

CITATION: *McDonald v Cassidy* [2002] NTMC 005

PARTIES: ROBERT ANDREW MCDONALD

v

NICHOLAS CASSIDY

TITLE OF COURT: LOCAL COURT AT DARWIN

JURISDICTION: TENANCY ACT

FILE NO(s): 20200647

DELIVERED ON: 20 February 2002

DELIVERED AT: DARWIN

HEARING DATE(s): 23 January 2002

DECISION OF: D LOADMAN, SM

CATCHWORDS:

SECTION 51 OF TENANCY ACT – TENANCY GOVERNED BY PROVISIONS OF TENANCY – NOTICE TO QUIT PURPORTEDLY GIVEN IN TERMS OF BOTH TENANCY AND RESIDENTIAL TENANCIES ACT (OF NO APPLICATION TO THE TENANCY) – VALIDITY OF NOTICE TO QUIT – ALLEGATION THAT PREMISES THE SUBJECT OF THE ALLEGED LEASE WERE SOLD BY THE LESSOR TO THE LESSEE – ISSUES RELATING TO JURISDICTION OF LOCAL COURT

Tenancy Act NT

REPRESENTATION:

Counsel:

Applicant: John Dearn
Respondent: Vanessa Lee

Solicitors:

Applicant: Tony Crane
Respondent: Withnall Maley

Judgment category classification: B
Judgment ID number: [2002] NTMC 005
Number of paragraphs: 40

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20200647

BETWEEN:

ROBERT ANDREW MCDONALD
Applicant

AND:

NICHOLAS CASSIDY
Respondent

DECISION

(Delivered 20 February 2002)

Mr David LOADMAN SM:

1. The proceeding before the Court is an application on form 30B filed on 11 January 2002, being “Application under section 51 of *Tenancy Act* for order terminating lease of dwelling house”. The premises relevant to the proceeding are 8 Sawyer Street Jingili being Lot 3236 Town of Nightcliff from Plan A 000585 Volume 416 Folio 165 (“the premises”).
2. The basis upon which the application is premised is said to be a Notice to Quit and perhaps a Notice of Termination of Tenancy and Notice of Breach of Tenancy (“the Notice to Quit”).
3. The Notice to Quit dated 7 November 2001 is in the following terms:

I enclose 3 notices in relation to this property:

A. . NOTICE TO YOU TO QUIT MY PREMISES AT 8 SAWYER STREET JINGILI,
Darwin NT; Sections 47, 47A Tenancy Act.

B. . NOTICE OF TERMINATION OF YOUR TENANCY OF 8
SAWYER STREET JINGILI, Darwin NT, Sections 89,101 of Residential
Tenancies Act

C. NOTICE OF BREACH OF YOUR TENANCY OF 8 SAWYER STREET
JINGILI, Darwin NT

ALSO NOTE THAT THIS IS A NOTICE TO YOU OF MY RIGHTS UNDER
SECTION 51, OF THE TENANCY ACT AND SECTION 97 OF THE
RESIDENTIAL TENANCIES ACT TO SEEK IMMEDIATE POSSESSION OF MY
PREMISES AT 8 SAWYER STREET JINGILI

4. It is apposite to point out that although there is reference to “3 notices” there is in fact a single document. Further it is particularly relevant to highlight the fact that the Notice to Quit invokes sections 47, 47A *Tenancy Act* and sections 89, 101 of *Residential Tenancies Act*.
5. Further, in the last portion quoted above there is reference to section 51 of the *Tenancy Act* and section 97 of the *Residential Tenancies Act* upon which the applicant claims to “seek immediate possession ...”.
6. The material filed both in support and in opposition to the application comprise the following:
 1. An affidavit by the applicant sworn 10 January 2002 (“the applicant’s first affidavit”);
 2. An affidavit of Hans Mitterhuber sworn 10 January 2002 (“Mitterhuber’s affidavit”);
 3. An affidavit sworn by the applicant on 18 January 2002 (“the applicant’s second affidavit”);
 4. An affidavit sworn by the respondent on 22 January 2002 (“the respondent’s affidavit”);
 5. An affidavit sworn by the applicant on 23 January 2002 (“the applicant’s third affidavit”);
 6. Written submissions tendered by applicant’s counsel on 23 January 2002 (“applicant’s submission”).
7. The crisp issue perceived at the time the matter was last before the Court on 23 January 2002 related to the issues as to whether the Court had jurisdiction to entertain the application. No attention at that time was focussed on matters which have subsequently become relevant in the

perception of the Court concerning an issue as to validity of the Notice to Quit.

8. It is common ground between the parties that the respondent unequivocally became a tenant in the premises by virtue of a written tenancy agreement executed on 1 May 1997 to endure for a term of 2 years. Annexed to the applicant's first affidavit and marked C is the Tenancy Agreement – Residential Premises, dated 1 May 1997 (“the lease”). At the time of the execution of the lease it is also unequivocal that the relevant legislation determinative of issues arising out of the lease was the *Tenancy Act*.
9. The *Residential Tenancies Act* commenced its operation on 1 March 2000 (clearly outside of the term of 2 years of the lease).
10. The *Residential Tenancies Act* contains provisions namely:

PART 18 - APPLICATION OF FORMER TENANCY ACT

159. Definitions

In this Part, unless the contrary intention appears -

"commencement day" means the day on which this Act commences;

...

160. Continued application of former *Tenancy Act*

(1) Subject to this Part, nothing in this Act applies to or in relation to a lease that was in force immediately before the commencement day.

(2) Subject to this Part, the *Tenancy Act* continues to apply to and in relation to a lease that was in force immediately before the commencement day as if the amendments to the *Tenancy Act* effected by the *Residential Tenancies (Consequential Amendments) Act* had never come into operation. ...

11. Therefore the commencement day of Part 18 effectively is 1 March 2000. Section 160 expressly exempts from its operation a lease such as the lease the subject of the proceeding. In section 160(2) it provides that the *Tenancy Act* continues to apply as if the *Residential Tenancies Act* had never come into operation.

12. There are other provisions in the *Residential Tenancies Act* which are not relevant for the purposes of this decision.

13. It is alleged on behalf of the applicant by Mr Dearn that the respondent in fact is in occupation of the premises by virtue of an express term of the lease which provides

“That in the event of the tenant continuing in occupation of the premises with the consent of the landlord after the expiration of the term hereby created:

(i) the parties are deemed to have entered into a periodical tenancy in accordance with Part VIII Section 61 of the Tenancy Act on the same terms and conditions (other than that clause relating to the term of the tenancy) as appear herein

(ii) [not relevant]

14. Assuming then for the purposes of examining the validity of the Notice to Quit (without holding it to be the case), that the submission set out in the preceding paragraph is valid, (either because of the term expressed or because of the provisions of section 61(3) of the *Tenancy Act*), the next issue is whether the purported Notice to Quit is valid. If it is not then in this Court’s perception the proceeding must be a nullity and the question of the Court’s jurisdiction does not arise for decision.

15. The following matters also bear scrutiny, being relevant sections of the *Tenancy Act*.

PART VII - REPOSSESSION OF PREMISES

45. DEFECTIVE NOTICE

A notice to quit which does not comply with the provisions of this Part does not operate so as to terminate the tenancy in respect of which the notice was given.

16. The premises in this proceeding comprise “a dwelling-house” within the definition set out in the *Tenancy Act*.

17. Section 47 of the *Tenancy Act* then sets out the formalities which a Notice is to observe for its validity:

47. NOTICE TO QUIT PREMISES BEING A DWELLING-HOUSE

(1) Subject to section 47A, a notice to quit premises, being a dwelling-house, shall

- (a) be issued on a ground prescribed in this section and specify that ground;**
- (b) be given for not less than the period prescribed in this section and specify the day on which the premises are to be delivered up; and**
- (c) specify the premises to which it relates.**

(2) The grounds and the length of period of a notice required by subsection (1) are

- (a) that the lessee has failed to pay rent, or any part of the rent, for not less than 14 days before the notice was given and the length of the prescribed period is 7 days;**
- (b) that the lessee has failed to perform or observe a term or condition of the lease other than a covenant to pay rent and the performance or observance of that term or condition has not been waived or excused by the lessor and the length of the prescribed period is 14 days;**
- (c) that the lessee has wilfully damaged the premises or any goods leased there with them and the length of the prescribed period is 2 days;**
- (d) that the lessee has failed to take reasonable care of the premises or of goods leased there-with or has committed waste and the length of the prescribed period is 14 days;**
- (e) the lessee has been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining premises or properties and the length of the prescribed period is 7 days;**
- (f) that the lessee or another person has been found guilty during the currency of the lease of an offence arising out of the use of the premises for an illegal purpose or that a court has found or declared that the premises have during the currency of the lease been used for an illegal purpose and the length of the prescribed period in either case is 2 days;**
- (g) that the lessee has given notice of his intention to vacate the premises and in consequence of that notice the lessor has agreed to sell or let the premises or has taken other steps as a result of which he would be seriously prejudiced if he could not obtain possession at the expiration of the notice given by the lessee and the length of the prescribed period is 7 days after the expiration of the notice given by the lessee;**
- (h) that the premises being the dwelling-house are reasonably required by the lessor for occupation by himself and the length of the prescribed period is -**
 - (i) where the rent is payable weekly, 42 days; or**
 - (ii) where the rent is payable at intervals greater than one week, 3 times the period of the interval between payments of rent or 8 weeks whichever is the lesser;**
- (i) that the premises have been occupied or are occupied in consequence of a contract of employment by a person in the employ of the lessor, or an agent of the lessor approved by the Com-missioner, and are reasonably required for the personal occupation in consequence of a contract of employment with some other person employed or about to be employed by the lessor, or the agent, and the length of the prescribed period is 14 days;**
- (j) that the premises are reasonably required by the lessor for reconstruction or demolition and the length of the prescribed period is 60 days;**
- (k) that the lessor has agreed to sell the premises by an agreement which requires the purchaser to pay not less than a quarter of the purchase money within 12 months from the date thereof and by which the purchaser is entitled to vacant possession of the premises and the premises are reasonably required by the purchaser for occupation by himself and the length of the prescribed period is 4 weeks;**
- (l) that the lessee has become the lessee of premises by virtue of an assignment or transfer that under the lease required the consent or approval of the lessor which consent or approval has not been given and the length of the prescribed period is 14 days; or**
- (m) that the lessee has sub-let the premises or some part of the premises by sub-lease that under the lease required the consent or approval of the lessor which consent or approval has not been given and the length of the prescribed period is 14 days.**

(3) Where a lease of a dwelling-house is expressed to be for a term certain, a

notice to quit may not be given upon the grounds specified in subsection (2)(h), (i) or (k).

18. Leaving aside another issue, that is whether in the circumstances grounds were required to be specifically set out by virtue of the premises being subject to a periodical lease either by operation of law or by the term of the lease, grounds purportedly were given. Those grounds embrace sections of the *Residential Tenancies Act* and purport to terminate various matters as specified on grounds amongst others being by virtue of sections of the *Residential Tenancies Act*. In those circumstances there is a very live issue as to whether the Notice itself is valid or whether it is invalid and the proceeding is a nullity. This by virtue of expression of legislation which does not have application.
19. It is not in this Court's perception necessary to finally decide the matter one way or another at this time for reasons which will become apparent from later aspects of the Court's decision.
20. Assuming merely for the purposes of argument that the Notice to Quit is valid, the next issue to be addressed is the submission that even if there is a sale of the premises which has come about either on the applicant's version of the facts relating to that issue or the respondent's version, nevertheless because on either version there is no express right of occupancy conferred by the sale agreement *per se* the right to occupy is either non-existent or must arise only by virtue of the over holding clause of the lease referred to above.
21. It is asserted on that basis there is nothing intrinsically invalid or unlawful or unenforceable about there existing simultaneously, on the one hand a contract of letting and hiring of the premises and on the other hand a sale of the premises, the sale giving rise, as is submitted by Mr Dearn, at most and at the highest and best position the respondent can achieve a claim in equity.

22. It is further submitted by Mr Dearn firstly (in paragraph 4 of the applicant's submissions) that "... any claim of an equitable nature, would have to be the subject of separate process, ...". It cannot in this Court's perception exclude if it be correct, a counter-claim being brought in the same proceeding. However that also does not seem to the Court to take into account the essence of the decision in *Waltons Stores (Interstate) Ltd. v Maher* (1988) 164 CLR 387 FC 88/005 ("*Waltons Stores*").
23. Although not directly relevant, it is noteworthy that in a decision by His Honour Mr Justice Bailey *Chief Executive Officer (Housing) v Leanne Bisaris* delivered 5 February 2002, His Honour decided that relief from forfeiture (equitable relief) was incompatible with the provisions of the *Tenancy Act*. That decision does not in this Court's perception detract from the issues previously and subsequently expressed in this decision.
24. It is without doubt the law that the equitable right derived if there was a sale of the premises may either constitute a defence to the current proceeding or be the subject of a counter-claim in the current proceeding. (See *Waltons Stores*).
25. Mr Dearn asserts (in paragraph 5 of the applicant's submissions) "oral Agreement alleged is clearly not capable of specific performance in equity due to the undisputed breach ... by Cassidy ...". There is no undisputed breach such as is alleged and to assert even if there was, "Cassidy clearly lacks clean hands ... "is simply not tenable. The Court was referred to the decision of *Giumelli v Giumelli* 73 ALJR 547, which orally Mr Dearn asserted provided authority for the proposition that an interest registered pursuant to the Torrens registration system (presumably a legal interest) was a paramount title to any equitable title. The Court has read the decision, that was neither the issue before the Court nor the subject of any relevant dictum and as this Court responded during the ventilation of the submission it reiterates that it is without validity to suggest that a legal interest whether

registered or not under the Torrens Title Registration system is indefeasible at the hands of an equal or better claim to the estate based upon the principles of equity.

26. Mr Dearn also submitted that by virtue of there being no express right to occupy the premises other than those, as he put it, conferred by the lease itself, the respondent had no right of occupation at all.
27. If the submission is correct and there is no enforceable right of occupation either as a purchaser whether by implication, estoppel, acquiescence, waiver or some such other equitable principle, then of course there is nothing to terminate by way of any contract of letting and hiring. In such circumstances, whilst conceding the point to be in a way valid, it would be incumbent upon the applicant to obtain possession of the premises by way of other causes of action quite apart from any relief conferred by the *Tenancy Act*.
28. There is also another issue which arises at equity, or perhaps at law, namely extinction by the doctrine of “merger”.

At common law, if the reversion and the leasehold interests vest in the one person, the lesser interests (the leasehold) ‘merges’ in the greater (the reversion) and is destroyed” *Rye v Rye* [1962] AC 496 at 505, 513 [cited by the author in *Land Law* 4th Edition]. “This occurs regardless of that person’s intention. However, in equity, merger is a question of intention; merger does not occur if the party who requires both interests does not intend merger to occur. In equity, the question is whether a person holding both interests intended to keep them alive. That intention can be proved by words spoken or acts done before or after the transaction ... However, it would seem that the subsistence of separate leasehold and freehold estate in the same person would not prevent merger in equity (if that was the intention), and an interested party could enforce that merger by requiring a change in the Register. (op cit at para [15.157.2])

29. There is further the issue of “surrender”. (op cit at para [15.157.3] and thereafter)

A lease comes to an end by surrender. Surrender may be express or by operation by law. Surrender puts an end to the parties’ future obligations under the lease, but does not release them from liability for breaches occurring before the surrender.

30. There is in addition the very central issue as to whether there was or was not a sale of the premises; whether the sale and the lease can and in fact do operate as separate contracts side by side the one with the other; whether there has been a sale brought about by the provisions of the statutes of frauds; whether on the basis of past performance there is a sale at equity or at law; these latter matters of course being of cardinal significance and necessitating the ventilation of communications between the parties, an observance of their conduct and the inferences which are ultimately to be drawn from those facts which a Court seized of the matter resolves.
31. It is pertinent to mention in this regard that significant matters relating to whether there was or was not a sale of the premises enforceable by the statute of frauds depend critically on issues as to whether there was writing within the means of that statute. As pointed out to Mr Dearn during his submissions, there do appear to be two “pieces” of writing, namely annexures A and C to the affidavit of the respondent, neither of which are revealed or even referred to by the applicant. Either or both of them may either alone or combined with other evidence, establish that there is a contract of sale of the premises enforceable as a consequence of either the provisions of the statute of frauds or according to principles of equity concerning past performance or perhaps both.
32. It must of course from the remarks of the Court be obvious that this Court has concluded that the resolution of the matter necessitates the adduction of oral evidence and the proper civil process attendant upon civil cases in an appropriate jurisdiction having proceeded on the assumption that the Notice to Quit was valid which of course is not necessarily in accordance with an appropriate decision on that issue.
33. Further and in any event, were the waters not to be as muddied as this Court has outlined them to be, although the principle cited shortly is not directly related to facts of an identical nature the principle is the same. In *Wardley*

Australia Limited and Another v The State of Western Australia (1992) 175 CLR 514 FC 92/039, the High Court by majority (Mason CJ, Mason CJ, Dawson, Gaudron, and McHugh JJ) express a principle which this Court in any event, but for the issues already ventilated, would have embraced, namely

We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.

34. Here of course we are not concerned with issues of damage, but with issues of fact. The principle is nevertheless unequivocally the same.
35. In short it is this Court's finding that it is impossible to address and resolve the matters at an interlocutory stage.
36. Before concluding this decision, there are some other matters which need to be brought to the attention of the parties.
37. This proceeding is a proceeding related to premises which would seem to have a sale value of at least \$220 000.00. Under the *Local Court Act* the jurisdictional limit for any civil claim is the sum of \$100 000.00 (section 3 *Local Court Act*). In section 14 of the *Local Court Act*, the Court is invested with jurisdiction with specified causes of action, if the "amount claimed is within the jurisdictional limit". Otherwise jurisdiction must be conferred for the Court to be able to deal with the matter by the consent of the parties or by virtue of some other piece of legislation. In the absence of that being so, it would seem to this Court that the Local Court is entirely lacking in jurisdiction for the purposes of resolving the issues which are alive between the parties. It seems to this Court that in those circumstances, either the Court or the parties should have regard to the provisions of section 18 of the *Local Court Act* [**Transfer of proceeding to Supreme Court**].

38. To summarise then, the Court holds that it is inappropriate to determine any issue between the parties at this interlocutory stage and that the resolution of the issues between the parties is only capable of such resolution by a proper contested civil hearing embracing the filing of pleadings and ultimately the giving of oral evidence with its concomitant right of cross-examination, credibility not having specifically outlined as an issue but being obviously a critical issue in this proceeding.
39. In those circumstances, there is no decision by this Court in relation to any of the merits raised by either of the parties concerning the issues set out in the said affidavits.
40. This Court will hear from the parties
 - (a) in relation to the employment of section 18 *Local Court Act*;
 - (b) the issue of costs.

Dated: 20 February 2002

DAVID LOADMAN
STIPENDIARY MAGISTRATE