated to pay rent to the end of the tenancy.

As there was no evidence before me that any of the proposed applicants was unsuitable, and as I am satisfied that the Agents appropriately vetted each application prior to advising the Landlord of suitability, I find that each of the four applicants was a suitable prospective tenant for the subject premises and able to begin tenancy on 1 September 2005.

Regardless of the issue of management of the premises, even if I were to accept the Landlord's assertion that LJ Hooker were acting as property managers for the Landlord, which, I do not, there is absolutely no evidence before me at all that LJ Hooker, in their purported capacity as agents did anything to mitigate the Landlord's loss, other than the vague claim by the Landlord of prospective tenants who were apparently unable to take up the tenancy.

I also reject the Landlord's and ..... evidence with respect to the purported termination of the management agreement between himself and DRS and find that DRS were Agents for the Landlord up to 17 September 2005 and that DRS had acted at all times appropriately and diligently in their efforts to procure new tenants for the premises and to ensure that the Landlord mitigated his loss in accordance with the law. This is despite the Landlord's view expressed in his letter to the Commissioner, in which he states, "*It needs to be stipulated that Darwin Rental Specialists have failed to adequately and professionally represent my wife and I throughout the period they have been engaged as property managers. They have continually failed to abide by the laws stipulated in the Residential Tenancies Act 2005, thus exposing myself to undue and unnecessary Tenancy Commission action.*"

On consideration of all the evidence during the Inquiry and that produced by the parties pursuant to the Order of 21 October 2005, I find that the Landlord had no intention of accepting any prospective tenant procured by the Agent, or the Tenant, regardless of suitability, in order to mitigate his loss, and therefore, did not mitigate his loss. I also find in fact, that he had no intention of mitigating the loss at all, as he was determined on ensuring that the Tenant pay rent to the conclusion of the original term of tenancy, regardless of reason and the law.

In particular, I find that the Landlord has acted in an arbitrary manner, without foundation, and in an obstinate refusal to accept any of the suitable prospective tenants procured by DRS. Had the Landlord accepted one of the suitable prospective tenants, procured by DRS on 15 August, or, as soon as practicable thereafter, he would have totally mitigated the loss, less one day's rent, (31 August), for which amount he would have been entitled to retain from the security deposit. As a result, the issue which remains to be considered is whether the Tenant is responsible to pay the one days rent shortfall, for which she would have been responsible, had a new tenancy begun on 1 September 2005.

The Tenant gave evidence that she had located a prospective tenant willing to take up the tenancy on 31 August 2005. However, that application did not ensue. If the application had ensued and the tenant deemed suitable, upon acceptance by the Landlord, the mitigation of loss would have been 100%, relieving the Tenant, from responsibility to pay rent to the termination date. As stated, I am mindful that no such application actually ensued, however, on consideration of all the evidence, I find that even if the application had ensued and the prospective tenant was deemed suitable, the Landlord had no intention of accepting the application, having made it clear to his Agent in writing, that he would only consider applications for tenancy effective from 18 September 2005. Therefore, I find on the evidence that the Landlord had no intention of mitigating his loss, therefore failed to mitigate his loss and is not entitled to claim the one days rent from the Tenant, for the period 31 August, following her early vacation of the premises on 30 August 2005.

I further find that there has been a total failure on behalf of the Landlord to mitigate his loss in accordance with section 120 of the Act, and the failure was that of the Landlord, and no other party.

Accordingly, I find that the Landlord is not entitled to rent for the period 31 August 2005 to the end of the tenancy (17 September 2005) and that the amount retained from the security deposit, in lieu of rent to 17 September, being \$461.43, be refunded to the Tenant and order accordingly.

Dated this 10<sup>th</sup> day of November 2005

Kathryn Gleeson  
Delegate of the Commissioner of Tenancies