

# REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

## INQUIRY – 28 OCTOBER 2005

### RT0506-064

This is a determination of an application dated 12 September 2005 by the Tenant, seeking certain declarations and compensation pursuant to s 122 of the *Residential Tenancies Act (NT)* (“the Act”). The application is made in respect of the premises being 235 Trippe Road, Humpty Doo in the Northern Territory of Australia.

A Notice of Inquiry dated 20 October 2005 was posted to the parties. The Inquiry was conducted on 28 October 2005 and 11 November 2005 during which evidence was taken from the Landlords (“the Landlord”). The Tenant (“the Tenant”) also appeared. Evidence was also given by Tracey Grocke, the former property manager via telephone from Alice Springs, who appeared in answer to a summons.

On the basis of the documentary and oral evidence before the Inquiry I find that the Tenancy Agreement existed within the meaning of and subject to the provisions of the Act on the following terms:

Premises: 235 Trippe Road, Humpty Doo NT

Commence Date: 17 December 2004

Period: 12 months

Landlord:

Tenants:

Rent: \$270 per week

Security Deposit: \$1080

This application is made by the Tenant seeking a number of declarations and orders for compensation. Firstly, the Tenant seeks a declaration that the termination of the tenancy by the Landlord was invalid. She seeks an order for compensation for the expenses suffered by her as a result of that purported termination. Secondly, the Tenant seeks a declaration that the Landlords failed in their duty to ensure that the premises was in a habitable state of repair at the time of letting. She seeks an order for damage suffered by her as a consequence. Thirdly, the Tenant seeks an order that she be allowed to retain monies owing to the Landlord (as ordered in matter RT506-091) and they be offset against any compensation claimed.

A Notice to Remedy Breach/Notice of Termination was served on the Tenant during the term of the tenancy. That notice was issued on 12 April 2005 by the Landlord. That notice specified that the Tenant was in breach of the tenancy agreement and specified those breaches as: 1. Selling palms from the premises 2. Keeping a horse on the property and ponies not contained 3. Damage to side fence and front fence by horse and ponies and 4. Not maintaining lawns in good order due to animals.

The notice required the Tenant rectify those breaches by: 1. All animals must be removed from the property and faeces cleaned up 2. Repair/replace damaged fence to our part of the fence and neighbours fence 3. No selling or running a business from the property of any items and 4. Lawns to be replaced at the Tenant's cost.

The compliance date was 22 April 2005, termination date was 29 April 2005 and the notice was served in accordance with s 88 of the Act which has now been repealed and replaced. Section 88 of the Act stated that if a Tenant breached a term of the tenancy agreement that was specified to be a term a breach of which permitted the Landlord to terminate the agreement then the Landlord may give the Tenant a notice in accordance with s 88(2) of the Act.

Clause 21 of the tenancy agreement stated that the Tenant was not to keep animals upon the property without the consent of the owner. There are no special or additional written provisions in relation to animals. Clause 11 of the tenancy agreement stated that the Tenant was to replace immediately any damage caused to the property by wilful, accidental or negligent conduct of the Tenant or person coming into or upon the property with his consent. Clause 16 of the agreement stated that the Tenant was to use the property solely for private residential purposes and not for any other purpose without the consent of the owner. Clause 26 stated that the Tenant was to maintain the gardens and lawns of the property in good order at all times including regular watering and pruning. Clause 54 provided that if the Tenant failed to perform or observe any obligations contained in the agreement, the owner could terminate the tenancy in accordance with the law.

### **The Tenant's Evidence**

The Tenant gave evidence that she had attended the agent's office on 15 December 2004. She gave evidence that she indicated to the property manager that she needed a property to keep her horses (3 miniature ponies, a mare) and a dog. Her evidence was that she spoke to the property manager, and two possible properties were highlighted. After an inspection the Tenant chose the Trippe Road property. The Tenant gave evidence that the property manager indicated that she would telephone the owner to check if the animals could be kept on the property. The Tenant gave evidence that she was later told by the property manager that it was alright to have the animals. Further she said she was told that if she wanted to keep the horses at the back of the property then she would need to fence it off. The Tenant gave evidence that she considered that too expensive and indicated she would keep them at the front of the property.

Evidence was given that the property consisted of a front and back. The front comprised the dwelling house fully surrounded (front, back and sides) by a fence. The back comprised a partial fence on one side but otherwise was open bushland.

It would appear from the Tenant's evidence that she understood she could keep the horses in either area, front or back, but if she wished to keep them in the back she would need to build a fence.

The Tenant gave evidence that she moved into the property on 15 December 2005 and the horses shortly thereafter. She gave evidence of initial problems with the property such as an air conditioner not working, a faulty water pump and a burst hot water system. She gave evidence that the first she had known about the Landlord (owner's) objections to the horses was when she received the notice to remedy breach. She gave evidence that the property manager had told her that the notice to remedy breach/termination had been served because of the problems she had caused in relation to the burst hot water system and the animals.

The Tenant gave evidence that she had contacted the owners directly who had told her that the animals were not in the tenancy agreement and that she gained the impression that even if she removed the animals she would not be allowed to remain. The Tenant gave evidence that she considered it a fait de complet that she would be evicted and thus vacated on 30 April 2005.

The Tenant also gave further evidence in relation to her other claims. She gave evidence in relation to the state of the premises when she moved in. She gave evidence as to the damage caused to personal belongings due to a burst hot water system. In relation the allegation that fences had been damaged she gave evidence that they were in poor condition, that she had undertaken some repairs and that her horses did not damage the fences. In relation to the issue of selling palms she admitted selling them but not running a business and stopped selling them after receiving the notice. In relation to the issue of the lawns that Tenant gave evidence that at the start of the tenancy the lawns were in poor condition, that she had watered and planted seed and provided topsoil.

### **The Agent's Evidence**

Mr Trnka, the proprietor of NT Realty (the Agent), gave evidence in relation to the matter. He gave evidence that he was present at some of the discussions concerning the rental of the property. He gave evidence that he was fully aware that the Tenant kept horses. The Tenant's application form for the tenancy was produced which relevantly noted the keeping of two pets namely a mastiff and quarter horse. That application is noted as approved on 14 December 2004. The Agent gave evidence that it was normal procedure for the property manager to call the owner and discuss items on the application form including pets. Mr Trnka gave evidence that the Tenant had contacted the owners who had given permission to keep horses but only at the back of the property. No written authority was provided. Mr Trnka gave evidence that he was present when the Tenant signed the lease and he recalled telling her to fence off the back of the property and to keep the dog outside, to which the Tenant agreed. He provided a condition report from the previous tenancy and an inspection report. Those documents indicated that the grass needed slashing. Mr Trnka also gave evidence that the fences were in reasonable condition but that the gate had a kink in it. In relation to the hot water system Mr Trnka gave evidence that the hot water system was serviced every two years and that it was not uncommon for systems to rust out because of the bore water which was supplied to the house.

### **The Owner's Evidence**

The owner of the premises, gave evidence in relation to her dealings with the agent and Tenant. She gave evidence that she was telephoned by Mrs Grocke, the property manager, on the mobile phone and told that the Tenant had three Shetland ponies. He gave evidence that she accepted the ponies but only at the back of the premises. She gave evidence that she did not recall the issue of the building of a fence being raised. She gave evidence that the keeping of horses at the back of the premises was subsequently raised with Mrs Grocke. Evidence was given that Mr Elliot had also indicated to the Tenant that the horses were to be kept at the back and was subsequently was told by the Tenant on 29 April 2005, after the notice was issued, that she had had enough and was moving out.

### **The Property Manager's Evidence**

Mrs Grocke gave evidence in relation to her recollection of events. Her recollection was fairly vague and unfortunately she had difficulty recalling most events. She gave evidence that she recalled speaking to the Tenant in relation to the horses and fencing. According to Mrs Grocke's evidence she recalled that the Tenant was happy to arrange for fencing and that she would do it properly.

She gave evidence that the Tenant also indicated that she would convert an old chicken house into a stable for the horses. Mrs Grocke gave evidence that on the few occasions that she visited the property the horses were under the back veranda and that she told the Tenant that was not a good idea to have them there. In relation to the issue of the burst hot water service Mrs Grocke recalls being contacted by the Tenant and then contacting the owner. She couldn't recall how long it took to repair.

## **Findings**

On the evidence provided I find that it was a term of the tenancy agreement that a horse and ponies could be kept on the property. The Tenant's tenancy application clearly lists a horse as a pet and it is noted as approved. I have no reason, given the evidence, to disbelieve that the issue of keeping a horse was discussed and allowed by the Agent (who was acting with the Owner's authority). Further I find that it was also a term of the tenancy agreement that ponies could be kept on the premises. I find that the keeping of a horse and ponies was incorporated into the agreement as an additional oral term and subject to Clause 54. Thus in relation to the notice to remedy breach, the item stating that the keeping of a horse is a breach of the tenancy is incorrect.

On the evidence it would seem that in relation to where the horse and ponies could be kept the parties were at crossed purposes. The Tenant believed she could keep the animals anywhere, but if they were to be kept at the back it would have to be fenced at her cost. The Landlord, in contrast, was of the view that the horse and ponies could only be contained in the back of the property. It would appear that the Landlord allowed the Tenant to move onto the property with the horse and ponies without ensuring that they were kept where they should have been or without ensuring that a fence was built. That would appear so despite visits by the Landlord's agent to the property who clearly observed them in the front of the premises.

Further in relation to the issue of ponies not being contained as mentioned in the notice to remedy breach. It appears on the evidence they were contained but within the area of the front of the premises. In that respect the notice is not particularly specific. In specifying breaches and how they should be remedied a Landlord should be as specific as possible. In these circumstances the breach should have been specified as "ponies have been kept in the front of the property contrary to a term of the agreement stating that they should be kept in the back of the property and a fence erected by the Tenant". Rectification of such a breach would have read "Tenant is to keep ponies at the back of the premises and erect a fence to contain them". I note that the notice itself states "include enough details so that the party receiving this notice will know exactly what they have to do to remedy the breach".

It is possible that the condition relating to where the ponies or horses were to be kept could have become a term of the agreement. However, there is conflicting evidence as to what in fact was agreed, and that is supported by the fact that the Tenant was clearly keeping the horse/ponies at the front of the premises with the Landlord's (Agent's) knowledge. In a letter from the Owner to the Agent dated 4 April 2005 the owner states:

"On inspection you have made no comment of a horse being on the property, or the Shetland ponies or the horse running free when the Shetland ponies were to be kept in a contained area in the back of the property, this has damaged the side fences and front fence, and has also cause the grass to be eaten up ...".

Further, a letter from the neighbour was tendered which supported the allegation that fences were damaged by the horses and ponies.

I am unable to make a definitive finding as to whether it was a term of the agreement that the horse and ponies were to be kept at the back of the premises. All that I can find is that it was a term that horses and ponies could be kept and that is contrary to one of the stated breaches on the notice to remedy breach. I am however satisfied that damage was done to the fences on the basis of evidence from the Landlord, neighbour and Agent. I also find that the Tenant remedied the breach in relation to the selling of palms. Further, I am unable to come to any definitive opinion as to whether there was damage to the grass because there was insufficient evidence on that point.

Thus parts of the notice to remedy breach are valid and parts are invalid or possibly invalid. In order for a notice to remedy breach to operate it is not necessary for a Tenant to fail to remedy all of the alleged breaches. The failure to remedy one alleged breach is sufficient. The tenant had an obligation to prevent damage to the fences and to make good that damage, and she failed to remedy that breach. That ground, by itself, even if the other grounds of the alleged breaches were invalid or remedied, was sufficient to allow termination of the tenancy and to give the Landlord the right to possession.

In relation to the all of the evidence and the Tenant's claims I made the following findings:

1. Termination of the tenancy agreement by the Landlord's notice to remedy breach was valid albeit some of the breaches of the terms specified were either not terms of the agreement or specified particularly well. The Tenant is therefore not entitled to compensation as the Tenancy was validly terminated. In any event the particulars of the amount of damage given by the Tenant (ie. rough estimates of costs without receipts or other evidence) would not have been sufficient to make an order for damages.

2. The Landlord did not have a duty to ensure that the premises was in a habitable state of repair. The Landlord has an obligation not to let the premises unless it is habitable and safe (see s 47) and it must be reasonably clean, suitable for habitation and meet health and safety standards (s 48). The Landlord also has an obligation to ensure that the premises is in a reasonable state of repair (s 57). There was no evidence that the premises was uninhabitable and unsafe contra to s 47 of the Act. There was no evidence that the premises was unreasonably clean or unsuitable for habitation contra to s 48 of the Act.

In relation to the requirement to reasonably maintain the premises there was evidence that the Landlord attended to a number of items including repair of the pressure pump which would turn on and off at times (fixed for \$102), the repair of a non functioning air conditioner (fixed at \$264) and the replacement of the hot water service (fixed at \$880). There was also evidence that the Landlord reimbursed the Tenant for the costs of slashing grass (\$140). Thus there was evidence on a number of occasions that the Landlord attended to repairs. The Tenant also complained of red coloured water. In that regard I accept the Landlord's explanation that the red water had resulted from the Tenant not allowing silt in the water tank to settle after it had been filled. The Tenant had also complained about a number of other issues such as leaking taps, insufficient water to water plants, fences in need of repair, grease stains on verandas, holes in fly screens, rusted fans, dirty windows and spear grass. Those appear to be matters which the Tenant rectified herself, were matters of a negligible kind or that the Tenant was aware of when she agreed to rent the premises. Further, no substantial evidence, other than the Tenant's oral evidence was presented in support of those claims.

In relation to the Tenant's claim for compensation for damage to personal items due to a burst hot water system there was no credible evidence that the damage was caused by a lack of maintenance by the Landlord. Further, I note that s 122(2) of the Act provides that no compensation can be ordered for loss or damage suffered by reason of a breach of the Landlord's obligation to repair unless notice under s 58(1) of the Act is given.

Obviously no such notice was given as it is my view that the burst hot water system was an unforeseen accident. Furthermore, there was no credible evidence (although the Tenant indicated that the plumber had said that it had not been maintained) that the hot water system was in a state of disrepair. The Landlord's (Agent and Owner) evidence was that the hot water system was inspected every two years and I accept that. Thus I am not satisfied that the damages suffered by the Tenant was as a result of a breach of the Act or the tenancy agreement by the Landlord.

Accordingly, I order that:

1. The Tenant's application for declarations and compensation in relation to the premises at 235 Trippe Road in the Northern Territory is dismissed.
2. Any further claim for compensation is adjourned to a date to be fixed upon further application and notice to the parties.

Dated this        day of December 2005

Craig Smyth  
Delegate of the  
Commissioner of Tenancies