CITATION: *Whiteaker v Commissioner of Tenancies & Tyron & Gooding* [2002] NTMC 017

PARTIES: EDWARD EVAN WHITEAKER
Appellant

v

COMISSIONER OF TENANCIES
First Respondent

and

RIA TYRON
Second Respondent

and

DAVE GOODING
Third Respondent

TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Residential Tenancies Act
FILE NO(s):	20119833
DELIVERED ON:	31 May 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	26 April 2002
DECISION OF:	Mr V M Luppino SM

CATCHWORDS:

Appeal to Local Court - Appeal from decision of Delegate of the Commissioner of Tenancies – Nature of appeal – Meaning of "ancillary property".
Evidence - Application of maxim de minimis non curat lex.
Residential Tenancies Act, ss 4, 20(1), 51, 147, 150; Local Court Rules rr 37, 38.09
Pinho v Andre, unreported, Smith J, Supreme Court of Victoria, 20 December 1994.

REPRESENTATION:

Counsel:

Appellant:	In person
First Respondent:	Mr Lanyon
Second Respondent:	In person
Third Respondent	In person

Solicitors:

Appellent:	Not represented
First Respondent:	Not represented
Second Respondent:	Not represented
Third Respondent	Not represented
Judgment category classification:	B
Judgment ID number:	[2002] NTMC 017
Number of paragraphs:	30

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

No. 20119833

BETWEEN:

EDWARD EVAN WHITEAKER
Appellant

AND:

COMISSIONER OF TENANCIES
First Respondent

And

RIA TYRON
Second Respondent

And

DAVE GOODING
Third Respondent

REASONS FOR DECISION

(Delivered 31 May 2002)

Mr V M LUPPINO SM:

1. This matter was an appeal pursuant to the Residential Tenancies Act ("the Act") from an order made from by the Delegate of the Commissioner of Tenancies ("the Commissioner") on the 29 November 2001. The order appealed from was made on an application for compensation pursuant to sections 121 and 122 of the Act and was an order for compensation in favour of the appellant in the sum of $971.27.

2. The appellant had claimed against the second and third respondents for certain losses consequent upon the tenancy agreement entered into between

the appellant and those respondents in relation to premises at 21 Gilbert Street, Ludmilla.

3. The following summary sets out both the nature of the claims made by the appellant and the amount awarded by the Commissioner in the decision appealed from namely:-

	Claim	**Claimed**	**Awarded**
3.1	Loss of income	75.00	Nil
3.2	Loss of rent	$640.00	$640.00
3.3	Advertising costs	$119.00	$119.00
3.4	Replacement light bulbs	$15.00	$2.67
3.5	Fridge repairs	$45.00	$17.60
3.6	Cleaning air conditioning filter	$5.00	Nil
3.7	Cleaning front verandah	$15.00	Nil
3.8	Cleaning laundry/downstairs area	Unspecified	Nil
3.9	Hole in dirt under stairs	$30.00	Nil
3.10	Cleaning rubbish bins	$10.00	Nil
3.11	Irrigation hose repairs	$10.00	Nil
3.12	Broken pool brush	$24.00	Nil
3.13	Cable TV repairs	$150.00	Nil
3.14	Bailiff fees	$192.00	$192.00
3.15	Tick and flea treatment	$125.00	Nil
	TOTAL		**$971.27**

4. At the commencement of the hearing before me the appellant volunteered that his appeal was taken as a matter of principle. I then suspected that to be a euphemistic way of saying that the appeal was trivial, a view that would subsequently prove to be justified in relation to a substantial part of the appeal.

5. No issue was taken in relation to the items in subparagraphs 3.2, 3.3, 3.6, 3.7, 3.8, 3.13, and 3.14.

6. Appeals to this Court from decisions of the Commissioner are regulated by section 150 of the Act. The relevant parts of that section provide as follows: -

> (1) A landlord or a tenant may appeal to the Local Court against an order, determination or decision of the Commissioner in relation to the landlord or tenant.
>
> (2) An appeal is to be an appeal de novo but the court may re-hear evidence taken before the Commissioner or take further evidence.
>
> (3) In an appeal, the court is not bound by the rules of evidence and may inform itself in any manner it thinks fit.
>
> (4) On an appeal, the court may do one or more of the following:
>
> (a) confirm, vary or quash the order, determination or decision of the Commissioner;
>
> (b) make an order that should have been made in the first instance by the Commissioner;
>
> (c) make incidental and ancillary orders.

7. In summary, an appeal to this Court is a hearing de novo albeit that the court may re-hear evidence taken before the Commissioner or take further evidence. To the extent that a court adopts the latter option, in taking evidence the Court is not bound by the rules of evidence and may inform itself in any manner that it sees fit.

8. In relation to the heads of loss referred to in paragraph five hereof, i.e. those in subparagraphs 3.2, 3.3, 3.6, 3.7, 3.8, 3.13 and 3.14, the parties agreed to be bound by the decision of the Commissioner. No evidence was therefore necessary in relation to those items and none was led.

9. Of the remaining matters, the head of claim referred to in subparagraph 3.1 relates to loss of income. The loss claimed by the appellant is for his claimed loss of income for a number of attendances including appearances before the Commissioner and in Court. The Commissioner ruled against the appellant on the basis that she did not consider it to be an appropriate cost to claim against the tenants but she did not go into reasons for that view. The appellant's claim under this head comprises essentially lost time and the consequential loss of income. To the extent that it represents a claim for his lost income during times that he had to appear before the Commissioner and before the Court, to allow an award on that ground is tantamount to allowing costs. The Commissioner is generally not permitted to order costs by reason of section 147 of the Act. In addition, rule 38.09 of the Local Court Rules provides that in appeals under Order 37 of the Rules (and the current appeal falls within that Order) the general rule again is that each party bears their own costs. I see know reason why there should be a variation from the general rule in either case and I would rule against the appellant in relation to those parts of this claim which relate to his attendances before the Commissioner and the Court.

10. Subject to the foregoing, upon reviewing my notes of the evidence and the submissions made, I note that the only evidence offered by the appellant in relation to his loss was to the effect that he was self-employed and that his income varied. He gave some basis to attempt to justify the quantum of the amount claimed in each case. However, his evidence as to the nature of his income was incomplete and I had insufficient evidence to satisfy myself that the time he occupied in dealing with this matter was consequently unremunerated because of those attendances. For example, a person whose

income is derived purely from rentals or investment i.e., non-personal exertion, earns the same income irrespective of the amount of hours he devotes to that pursuit. Before I could consider this claim therefore, I would require evidence to show either that he would actually have earnt the amount claimed if the time had been put to income producing pursuits or, alternatively, that he had to pay someone to perform a necessary task during times that he was thereby unable to perform them himself. The hearing being a de novo hearing, the onus is consequently on the appellant to prove his claim to loss, I find that the appellant has not satisfied that onus.

11. If not for that, I would have been prepared to allow a total of $112.50 pursuant to this head. This represents the appellant's time on the 3 October 2001. This was the time claimed when following an order made by the Commissioner, and without arrangement with the appellant, the second and third respondents failed to move out of the premises within the time ordered. As a result of that default the appellant spent some time in attempting to secure compliance with the order. The amount claimed is therefore necessarily incurred in consequence of the second and third respondents' default and in that sense is not in the nature of costs. However, due to the appellant's failure to satisfy the burden of proof in relation to the claimed loss, I make no allowance under this head.

12. The second head of loss in dispute is that referred to in subparagraph 3.4. The appellant claimed the sum of $15.00 being the cost of a replacement light bulb. The second and third respondents claimed that they had replaced all of the light bulbs and produced a receipt to prove that a light bulb cost $2.67. I am not satisfied with the evidence of the appellant as to why the cost of the one light bulb should be $15.00. To the extent that it includes his own time to obtain and replace the light bulb, I would not allow that for the same reasons as set out in paragraph 10 hereof.

13. This part of the claim is certainly one very trivial aspect of the claim. I query however whether the second and third respondents were in fact obliged to replace the light bulb, that being a consumable in my view. There was no evidence in that regard.

14. The triviality of this part of the claim is a concern. I do not consider that the appellant proved this part of his claim. In any event, this head of claim should be rejected upon application of the maxim *de miminis non curat lex.* (See *Pinho v Andre*, unreported, Smith J, Supreme Court of Victoria, 20 December 1994.) That maxim allows minute failures and insignificant defects in performance of contracts to be excused. In Pinho v Andre all bar $7.63 of a debt to a bank of approximately $78,000.00 had been paid and it was held that the debt was to be considered to have been paid on application of the maxim notwithstanding that that minute portion remained outstanding. Had the appellant proved his loss, I would dismiss this part of the appellant's claim on this basis in any event.

15. In relation to the head of loss referred to in subparagraph 3.5, the appellant claimed $45.00 to replace a broken kickboard on a fridge. It was conceded that the cost of the item was $35.20. The claim of the appellant was for $45.00 to include the value of his time. For the same reasons as are set out in paragraph 10, the component that relates to the appellant's time is disallowed. Before the Commissioner, as well as before me, the second and third respondents claimed that the repair was only necessary due to reasonable wear and tear. The Commissioner found that the kickboard had to be replaced partly due to wear and tear and partly due to damage. I cannot see how this can be sustained. The appellant gave evidence before me as to the age of the fridge and the broken item was produced for inspection. It is clear that one of the clips on the side of the kickboard, which is necessary to hold the kickboard in place, had been broken off. I thought it was evident that the clip was broken, not worn. Having regard to the age of the item I do not consider there is any evidence to justify a

finding that the repair was partly due to wear and tear. Accordingly I allow $35.20 under this head.

16. The hole under the stairs referred to in paragraph 3.9 involves a claim for the sum of $30.00, partly the appellant's labour and partly (approximately $7.00) the cost of dirt specifically purchased to fill the hole. To the extent that the amount claimed represents the appellant's labour, then for the same reasons as are set out in paragraph 10, I disallow that part of the claim. As to the balance, the second and third respondents' dog allegedly dug the hole under a stairway. It was not in dispute that the second and third respondents were given permission to have the dog on the premises. The same photographs produced before the Commissioner were produced to me. I did not think that the photos were as clear as the Commissioner commented in her reasons. The Commissioner ruled against the appellant on the basis that on her viewing of the photos it was not clear that a hole existed and it did appear that some fresh dirt had been placed in the hole. It appears therefore that the Commissioner accepted the evidence of the second and third respondents that they had filled in the hole. I must say I thought that their evidence was more convincing than that of the appellant. In any event, it is hard to see how a small hole dug by a dog, something dogs commonly do, can be defined as damage. The second and third respondents had been given permission by the appellant to have the dog at the premises. Consequently I think it is implicit in that that certain things likely to be done by the dog would be considered to come within the definition of wear and tear. In my view the insignificant hole shown on the evidence would fall into that category. It is for this reason that I have difficulty in seeing how this can be considered to be damage. Moreover when a dog digs a hole the dirt is not taken away. All that happens is that the dirt is moved a short distance. The appellant's evidence was that he had to actually buy dirt to fill in the hole because he could not find any dirt anywhere else on the premises. The second and third respondents said that they filled in the hole from dirt from

other parts of the garden. I think the claim by the appellant that he could not find sufficient dirt anywhere else on the property to fill in the hole is quite ludicrous. This is extremely unlikely and lacking in credibility.

17. However, as with the claim in relation to the light bulb I think in any event that there is room for application of maxim *de miminis non curat lex* in relation to this claim. It is not necessary that I decide on that basis as I accept the evidence of the second and third respondents that they filled in the hole and I reject the evidence of the appellant including the evidence relevant to the issue of assessment damages under this head. I therefore make no award in relation to this part of the claim.

18. The claim in relation to the cleaning of the rubbish bins was dismissed by the Commissioner on the basis that the bins were the property of the Council. I consider that to be an inappropriate reason to dismiss that head of claim. Whether the bins are provided by the Council or actually owned by the landlord of the property, they form part of the tenancy arrangements. I think that the bins are "ancillary property" as defined by section 4 of the Act which defines the term as:-

> "ancillary property", in relation to premises to which a tenancy agreement relates or is to relate, means –
>
> (a) ancillary real property, including a garden, not forming part of the premises;
>
> (b) fixtures; and
>
> (c) chattels, including but not limited to furniture, other household effects and a garden watering system,
>
> provided, or to be provided, by the landlord, either under the tenancy agreement or independently of the agreement for use by the tenant, but does not include common property within the meaning of the Unit Titles Act;

19. Consequently the second and third respondents had responsibilities in relation to the bins by reason of the express reference to "ancillary property" in section 51 of the Act. That section deals with the responsibilities of tenants in relation to cleanliness and damage. The relevant parts of that section provide as follows:-

> 51. Cleanliness and damage
>
> (1) It is a term of a tenancy agreement that a tenant –
>
> (a) will not maintain the premises and ancillary property in an unreasonably dirty condition, allowing for reasonable wear and tear;
>
> (b) must notify the landlord of any damage or apparent potential damage to the premises or ancillary property, other than damage of a negligible kind;
>
> (c) must not intentionally or negligently cause or permit damage to the premises or ancillary property;
>
> (2) It is a term of a tenancy agreement that at the end of the tenancy the tenant must give the premises and ancillary property back to the landlord –
>
> (a) in reasonable state of repair; and
>
> (b) in a reasonably clean condition,
>
> allowing for reasonable wear and tear.

20. However I am also of the view that the maxim *de miminis non curat lex* should apply to this head of damage. In addition, the appellant in claiming $10.00 for this head bases this solely on his income, i.e. the total claim relates to his labour. As I said in paragraph 10, the evidence given by the appellant in relation to the income was insufficient to discharge the onus upon him. Consequently, were it not for the application of the maxim, it would be my finding in any event that the appellant has not satisfied the burden of proof in relation to any damages claimed for this head.

21. The claim for repairs to irrigation piping relates to claimed damage to a piece of poly pipe. Unlike most instances where an irrigation pipe of that type is laid underground, in this case the pipe was simply laid across the surface of the ground and that this was the situation at the commencement of the tenancy. The evidence establishes that it in fact lies across bitumen surface and in an area where the public has access. The Commissioner dismissed this head of claim on the basis that the pipe was situated outside the property boundary. I do not consider that alone to be an appropriate reason for dismissing that part of the claim as an irrigation system also falls within the definition of "ancillary property" as defined in section 4 of the Act. The evidence shows that the damage to pipe was a small hole. Mr Lanyon who appeared for the Commissioner confirmed this. There was some evidence to show how the damage might have been caused, i.e., the postman drove over the pipe on his motorcycle. It appears to me also from the available evidence that the type of damage sustained could have been caused by a pedestrian inadvertently stepping on the pipe as they walked along the footpath. The appellant apparently relies on what he believes to be the general responsibility of tenants for damage, possibly relying on some widely drawn term of the tenancy agreement. That however is not determinative of the issue as the Act sets parameters for responsibilities of tenants. Any term in a tenancy agreement to the contrary is, by operation of section 20(1) of the Act, void to the extent of the inconsistency. Section 20(1) is discussed in more detail below.

22. In determining the responsibility for the damage to the pipe, I think it is a relevant fact that the appellant has chosen to have the rather fragile plastic pipe laid across a bitumen surface and in an area to which the general public has access. I think the responsibilities of the second and third respondents as tenants need to be looked at in that light. Contrary to the belief of the appellant, the responsibilities of tenants are as set out in section 51 of the Act. I have set out the relevant parts of that section in paragraph 19 hereof.

Subsection (1)(a) appears to relate to the state of cleanliness only and therefore does not appear to apply in this case. If it were to apply, in any event "reasonable wear and tear" is exempted. What is reasonable in this context depends on the facts of each case. It is my view that the fact that appellant has chosen to allow the pipe to be laid across a bitumen surface in an area where the general public has access is a relevant factor to be regarded in determining what is reasonable in this case. It would be unrealistic to require tenants to be liable for any damage to that pipe in the same way that they should be liable, for example, for items within the premises. The appellant must have contemplated the possibility of damage to the pipe when laying it in the way that it was. The type of damage sustained here therefore falls within "reasonable wear and tear" in my view.

23. Subsection (1)(b) also appears not to apply as it appears to relate to *notification* of damage only. In any event it exempts notification for damage of "a negligible kind" and this would clearly fall within that phrase. Subsection (1)(c) has application and places a responsibility on tenants for damage caused intentionally or negligently by them. The appellant did not produce any evidence attributing the damage to the second and third respondents and hence the appellant would not be entitled to an award under this head in any event.

24. Subsection (2) places a responsibility on tenants to yield up the premises and the ancillary property to a landlord at the end of a tenancy in a reasonable sate of repair and reasonably clean allowing for "reasonable wear and tear". In my view, for reasons akin to those set out in paragraph 22 hereof in discussion of that phrase in subsection (1)(a), the damage in question clearly falls within that. I therefore find against the appellant in relation to this head of claim.

25. In any event, the nature of the repair involving only a cost of $10.00, again mostly (if not entirely) labour by the appellant, there is ample justification

for applying the de minimis principle to this head of claim also. Were I not to dismiss this part of the claim for the reasons set out on paragraphs 21-24 above, I would not hesitate to apply that principle. I therefore also rule against the appellant in relation to this head of damage.

26. The claim in subparagraph 3.12 is for the cost of replacing a broken pool brush. The broken parts were produced to the Court for inspection. The Commissioner considered the breakage to be reasonable wear and tear and declined to make and award in relation to this head. After inspecting the brush produced to the Court, I accept the appellant's evidence that the marks on it are consistent with a dog gnawing at it. More importantly however, my inspection made it evident that the damage was clearly breakage as opposed to wear and tear. The appellant claimed the sum of $24.00 to replace the pool brush. The second and third respondents claim they had priced a replacement at $12.00, however they conceded that the price varied and conceded particularly that they had seen it priced at up to $25.00. Therefore, I allow the appellant the sum of $24.00 under this head of damage.

27. The last item in dispute is the tick and flea treatment at a cost of $125.00. The Commissioner dismissed this part of the claim based on section 20(1) of the Act which provides as follows:-

> "An agreement or arrangement that is inconsistent with this Act or the Regulations or purports to exclude, modify or restrict the operation of this Act or the Regulations is void to the extent of the inconsistency."

28. The provisions of section 51 of the Act are also relevant to the decision of the Commissioner. Subsections (1) and (2) of that section are set out in paragraph 19 hereof. The tenancy agreement in question included a term to the effect that at the conclusion of the tenancy, the tenants would have the premises treated for ticks and fleas. This provision applied whether or not there was any need for such treatment. To my mind that appears to be an

unconscionable term in any event. In any event, having regard to the responsibilities of tenants as set out in section 51 of the Act, in my view, except in one circumstance, a clause in a tenancy agreement which requires a tenant to undertake tick and flea treatment has the effect of requiring the tenant to exceed those responsibilities. To that extent the tenancy agreement is inconsistent with the obligations under section 51 of the Act and consequently by section 20(1) of the Act, such a clause in the tenancy agreement is void as inconsistent with section 51.

29. The one exception I refer is an obvious one namely where it is established that, at the end of the tenancy, there were ticks and fleas on the premises. If there was evidence of that then there might be some basis for inferring that the tenants' dog caused any such infestation. That however does not become an issue. There is no evidence that there was an infestation. The extent of the evidence on this issue is simply that the premises were treated for ticks and fleas and of the cost of that treatment. The burden of proof on this issue is also on the appellant. The appellant submitted on authority of *Banco de Portugal v Waterlow & Sons* [1932] AC 452 that he did not bear the burden of proof on this issue at least. I was not aware of the case and therefore took the opportunity to consider it. The case does not stand for that at all. I reject that submission. The burden of proof is on the appellant and the appellant has failed to satisfy that onus. That head of claim is therefore also dismissed.

30. In summary therefore and having regard to those parts of the decision of the Commissioner which are not the subject of dispute, I find for the appellant in the sum total of the following:-

Rent	$640.00
Advertising	119.00
Fridge repairs	35.20
Pool brush	24.00

Bailiff fees	192.00
TOTAL	**$1010.20**

31. This amounts to the sum of $38.93 over and above the amount awarded by the Commissioner.

Dated this 31st day of May 2002

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V M LUPPINO
STIPENDIARY MAGISTRATE