

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 23 AUGUST 2002

This is a determination of an application dated 30 May 2002 by the tenants, seeking the return of their \$1,400.00 security deposit pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 18 Dalwood Crescent, Malak, 0810 in the Northern Territory of Australia (“the premises”).

A Notice of Inquiry dated 2 August 2002 was posted to the parties. The Inquiry was conducted on 23 August 2002 during which evidence was taken from the Landlord’s agent, on behalf of the Landlord (“the Landlord”). The tenant appeared on behalf of the tenants (“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:	18 Dalwood Crescent Malak NT 0810
Commencement date:	30 March 2001
Period:	12 months
Rent:	\$350.00 per week
Security Deposit	\$1400.00

The oral and documentary evidence from the Tenant during the course of the Inquiry can be summarised as follows:

- The Tenant vacated the premises some time before Easter on or about 28 March 2002.
- The Tenant says when they first looked at the premises it was dirty and a ‘real mess’. In addition workmen were working at repairing the premises. Notwithstanding, the Tenants paid their security deposit as well as a months rent in advance and were told by the agent at the time that the premises would be cleaned prior to the Tenants moving into it.
- Upon moving in the premises, the Tenant says that the premises had not been cleaned and instead because of the repairs undertaken by the workmen the premises was dirtier than when they had inspected it. The Tenant says it took them about a week to clean the premises and the agent (who was the agent managing the premises at the time) gave them one weeks rent free in lieu of the cleaning.
- The Tenants stayed there for about a year during which time they paid their rent in advance and all their inspection reports were positive.
- Upon vacating the premises and after the removalist had taken the furniture the Tenant says a team of approximately four or five people including some of their friends helped them to clean the premises.

- The Tenant does not know when the condition report was done he had spoken to the agent at that time prior to moving out of the premises and had indicated to her at that time that he was vacating early and wanted the outgoing inspection to be done. The Tenant says he spoke to the Agent on a number of occasions with respect to the outgoing condition report however the inspection was set down to a date after he left Darwin.
- At that time the Tenant says he didn't have a forwarding address but has maintained contact with Ms Agent.
- The Tenant says when the issues were initially raised with respect to his tenancy he had initially told the agent that he would pay \$300.00 out of his security deposit. However, the Tenant says due to the unreasonableness of the Landlord and the lengthy delays with respect to the return of his security deposit this offer was never accepted. In addition, the Tenant says the Landlord, for reasons unknown to the Tenant, upon finding out that the agency were managing the premises wanted to change agents. The Tenant says that he has no problems with the current agent however once the owner found out the agency were managing the premises everything became difficult and he felt like he was the "piggy in the middle".
- The Tenant says he received from the Landlord a cleaning list however disputes a number of items on that list. The Tenant says he may have received an outgoing condition report but does not currently have a copy at hand.

The documentary and oral evidence from the Landlord during the course of the Inquiry can be summarised as follows:

- Ms Agent ("the Agent") conducted the outgoing inspection on 2 April 2002. Ms Agent says she attempted to contact the Tenant and also discussed the outgoing condition report with the Tenant when he handed back his keys on 31 March 2002. The agent says the Tenant indicated he was happy for her to conduct the inspection and so she proceeded to do it on her own as by that time the Tenants had left the Territory.
- It appears the agent carried out the outgoing condition report by marking on the ingoing report dated 30 March 2001 various places in the premises that required cleaning. The Agent did this by ticking the relevant parts of the premises that did not require attention and on the parts of the premises that required cleaning the agent wrote a "C" with a circle around it.
- It appears some time after the Agent did this, the Landlord also went through the premises personally and added further comments to the outgoing inspection regarding his perceptions of the alleged deficiencies in the premises.
- The Agent says after completing the outgoing condition report they sent the Notice of Intention to Retain Security Deposit the following day on 3 April 2002 to the address supplied by the Tenant being GPO Box 8690 Alice Springs. The Agent says included with the Notice of Intention to Retain Security Deposit dated 3 April 2002 ("the Notice") was two copies of the outgoing condition report as well as a cleaning list which identified the various things in the premises that required cleaning.
- The Agent says in the Notice they initially claimed \$1,000.00 which was for damage to the premises being the removal of certain hooks which had been affixed to the walls. The Agent says she initially thought that the hooks had to be removed as well as puttied over and the walls had to be completely repainted. Accordingly, the Agent calculated this amount on the basis of previous contractor invoices they had for similar type of work.

- The Agent says at some stage following this, they requested that a Tenancy Officer from the Office of the Commissioner of Tenancies (“the Office”) attend and inspect the premises. Apparently, the Officer indicated to them that the \$1,000.00 claimed by them was too much as the Landlord had to depreciate the value of the walls. Additionally in order to fix the damage, all that was reasonably required was that the places along the wall where the hooks had been removed would be filled in and spot painted.
- In relation to the amount for the cleaning, the Agent says that the \$450.00 amount specified in the Notice was calculated based on the general rate that cleaners normally charged to clean premises of this sort.
- In relation to the amount of \$50.00 retained for unpaid rent, the Agent says this was the rent payable from the date the tenancy agreement on 29 March 2002 up until the Tenant’s returned the keys to the premises on or about 31 March 2002.
- The Agent says that when she obtained quotes for the premises she faxed that to the Tenant in Adelaide on or about 24 April 2002.
- The Agent concedes that their Notice of Intention to Retain Security Deposit did not annexe receipts or any other documentation in support of the amounts claimed by the Landlord to be retained, but she says that was because at the time she did not have documentation to attach.
- The Agent says that they had been instructed by the Landlord not to refund the Security Deposit and in accordance with their obligations under the *Agents Licensing Act* they could only release the funds with the consent of the Landlord.
- I note the Office of the Commissioner of Tenancies has liased with the Public Trustee who I believe is acting on behalf of the Landlord. The Trustee has essentially indicated that he was of the understanding that the security deposit had already been released less \$260.00 for cleaning. The Agent indicates at no time have they received any instructions from the Landlord to release the security deposit. In any event the Trustee has indicated he was happy to ‘go with the Commissioners finding’.
- The Agent indicated during the course of the Inquiry that she was unaware that this documentation had to be attached to the Notice .
- Irrelevant to the Tenant’s application, the Agent also indicated her disappointment at the Office of the Commissioner of Tenancies delay in setting the matter down for Inquiry and the fact that they did not advise her of the requirement to attach documentation to the Notice prior to the hearing of the Inquiry.

I indicated to the Agent during the course of the inquiry that the matters she raised were administrative issues and irrelevant to the issues that had to be determined by me in relation to the Tenant's application. The agent should raise these issues with the Manager of the Office of the Commissioner of Tenancies at a later time.

I note in passing, one of the functions of the Office of the Commissioner of Tenancies (“the Office”) is to provide information to landlords and tenants about their rights and obligations under the Act. The information given by such officers is generally given with respect to the operation of the Act and general indications are given as to how these obligations may be fulfilled. That being said, the onus of complying with any obligations with respect to the tenancy agreement under the Act rests solely on the parties to the agreement to ensure the Act is complied.

When an application is made to the Commissioner, the Commissioner determines if the matter can be conciliated or whether it should go directly to an Inquiry. In this case, I note that this Office attempted to conciliate the dispute between the parties. That conciliation being unsuccessful the matter was then referred to an Inquiry.

When the matter proceeds to an Inquiry, the obligation falls on both the Landlord and the Tenant to satisfy the Commissioner on the balance of probabilities the matters in support of their contentions relevant to the application. It is inappropriate for the Office to advise parties prior to the application being heard at the Inquiry that one party has failed to comply with a requirement under the Act, as any such determination necessarily depends on the hearing of all the facts and circumstances presented to the inquiry.

Section 112 of the Act

Section 112 of the Act provides the circumstances in which a Landlord is entitled to retain the Tenant's security deposit at the end of the tenancy agreement. In particular, 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 –
 - (i) has given up **vacant possession of the premises – a condition report has been provided to the Tenant under section 110**; or
 - (ii) has, in the opinion of the Landlord, apparently abandoned the premises – notice has been given to the Tenant in accordance with section 110(3) and, if the Tenant demanded copies of the condition report within 7 days after notice was given to the Tenant under that section, those copies have been given to the Tenant.

- (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).

...

It is clear, section 112(4) of the Act provides that the Landlord is not entitled to retain any part of the security deposit to make good damage or to clean the premises unless the requirements of section 110 of the Act have been met.

Section 110 provides, my emphasis:

- (1) A Landlord may, **within 3 business days after a Tenant has given up vacant possession of premises** to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report** and give both copies to the Tenant.
- (2) **The Landlord is to fill out the condition report under subsection (1) in the presence of the Tenant or a representative of the Tenant** (who is not the Landlord or the Landlord's agent) **unless it is not practical to do so** or the Tenant or the Tenant's representative does not appear at the agreed time.

...

- (4) **A condition report is to –**
- (a) **specify the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates;**
 - (b) **itemise, and specify the condition of, any fixture or chattel that is ancillary property; and**
 - (c) contain other prescribed information, if any.
- (5) **A Tenant or Tenant's representatives may –**
- (a) **accept a condition report given to him or her under subsection (1) or (3) by signing both copies of the report and returning one to the Landlord; or**
 - (b) if the parties are unable to agree as to the contents of the condition report – refuse to accept the condition report.
- (6) If, within 7 business days after 2 copies of the condition report have been given to a Tenant under subsection (3), both parties have not accepted the report, the Landlord or the Tenant may apply to the Commissioner to prepare a condition report in respect of the premises.

In my view, section 110(4) of the Act clearly requires a condition report is to specifically itemise the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates. The outgoing condition report and cleaning list submitted by the Landlord does not in my view, comply with this requirement. The outgoing condition report submitted by the Landlord merely identifies the aspects of the premises that required cleaning by the notation of a “C” with a circle around it. This provides no assistance in the event that a dispute as to the condition of the premises arises. Just because the Agent is of the view that certain aspects of the premises require cleaning does not mean the Tenant has left the premises in an “unreasonable dirty condition” for the purpose of his obligations under the Act. In addition, completing the condition report in this manner provides no assistance to the Commissioner in resolving disputes in relation to this issue.

In my view the use of “specify” within section 110(4) indicates a requirement that the actual condition of the premises be described in the outgoing condition report. To mark the relevant aspects of the condition report with a “C” and a circle around it merely tells me what is required to be done to the premises but does not in fact describe the state or condition of the premises. Accordingly, I find that the Landlord has not complied with section 110 of the Act. Therefore by virtue of section 112(4) of the Act the Landlord is not entitled to retain the security deposit for the purposes of making good damage, replacing ancillary property lost or destroyed by the Tenant or for cleaning the premises left unreasonably dirty.

In addition, Landlords can only withhold part or all of the Tenants security deposit if the other requirements of section 112(5) of the Act are met. The conditions are clear in its terms and are in my view mandatory requirements. The Landlord attached a statutory declaration dated 2 April 2002 to the Notice, in purported compliance with section 112(5)(b). However, the statutory declaration did not attest to nor attach any documents in accordance with section 112(5) (c) substantiating the amount of the security deposit withheld by the Landlord.

The purpose of the Notice is to give the Tenant a reasonable indication of why their security deposit is being retained by the Landlord. Merely specifying the amount does not reasonably notify the Tenant why the amounts specified in the Notice are being withheld. I acknowledge that the Agent at the time of issuing the Notice did not have any quotes or invoices however, it was incumbent on her to substantiate, for example by way of file notes, how she arrived at the various figures specified in the Notice of Intention to Retain Security Deposit. Accordingly, I find the Landlord has not complied with section 112 of the Act and is not entitled to retain the Tenants security deposit.

I note during the course of the Inquiry it was apparent that the Landlord's personal intervention and the instructions given by the Landlord to his agent had confused the whole issue with respect to the security deposit. I am not aware of the precise details of these negotiations however it was apparent during the Inquiry that the Landlord by his Agent and the Tenant wanted the matter to be resolved "once and for all". I indicated to the parties during the course of the Inquiry that the only application before me was for the return of the security deposit. The Tenant indicated that out of 'good will' he would be prepared to consent to an order that the Landlord retain \$350.00 from his security deposit for the purposes of compensation, being cleaning and the unpaid rent on the condition that the matter was finally determined.

I have received no application by the Landlord with respect to compensation but indicated to both parties I would be prepared to deal with the matter if both parties consented to this course. The Landlord by his Agent also agreed that they wanted the issue dealt with "once and for all" and agreed to a consent order for that amount given the indications by the Public Trustee to this office that he would be prepared to abide by my findings. In these circumstances in the interest of resolving the matter finally, I am prepared to enter a consent order for both parties. The terms of the order agreed by the parties was follows: 'by consent of the parties the Landlord is entitled to retain \$350.00 from the \$1,400.00 security deposit from the Tenant for the purposes of unpaid rent, cleaning and repairs to the premises'.

On the basis of the above, I order;

1. The Landlord is to return to the Tenant the amount of \$1,050.00 being his security deposit forthwith; and
2. By consent of both parties the Landlord is entitled to retain \$350.00 from the Tenants \$1,400.00 security deposit for the purpose of unpaid rent, cleaning and repairs to the premises.

I note the Tenant also applied for interest on the withholding of his security deposit however in the interest of 'good will' withdrew this aspect of his application.

Dated August 2002

Penny Turner
Delegate of the
Commissioner of Tenancies