

**REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES
INQUIRY - FRIDAY, 14 OCTOBER 2005 AT 10.30 AM**

RT0506-159

This is a determination of an application dated 20 September 2005 by the tenants ('the Applicants'). The Applicants seek the return of their security deposit pursuant to part 12 of the *Residential Tenancies Act NT* ('The Act'). The application is made in respect of premises being 9 Carpentaria Court, Durack NT. A Notice of Inquiry dated 30 September 2005 was posted to the parties. The inquiry was conducted on Friday 14 October 2005 at 10:30am during which evidence was taken from the landlord and the tenant. Also present was Mitch Elton from Raine & Horne.

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:	9 Carpentaria Court, Durack NT 0830.
Commencement Date:	13 August 2003.
Period:	2 years ending 9 August 2005 then reverting to a periodical tenancy.
Landlord:	
Tenant:	
Rent:	\$760.00 per fortnight payable in advance.
Security Deposit	\$1,520.00.

Part 12 of the Act deals with the return of bond at the end of a tenancy. Section 112 of the Act states that a tenant is entitled to have his or her security deposit returned at the end of the tenancy agreement and that it must be returned within seven business days after the tenant gave up vacant possession.

S.112 (3) details the circumstances upon which a landlord is permitted to retain a tenant's security deposit. S.112 (4) states that a landlord is not entitled to retain some or all or the amount of a security deposit for damage of the premises, the replacement of property or cleaning unless: -

1. a condition report in relation to the premises was accepted by the tenant under part 5;
and
2. a condition report has been given to the tenant under section 110.

Section 110 requires a landlord to fill out and sign a condition report and serve it upon the tenant within 3 business days after the tenant has given up vacant possession.

The condition report must be filled out in the presence of the tenant unless it is not practical to do so or the tenant or the tenant's representative does not appear at the agreed time.

S.110 (5) states that the tenant or tenants may either: -

1. accept the condition report given to him/her by signing the report and returning it to the landlord; or
2. refuse to accept the condition report in the event that the parties are unable to agree as to its contents.

The Act then goes on to make specific provisions in relation to a party refusing to accept a condition report which are not relevant in these circumstances.

The issue in this case is whether or not the condition report was filled out and executed by the landlord and served on the tenant within three business days after the tenant gave vacant possession of the premises as required by s.110 (1) of the Act.

The landlord's position on this issue was that because not all of the keys had been returned, the landlord could assume that the tenant had not provided vacant possession. He submitted that it was still possible to argue that the tenant had not vacated the property because there were still keys that had not been returned.

The tenant gave evidence that as he was informed by Raine & Horne on Thursday 8 September 2005 not to go onto the property or the landlord would have him charged with trespassing. As such he submitted that vacant possession to the property was given on that day or at least on Friday 9 September 2005 which was the date he had agreed with the landlord's agent to vacate the premises and the date upon which he says he delivered to the landlord's agent all the keys in his possession.

I have considered the lengthy evidence from all the parties and find that the relevant facts are as follows: -

- 19 August 2003 Ingoing condition report completed.
- 6 September 2005 Cleaners collect keys from tenant with a view to cleaning the property

- 7 September 2005 Email from Chris Frey to Mitch Elton of Raine & Horne demanding access to the property either by obtaining keys from the tenant or via a locksmith.
- 7 September 2005 Locksmith engaged by the agent at the request of the owner in order to gain access to the property.
- 7 September 2005 The landlord inspected the property with another real estate agent in order to determine if maintenance was required prior to the sale of the property.
- 8 September 2005 Landlord instructs Raine & Horne that no person is to visit or go into the property until further written notice from him including staff or representatives from Raine & Horne.
- 8 September 2005 The keys are collected from Raine & Horne by the landlord.
- 9 September 2005 The date agreed by Raine & Horne and the tenant to vacate the premises.
- 9 September 2005 Tenant returns all remaining keys in his possession.
- 19 September 2005 Letter to tenant serving outgoing condition report, statutory declaration and notice to return security deposit.

I do not accept the submission of the landlord that vacant possession only occurs when all the keys have been returned to the landlord. A closer examination of all the facts and circumstances surrounding the giving of possession must be examined when determining when vacant possession occurs.

It is the tenant's evidence that their original intention was to vacate the premises on 6 September 2005. There is then an agreement between Raine & Horne and the tenant that the date vacant possession would occur was 9 September 2005. In accordance with that agreement the tenant dropped all the keys in his possession to the landlord on 9 September 2005.

On 7 September 2003, the landlord instructed Raine & Horne to hire a locksmith so that he himself could inspect the premises. I accept that it was not his intention to exclude the tenant at that time. Had he intended to exclude the tenant at that time, he would have instructed the locksmith to change the locks. He did not do so, he simply engaged the locksmith to enable him to access the property. On this basis I do not find that he took possession of the premises on 7 September 2005.

On 8 September 2005, however, the landlord gave unequivocal instructions to Raine & Horne not to permit any person to enter the property. Despite this instruction he now says that it was not his intention to exclude the tenant permanently, rather he wanted to preserve the state of the property as a 'forensic site' so that he could make a claim in the future.

The tenant and Mitch Elton from Raine & Horne gave evidence that because of this instruction, the tenant was unable to organise for the property to be cleaned.

Whilst I accept that the landlord may not have intended to exclude the tenant on a permanent basis, by issuing the order to the agent on September 8 not to permit anyone on the premises. It is open to me to find that vacant possession of the premises occurred on this date.

In any event vacant possession was at least provided by the tenant on 9 September 2005 evidenced by the agreement between the tenant and the agent and by the action of the tenant in delivering all the keys in his possession to the agent.

In the event that the landlord is minded to make a claim against the security deposit he is required within 3 business days after vacant possession to fill and sign a condition report and give it to the tenant. I find that vacant possession occurred either on 8 or 9 September. Even if the later date is used, three business days from 9 September 2005 is 14 September 2005. The outgoing inspection was not completed until 15 September 2005 and as such is out of time.

In addition, the tenant was not notified that the outgoing report was to be completed and was not given an opportunity to provide any input into the outgoing condition report. Section 112 (4) requires that the tenant is given such notice.

Both Mitch Elton and the tenant gave evidence that the first time the tenant was presented with the outgoing condition report was when he was served with the statutory declaration attaching the receipts for claims against the property on 19 September 2005. Given the outgoing condition report was not completed within the time specified in the Act and that the tenant was not served with or given an opportunity to comment on the outgoing condition report I find that the landlord is not entitled to retain any part of the security deposit.

The landlord has made a number of claims in relation to alleged damage to the property. Although the landlord is required to return the tenant's security deposit there is nothing in the Act preventing the landlord from making an application for compensation pursuant to section 122 of the Act. In the event that the landlord makes such an application then the submissions made in relation to the landlords alleged loss and damage to property can be reconsidered.

In my view the failure of the landlord to fill out and sign an outgoing condition report and give it to the tenant prevents him from making any claims against the security deposit. As such I make the following orders: -

1. The landlord shall return the security deposit to the tenant in the sum of \$1,520.00 forthwith.

Dated this Tuesday 25 October 2005.

Sophie Cleveland
Delegate of the
Commissioner of Tenancies