CITATION: *Housing v Maurisa Luanna Henwood* [2004] NTMC 072

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| PARTIES: | CHIEF EXECUTIVE OFFICER (HOUSING) |
| | V |
| | MAURISA LUANNA HENWOOD |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Tenancy Act |
| FILE NO(s): | 20411804 |
| DELIVERED ON: | 13 October 2004 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 13.9.04, 13.10.04 |
| JUDGMENT OF: | D. TRIGG SM |

**CATCHWORDS:**

*Tenancy Act*- notice to quit on grounds that disturbance, nuisance or annoyance to neighbouring property.
*Mason& Mason v NT Housing Commission (1997) 6 NTLR 153,* followed.

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Ms Stevenson |
| Defendant: | Self |

*Solicitors:*

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| Plaintiff: | Morgan Buckley |
| Defendant: | N/A |

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| Judgment category classification: | C |
| Judgment ID number: | [2004] NTMC 072 |
| Number of paragraphs: | 152 |

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

No. 20411804

*[2004] NTMC 072*

BETWEEN:

**CHIEF EXCUTIVE OFFICER (HOUSING)**
Applicant

AND:

**MAURISA LUANNA HENWOOD**
Respondent

REASONS FOR DECISION

(Delivered 13th October 2004)

Mr TRIGG SM:

1. The respondent and her former partner, Julius Kernan, entered into a Tenancy Agreement with the Applicant on the 21st day of April 1995, in relation to house premises at 8 Phineaus Court, Gray. This Tenancy Agreement (part of ExP3) contained a number of covenants, the relevant one for present purposes being as follows:

> (2) the tenant covenants with the Commission as follows:
>
> (j) to use the premises solely for the lawful purposes of the tenant for residential accommodation and that no nuisance or act which would be an annoyance, danger or nuisance to the Commission or the owner or occupiers of adjoining premises and near neighbours shall be committed or suffered to be done on the premises.

2. The respondent is of aboriginal descent, and appears to have an extensive family network. Mr Kernan is also of aboriginal descent and

comes from the Maningrida area. He also appears to have an extensive family network.

3. The respondents' relationship with Mr Kernan appears to have been somewhat problematical. On 19 April 1996 the respondent took over sole responsibility for the tenancy of the property at 8 Phineaus Court, Gray (hereinafter referred to as "the premises"). Her signed acceptance in relation to this forms part of ExP3.

4. On the 14th day of April 2004 the applicant, under its' common seal, executed a notice to quit to the respondent requiring her to quit the premises on 27 April 2004. This notice purported to be issued pursuant to sections 42A and 47 of the *Tenancy Act* (hereinafter referred to as "the Act"). The Act has now been replaced by the Residential Tenancies Act, which commenced on 1 March 2000. However, s160 of the Residential Tenancies Act states:

> "(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."

5. As the lease herein was entered into on 21 April 1995, it follows that the Act governs this matter. S42A of the Act states:

> "A notice to quit given by a lessor shall be in writing and signed by the lessor, or his agent authorised in writing."

6. As the notice to quit is in writing and signed under the common seal of the applicant/lessor it conforms with this legislative requirement. In

addition, the notice also purports to be under s47. The relevant sub-sections of this section are:

> "(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 –
>
> (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;"

7. The notice to quit herein relied upon alleged breaches of s47(2)(b) of the Act. It stipulated the address of the premises; set out in full the wording in s47(2)(b) as the grounds for issuing the notice; gave particulars of the alleged breaches; and required the respondent to vacate the premises on 27 April 2004.

8. This notice to quit was served personally upon the respondent on the 13th day of April 2004 (Exhibit P1). 27 April 2004 is 14 days after 13 April 2004. Accordingly, I find that the notice to quit herein is a valid notice under the Act.

9. The respondent did not vacate the premises as the notice to quit required her to do. Accordingly on the 19th day of May 2004 the applicant under it's common seal prepared an application under section 48 of the Act for a warrant of possession. This application was filed in this court on the 19th day of May 2004. This application was served upon the respondent personally on the 27th day of May 2004 (ExP2).

10. The application complies with s48(1) of the Act, and accordingly there is no procedural bar to the applicant obtaining the relief that it is seeking.

11. This matter was originally listed for hearing on the 21st day of July 2004. On that day Ms McLaren appeared for the respondent and the respondent was apparently not present. Ms McLaren sought to rely upon a medical certificate which Mr Gillies SM decided was inadequate. Mr Gillies SM declined to grant an adjournment on medical grounds to the respondent and stood the matter down till later in the day to be dealt with by another magistrate.

12. The matter apparently then came before Mr Loadman SM sometime during the course of that day. The respondent still was not in attendance and apparently was not due to attend court until about 3.30pm. The explanation was that the respondent was attending medical appointments. Mr Loadman SM was unwilling to start a hearing that late in the day and accordingly adjourned the matter for hearing on 13 September 2004.

13. On 13 September 2004 the matter again came before Mr Gillies SM who noted that he would disqualify himself if he were asked to do so. It does not appear that any application to actually disqualify Mr Gillies SM was made. In any event, Mr Gillies stood the matter down to be heard before another magistrate. After completing the other matters in

my list I commenced this hearing around about noon on 13 September 2004.

14. When the hearing commenced the respondent was unrepresented and the applicant was represented by Ms Stevenson.

15. The respondent sought an adjournment of the hearing on two grounds. Firstly, she wished to be represented by Ms McLaren but wasn't able to secure her representation without paying her some money which she had yet to do. No indication was given by the respondent as to how much money she had to pay, whether she was likely to be able to raise this money, and if so when by. The second ground was that she had a medical appointment at 12.30 and wished to keep that as she was "haemorrhaging". I inquired of the respondent as to when the medical appointment was made and she was unable to be specific, beyond saying it was either on Friday or Saturday. Further, I asked respondent how long she had been haemorrhaging for, and she advised that it was about a month. The respondent did not have any medical certificate or other material to put before me to substantiate her condition. Given the history of the file, and the matters that she advised me of I declined to adjourn on the basis that I was not satisfied that she was too unwell to continue with the matter. I accordingly refused the application for adjournment, but advised the respondent to notify me if there was any change to her condition such that she thought that she needed urgent medical treatment or an ambulance. No such change in her condition occurred and the hearing proceeded.

16. Three exhibits were tendered before me (ExP1 was an Affidavit of Service in relation to the Notice to Quit, which annexed a copy of the Notice to Quit; ExP2 was an Affidavit of Service in relation to the application herein which annexed a copy of the application; and ExP3 was a brief affidavit setting out the history of the lease and annexing a

copy of the original lease and the original acceptance of the tenancy into the sole name of the respondent). The only oral evidence called in the applicant's case was from the two adult occupiers of 85 Priest Circuit Gray.

17. No map or plan of the area around the property was tendered in evidence before me. Accordingly, I do not know what houses or properties adjoin or are in the vicinity of the premises.

18. As noted, the only witnesses were from the occupiers of 85 Priest Circuit Gray. I understand that this property backs onto the premises and that they share, at least in part, a common rear boundary.

19. No explanation was forthcoming from the applicant as to why no other neighbours were called.

20. The first witness called was Melissa Berger. She was a casual sales assistant and she had lived at her address for about 3 years. She was purchasing the property. She had a daughter who apparently is about 8 years of age who lived there along with her boyfriend (the other witness in the case) Benjamin Jefferies.

21. The evidence of Ms Berger was that there sometimes were a lot of people at the premises. She could not say how many people actually lived at the premises but she thought about 3 or 4 children and possibly 5 adults. As far as she could see she'd say they were living there as they always appeared to be there and on occasions for 2 weeks at a time maybe. She went on to say that when these people leave it is quiet.

22. **The matters that she complained of were obnoxious behaviour, yelling, screaming and fighting with each other at a loud volume**. She did not give any examples of what she meant by "obnoxious behaviour", and accordingly I am unable to find that obnoxious behaviour did occur. She did not give any examples of what words she

heard during the "yelling or screaming", but I do not consider that to have been necessary. She did not give any examples of the "fighting", but she seemed to be relying upon verbal rather than physical fights.

23. She said that the **incidents happen at least once a week** and that **sometimes she had called the police 3 times in a week**. She said the incidents are mainly at night time and that she gives them until about 9.30 at night and if it hasn't calmed down by then she starts calling the police.

24. She said on weekends when she is home the incidents can start around 1.30 to 2 o'clock in the afternoon.

25. During the week she gets home at about 5.00pm and there are children jumping on the shed at the back of the house. However, it appears that she's not complaining about the noise from the children doing this rather she appears to have some concern about the safety of the children if they're involved in this activity. I'm not sure how this therefore fits in with the complaints in the notice to quit.

26. She said that they put the air conditioner on in the house and block off the house more to try and cut out the noise but they can still hear it. She said that the noise was continuous although the volume goes up and down.

27. She went on to say that **since the last court hearing they'd have called the police on 3 occasions for loud music, yelling and fighting**. Despite this she said they'd quietened down a little bit since the last court hearing but it was not really different.

28. She went on to add that she is hearing impaired and if she turns the TV up she could still hear the noise from next door and so therefore considers it to be a problem.

29. She said that when she calls the police it is probably about 11.30pm or midnight. **After calling the police the noise would stop for about half an hour to three quarters of an hour but within an hour she could almost guarantee that it has begun again**.

30. She went on to say that **one day she was up all night and she was too mentally and physically exhausted by lack of sleep to go to work.** She added that her daughter also wakes up due to the noise and it affects her partner as well.

31. She said that the premises were quiet possibly only when no one was there.

32. In cross examination she said that **on 3 or 4 occasions she had found beer bottles and broken glass in her backyard.** She didn't drink beer nor did her partner and since the bottles and broken glass were on the fence line between the two properties she assumed it was from the premises but she couldn't say for sure.

33. She also said that they don't let their daughter go outside as they're concerned for her safety.

34. Having heard all of the evidence in the case I accept her evidence as being true and generally accurate, although it did lack specifics. Given the large number of incidents involved this lack of specificity is not that surprising.

35. The next witness was Benjamin Jefferies. He is a mechanic by trade and has lived at 85 Priest Circuit Gray for about 2 years. He confirmed that the respondent lived at the premises, but that no one else lived there that he knew of.

36. Mr Jefferies said that there was a man called "Cliff' or "Clifton" and his son who he had seen at the premises. There are other people who he

doesn't know and there appear to be several different males aged between twenty to thirties. He said occasionally there were other females there as well and a few children but he couldn't say how many. He said there were people there all week long.

37. He said when he comes home from work about 5.30 there are people there and the numbers vary between five and ten. On the weekends there are sometimes more and sometimes less. On the weekends he said they were probably there all day but he wasn't sure, as he goes fishing on the weekends and apparently is away some evenings.

38. He says that on occasions he has come home at about 2 or 3 in the morning and they were still partying. He referred to **yelling, loud music and singing to the music.**

39. He said that if he was trying to sleep and they were still yelling, Sunday and then the Sunday night as well then he doesn't get much sleep and he has been so tired on occasions he's had to ring up work and come in late because he's needed to catch up on some sleep.

40. He said on week nights when he gets home he hears yelling and screaming when he gets to the front gate. He also said that **they hear fighting** and because they have an eight year old they don't want her to have to hear this.

41. He said that he has gone to sleep in the past and been woken at 2am and 4am and then gotten up at 6am and it is still going. He said last year that was quite regular.

42. He referred in particular to **one incident** (although he didn't tell me when it occurred) when he came home after work and started doing some weights. He found the music was blaring and he went to the back fence and yelled out for the people to turn the music down but they ignored him. He waited until they changed the CD or the music slowed

and he yelled again but there was no reply and the music wasn't turned down. As no-one was outside he got his hose, turned it on, and hosed at the window of the premises. As a consequence of this two males came out of the house, and the older male said that his name was Cliff. These **two males took their shirts off as if to fight him. He said that they told him they were going to jump the fence and bash him. Mr Jefferies said that he told them all he wanted was for them to turn the music down and they said they were going to "fuck me up". He also said that they told him he was "a hero" and "they're going to get mates to come around and get me and my family".**

43. Mr Jefferies said he turned and walked away after this but they kept yelling abuse and threatening him. He called the police and they attended about twenty minutes later. He said after the police left the music was straight back up again and the police came to his gate and it went down again. He said the police told him to stay out of sight of the neighbours and he didn't think that was fair.

44. Mr Jefferies also expressed concern for the safety of the kids when they jump on the back shed. Again I don't know how this fits within the complaints on the notice to quit.

45. He said the noise from the premises was not as often now, but it would still be every couple of nights. He said **it was at least three nights a week even now and that the noise was from yelling and screaming.**

46. He said there was some change since the last court as the partying was not all night long now and the music was not as loud.

47. He predicted that **on a Thursday night you could guess it was going to happen. He said the noise was not acceptable**.

48. Mr Jefferies said **he had called the police many times, too many times to remember. He said he called them two or three times a**

**week for a period of time.** Then there was no problem for about a month and then it started again. He said **the worst occasion was when he called the police three times in the one night**, as he usually only has to call once a night. He said that **he called the police more than once a night on about five or six occasions**.

49. He said that **after he calls the police initially there is a quite period of half an hour to an hour and then it's back in full swing again**.

50. He said he would let it go for a couple of hours until he couldn't stand it any further. He said the premises next door has affected his life. He's missed work from being too tired; he doesn't train under his house any more and he doesn't let the child play in the backyard due to the bad language.

51. He said that **when the noise was happening it was mainly males**. He said he has heard the respondent and her mother yelling at the males to be quiet but the blokes yell "fuck off" back and there is no change in the noise.

52. I accept his evidence. Again there was a lack of specificity, which is not overly surprising given the number of incidents complained of and their frequency.

53. That was the case for the applicant. No evidence was placed before me in an attempt to substantiate the allegations in paragraphs 1(e), (g), (h) and (i).

54. Respondent said that she does not have a dog and there is no evidence before me that any dogs were at the premises at any time.

55. In relation to the allegations of police attendances it is clear, and I find, that the police have been called to the premises and have attended on numerous occasions. I am however unable to find when any of these

attendances were. No police officers were called, and no police documents were summoned or placed into evidence to establish that any attendances were made on any of the dates or times or for any of the reasons stipulated in paragraph 1(i) of the notice to quit. I am therefore unable to be satisfied on the balance of probabilities that the police did attend on any of those occasions or for any of the alleged reasons. There is simply no evidence of this.

56. In relation to paragraph (d) of the particulars in the notice to quit I did not hear any evidence from any representative of the applicant. I therefore do not know who, if anyone, was or was not authorised to reside at the premises (apart from the respondent), or for what periods. Accordingly, there was no evidence going to this allegation.

57. On the applicant's case I am satisfied that a prima facie case has been made out in relation to the allegations in paragraphs (a), (b), (c) and (f) of the particulars. These were as follows:

> "(a) people from the premises engage in noisy and anti-social behaviour on a regular basis at random times of day and night, such as yelling, screaming, playing loud music, fighting violently, smashing glass, drunken and aggressive behaviour, shouting loudly and using abusive, threatening and foul language.
>
> (b) people from the premises congregate in large groups in and near the premises, and wander around these areas whilst engaging in the anti-social behaviour described in paragraph (a).
>
> (c) people from the premises throw bottles and rubbish into the yards of neighbouring premises.

(f) people from the premises are rude, abusive, threatening toward neighbouring residents if neighbouring residents ask them to quieten down."

58. On the evidence I was not told (apart from the incident involving "Cliff") of any actual words that are heard from the premises. Accordingly, I cannot be satisfied that any such words are "abusive" or "foul". Also, there is no evidence from which I could be satisfied that persons at the residence "fight violently". There is also no evidence of "rubbish" being thrown into neighbouring premises. There is, in my view, ample evidence of all other matters alleged in paragraphs (a), (b), (c) and (f) of the notice to quit.

59. In the respondents case she firstly called her mother, Pavalina Henwood. She lives at 96 Byrne Circuit Moil.

60. Ms Henwood confirmed that she had seen the respondent try to stop family coming into the premises and drinking.

61. She also confirmed that she had been with the respondent when she has gone to the housing commission and requested to be moved but was told that she had to pay $2,000 in outstanding damages to the premises before that could occur. This was also a matter that was raised by the respondent herself, however, I fail to see how this is relevant to the present application. The issue herein is whether the respondent is in breach of any covenants under the lease, and if so whether the applicant/lessor is entitled to the warrant of possession that it seeks. I have no jurisdiction (as part of this application, and probably not at all) to decide whether the applicant should or should not have been prepared to shift the respondent to another property. The Act does not deal with this aspect of a tenancy at all, and therefore the Act does not grant any jurisdiction to this court in this area. In addition, the Housing Act (which creates the applicant and gives it power and functions)

grants no right of review or appeal to this (or any other court) in relation to any decisions that the applicant may make in the exercise of it's functions.

62. Accordingly, I find that the issue raised in the respondent's case about her requesting a move to alternative premises is not a relevant issue in the present application. The applicant did not (correctly in my view) address this issue at all in it's case. I therefore ignore this issue in my deliberations, and make no findings in respect to the same.

63. Ms Henwood also confirmed that she had been through the house with aboriginal housing to see what had been done and noted that tiles were removed from the roof of the house when the respondent was away last year and the year before and she had also seen screens removed.

64. Ms Henwood also confirmed that the respondent had tried to pay to get the house fixed and as a result she'd had to help out with food for the respondents' children. Again, this was another issue raised by the respondent herself as well. However, this issue also appears to be irrelevant as damage to the premises (whether caused by the respondent or others) is not a matter that the applicant relies upon in it's notice to quit. Whether the applicant may (or may not) have been entitled to rely on other breaches of covenants is irrelevant. It is only those breaches that are alleged in the notice to quit upon which I am required to adjudicate. As noted above, this is now limited to paragraphs (a), (b), (c) and (f) of the particulars in the notice to quit.

65. **Ms Henwood also said that she is called at all hours of the night by the respondent when people are knocking at the respondents' house to get in.** She confirmed again that the respondent had asked to be moved or have a large fence put up to keep these people out.

66. In relation to a fence I do not know the full particulars of this. I do not know what discussions took place in relation to a fence, when or with whom. Clearly, no lessee would be entitled to erect a fence upon any leased property without the knowledge and consent of the lessor. I do not know what type of fence was proposed by the respondent, nor for which boundaries of the premises. Given that people who attended the respondent's premises had in the past resorted to damaging the roof to gain entry it appears highly unlikely that a fence by itself would have been much deterrence.

67. The applicant did not address the fence issue in it's own case at all. In my view, it was unnecessary for it to do so. In general, a lessor offers a particular property for rent. The lessee is the one who knows what their requirements are, and provided the lessee does nothing unlawful or wrongful from or to the property the lessor has little role to play. If the property turns out to not suit the lessee's particular circumstances then that is a matter for the lessee. The lessor has no responsibility (unless it takes this responsibility upon itself, either as part of the original lease or by subsequent amendment) to change or alter the property in any way to make it more suitable to the lessee.

68. Hence, if a lessee chooses to use a suburban residential property for band practice (which causes a nuisance to neighbours) the lessor is not obliged to install sound proofing or take other steps to remedy the nuisance. The lessor's remedy is to enforce the covenants under the lease, and to evict the lessee if the breaches continue. A lessor who fails to take reasonable action under a lease may themselves be liable in damages for any loss or damage to any neighbour of which they become aware.

69. Ms Henwood went on to add that they had even approached Aboriginal Housing to see if the respondent could purchase the property so that she

could put up a fence herself to keep the families out. Again, in my view, this is irrelevant to the application before the court. A lessor has no obligation to sell a property to a lessee or to anyone else. This court has no jurisdiction in any such decision. Further, the applicant (correctly in my view) did not call any evidence on this issue.

70. The only issue that I have to determine is whether the applicant has satisfied me on the balance of probabilities that the respondent has breached any of her covenants in the lease as alleged in paragraphs (a), (b), (c) and (f) of the particulars in the notice to quit, and if so, which ones, and how.

71. In cross examination Ms Henwood said that she stayed at the premises about once a month or whenever the respondent needed her there. She said that people do come to the premises but she tells them to go and they do. She was asked whether she had ever had to forcefully make people leave and she said that she had when people pulled up in a mini cab with their grog.

72. Ms Henwood did not know anybody named “Cliff’ or “Clifton”.

73. **Ms Henwood herself said that she had had cause to call police to remove people from the premises a couple of times. The reason for calling was their disorderly behaviour.** She said if they don’t leave she calls the police. As noted above, Ms Henwood is not a lessee of the premises.

74. Ms Henwood confirmed that neither herself nor the respondent drink alcohol at all.

75. Ms Henwood said **there were numerous occasions when the respondent stayed at her place because of disorderly people staying at the premises**. She said that the respondent would turn up at her place in a mini cab and on other occasions she’s gone to collect her and

she's out the front in the street with the children waiting for her. This is consistent with the respondent's evidence.

76. Ms Henwood also said that the respondent had called the police from her place in the past.

77. Ms Henwood said she understood that the respondent was told she had to pay $2,000 for damages or the applicant would not move her. She said that **other people damage the premises when the respondent is not there.**

78. Ms Henwood was aware that the applicant had advised the respondent of complaints by neighbours but said a number of times the respondent was not there at all and that she had told Karen (apparently an employee of the applicants) that she was going away.

79. **When Ms Henwood was asked what the respondent had done to stop people coming to the house and she said that the respondent had told the applicant.** This is clearly not sufficient. It is the respondent who has the sole right to invite or exclude persons from the residence. It is therefore the respondent's responsibility and not the applicant's.

80. Ms Henwood agreed that no trespass notice had been issued by the respondent.

81. Ms Henwood said the yard was quite tidy at the moment as the respondent has someone coming every fortnight to cut the lawn and take rubbish away.

82. **Ms Hewood said that on one occasion when the respondent was away someone lifted the tiles in the roof and broke into the house and were cooking on the stove and blew the stove up.** The last time she was aware of anyone breaking into the house might have been about this time last year.

83. **Ms Henwood said** that the respondent does her shopping for herself and her children and then **these people come in and there's nothing left in the fridge to eat.**

84. Ms Henwood made the point that the respondent was up to date in her rent, and this was a matter that was confirmed by the respondent. It appears to be no part of the applicant's case that the respondent is in arrears of rental.

85. The final witness called in the case was the respondent herself. She confirmed that she had lived at the premises since 1995.

86. The respondent has five children, all apparently to Mr Kernan. The children are Morris aged twelve, Marlene aged ten, Alicia aged 7, Scott aged 6, and Louise who is almost 3.

87. For about a year the two oldest children have been living with their father in Maningrida. The three youngest children continue to reside with the respondent in the premises. She stated that no one (apart from herself and her children) is a full-time or regular resident of the house.

88. The respondent confirmed that she does not drink or smoke (which I take to be a reference to marijuana). Her explanation for the problem was that "**people come to my house because they think they can come to my place and drink"**.

89. **She identified a number of different groups of people who apparently come to her place and cause trouble**, not only for the neighbours, but also for herself.

**90.** One particularly troublesome group she identified was Nora Smith (who is like an Aunty to the children's father) and her daughter, Kaylene, and the daughter's boyfriend Isaac Moreen. She said that Nora lives in a flat near the Gray School but her partner bashes her then kicks her out

and she brings all her tribe to the residence. She says **Nora comes over about three times a week after drinking home brew with heaps of people and this has been going on since last year. She went on to add that she has to get a trespass order on her and the two others, but appears to have done nothing about getting a trespass order to date.**

91. In addition she identified Virginia (she did not know her last name) who was from Maningrida, and who lived over the back. She said that about nineteen of twenty people were staying with Virginia. She went on to add that **Virginia's kids (who were in their late twenties) would come over to the residence when the respondent is out, and when she comes home she finds them yahooing in her house**. She said that last week they claimed that they wanted to stay and she refused and said she'd call the police. She said that no sooner do these people come to her place than she calls the police to have them removed.

92. She said that during 2003 she went to Maningrida for about four or five months as she had to be there for her eldest son going through ceremonies. She said that while she was away Nora, Kaylene and Isaac had apparently been found in her house and they'd run amok.

93. The respondent said that if she was not at the residence then she was either at Maningrida or in the Finniss River area where she has family. It also appears from the evidence that she also spends time at her mother's house in order to escape the noise and trouble at the residence.

94. In the past twelve months the respondent said that she spent about four or five months in Maningrida in the middle of last year, then on and off for the twelve weeks of the Christmas school holidays, and then for about two weeks again in June or July of 2004. She said that next month she would again be going away for about two to three months for

further ceremonies for her eldest son. She said as his mother she has to stay up and dance all night when he is going through ceremony. She also said that on about three occasions last year she had gone down to the Finniss River area. Hence, in the last fifteen months it appears that the respondent has been absent from the residence for at least six months.

95. It appears that the respondent takes no particular security measures while she is away apart from locking the residence. No evidence was given to suggest that she had anyone looking after the residence or even checking up on it. Hence, in about the middle of 2003 it seems that Nora and her family may have broken into the residence and used it as their drinking spot for a not inconsiderable time. It appears that the respondent only became aware of this upon her return. Given the aforementioned history of Nora (and other groups) attending upon the residence she should have anticipated that these people may have been an ongoing problem at the premises, and done something to try and prevent it. She did not give evidence of doing anything, except perhaps telling the applicant that she was going away.

96. It was not the applicant's responsibility to patrol or check on the premises. The premises were leased to the respondent and therefore it was her responsibility.

97. I asked the respondent whether she had invited any of these people to her house and she said no. I asked her if she was home and they turned up what she normally did, and she said that she tells them to go or she'll ring the police. **In the past twelve months the respondent said that she had rung the police about ten to fifteen times due to people at the premises.**

98. The respondent said that in 2003 she took out an order against the children's father to stop him coming to her house and drinking alcohol

or smoking drugs. She said that the children's father would turn up with his family as well and would ask to stay there. However, she said that he's not allowed to drink or smoke (which I again take to be a reference to marijuana) or to cause any noise. The respondent stated that in 2003 she had the children's father arrested and taken away from the residence on an occasion when he was drinking and he hasn't been back since.

99. The respondent is therefore aware of the use that she can make of domestic violence orders. Nora is a relative (as are other apparent trouble makers). Given the extended definition of "domestic relationship" in the Domestic Violence Act, and the behaviour of these "visitors", the respondent may well have been able to use that legislation to her benefit. She has not done so.

100. The most obvious step that the respondent could have taken against trouble makers who come to the residence was to serve a trespass notice. She has not done so. I am not aware of any steps that she has taken to do so. **When asked why she had not taken out a trespass notice her explanation was "I haven't had time to".** Given the gross nuisance that these "visitors" to the residence were causing to the neighbours and to the respondent herself, this explanation is far from satisfactory. She added that if she took out a trespass notice she didn't know whether the people would listen to it anyway. In my view, given the facts of this matter she had an obligation to do all that was necessary, and trespass notices were the minimum starting point.

101. Pursuant to s8 of the *Trespass Act*, the respondent, as the "occupier" of the residence has the right to warn any person to stay off the premises (s8(1)). Any person thus warned off who unlawfully trespassed within one year of such warning would commit an offence punishable by a $2000 fine (s8(4)). Further, if a person thus warned did trespass again

then the court could also warn the person to stay off the premises (s8(3)). In addition, the police would then be empowered to arrest and charge any such trespasser.

102. I formed the impression that the respondent expected other people to sort out the problem for her. She complained that the police didn't do enough, but without a trespass notice their powers were somewhat limited. She complained that the applicant hadn't built a big fence for her, or moved her. She even seemed to hint that she expected the applicant to do something about keeping trouble-makers away from the residence.

103. However, the respondent is the person in lawful occupation of the premises under the lease. As such she is the "occupier" under the *Tenancy Act*, and she is the only person who can warn anybody off (with the exception of a limited 24 hour warning granted to police at the request of an occupier-s7(1)). The applicant had no power to issue a trespass notice with respect to the premises.

104. It is apparent that the respondent does not appear to understand that once a lease is created, the interest held by the applicant was a "leasehold reversion". The respondent herself had a possessory interest in the premises. Further, the possessory interest was a right to exclusive possession of the premises as against everyone including the applicant. The only right generally granted to a lessor to enter upon demised premises is for the purpose of inspecting it's condition from time to time. In clause (2)(e) of ExP3, such inspections can only be at "reasonable times" and on all such inspections the applicant "shall" be accompanied either by the respondent or a person authorised by her. Accordingly, the applicant was not permitted to enter the premises when she or her authorised representative was not present for the purpose of an inspection.

105. The respondent said that since February 2004 she has twenty five dollars a week taken out of her pension to have her yard done. This may explain why the applicant did not seek to adduce any evidence to substantiate particular (e) of the notice to quit. She said that she had no dog.

106. The respondent was not asked whether she knew a "Cliff" or "Clifton". However, in her cross-examination of Mr Jefferies she seemed to indicate that the names meant nothing to her.

107. The respondent said that she had spoken to the applicant about moving but they quoted $2,000 in damages which she had to pay and then she'd get a transfer. She said she'd also asked them for a high fence but she hasn't got a reply. She said she'd also spoken to Karen (an employee of the applicant) about the problems and that Karen had spoken to Nora, Kaylene and Isaac and told them not to be in the Gray area but they didn't listen. I do not understand what it was exactly that Karen was supposed to have done.

108. **In the past two years the respondent said she'd been at her house when the police were called by her neighbours on about maybe eight to ten times. She agreed that the people were making unreasonable noise at the time police were called** and she herself had asked them to leave as well. **She said that when police attend they just jump the fence and run away and so she gets frightened and locks up the place and goes to her mothers**. **She was asked whether when she came back it looked like the people had returned and she replied that it did as they had taken her children's food and there was a big mess and she had to call the yard mob to help her clean it up.**

109. In the course of the respondents evidence she looked at the applicants two witnesses and said she was sorry if the family had threatened them but she needs her house.

110. In addition to Nora Smith and her family, and Virginia and her family, she also identified the Nickaloff family (who were relatives from her side) and in particular Anita, Eddie and Junior who "come and make trouble" and the Kernan family from Maningrida (her ex partner's family) who also come.

111. In relation to all these people the respondent said "I don't want any of these people either. They're not there with permission". She went on to say that **when she asks them to go away and they won't she ends up leaving because she's scared of them**, she said there were too many of them.

112. **In the past two years the respondent said that she had called the police in relation to Nora on about three or four occasions**. Given the attendance of Nora about three times a week this is far too few times. I find that the respondent should have served a trespass notice on each of Nora, Kayleen and Isaac at least a year ago, and strictly enforced it every time they came anywhere near the residence. I find that this is the least that she should have done, and she has not done it.

113. In cross examination the respondent agreed that **on some occasions she does leave her premises leaving people there. She said that she would lock the house up as the people were outside and that she'd call the police before she goes. However, people run off when police arrive then police either drop her off at her mothers or her sisters' place and the people return.** It was put to the respondent that it wasn't true that she'd called the police before she went and she denied this. She said that she even does this when her mum picks her up.

114. The respondent confirmed that in January 2004 Kaylene was dropped off at her house after a domestic violence incident. It was put to her that she just left and went to her mothers. However, the respondent said she called police as well, as Isaac was running amuck. She said

she called five or six times but “they just won’t stop coming around”. She agreed that she locked up the house and ran to her mothers. She said that they think they can just take over her yard and play their music and Nora thinks she can stay there. This is despite the fact that she calls the police.

115. The respondent confirmed that the last time the house was broken into they took tiles off the roof, got in through the man hole and took over her house causing damage. She had earlier break-ins before she had security screens. She agreed the security screens were installed about November 2002. The respondent said she had asked police to charge Nora, Isaac and Kaylene in relation to breaking into her house. I do not know what if anything has happened in this regard.

116. The respondent said when she calls police she waits for police to come.

117. The respondent said that she understood that the applicant really wanted her out of her house, but she asked aren’t the police supposed to protect her from violence, and where can she go with her children.

118. That was the extent of the evidence called on 13 September.

119. The respondent indicated that she would have liked to call one of her neighbours to give evidence, but she was a teacher and therefore not available. On 28 September 2004, prior to publishing my decision herein, I gave the respondent the opportunity to seek an adjournment to call other evidence if she felt it in her interest to do so. I advised her of her ability under the Local Court Rules to have the court issue summonses to require the attendance of a witness. The respondent decided that she did wish to seek to call other evidence and accordingly this matter was adjourned to 13 October 2004 at 9am to enable this to occur. After court was adjourned the respondent caused a summons, to Monica Taylor of 7 Phineaus court Gray, to be issued by the court.

120. The hearing resumed before me on 13 October 2004. The respondent arrived half an hour late for court and advised that she had shown the summons to witness to Ms Taylor (who was apparently the respondent's aunt and lived next door to the respondent) on 28 September and again the Sunday before this matter resumed. She advised that she had given Ms Taylor $60 conduct money, but this had subsequently been returned by Ms Taylor when she advised that she did not wish to attend as she was too busy at work. Ms Taylor apparently works at the Gray primary school. I offered to issue a warrant of apprehension for Ms Taylor and have it executed forthwith, then standing the matter down until 2pm in order to hear from Ms Taylor if she was then before the court. I stood the matter down to enable the respondent to discuss this with her mother, and then advise me whether she did wish me to issue a warrant or call no further evidence. When the matter resumed the respondent advised that she did not wish to have a warrant of apprehension issued for Ms Taylor, and wanted the matter finalised. Accordingly, no further evidence was called.

121. The applicant has the onus on the balance of probabilities of establishing the matters in the notice to quit. In this regard, Ms Stevenson conceded (correctly in my view) that paragraph 3 of the notice to quit was not made out as there was no actual allegations of any conduct of the respondent herself.

122. The matters in the notice to quit are complaints about persons who are not residents of the premises. It appears to be part of the applicant's case that these people attend with the express or implied consent of the respondent.

123. A lot of the facts in this case are not in dispute. I make the following factual findings on the evidence before me:

- Each of the factual matters set out above in **bold type** I find to be proved on the balance of probabilities;

- Nora Smith and her family only attend at the premises because it is occupied by the respondent;

- Virginia's family only attend at the premises because it is occupied by the respondent;

- Member's of Kernan's family only attend at the premises because it is occupied by the respondent;

- Troublesome members of the Nickaloff family only attend at the premises because it is occupied by the respondent;

- Persons (not the respondent or her mother) at the premises regularly (at least once a week on average, sometimes three times in a week, and sometimes there might be a break of a week or two) drink alcohol, play loud music, argue, scream, yell and fight;

- This behaviour mainly occurs at night and keeps Ms Berger and Mr Jefferies awake, and wakes them and their daughter from sleep;

- The behaviour from the premises has led to Ms Berger and Mr Jefferies keeping the eight year old daughter inside on occasions;

- Persons (not the respondent or her mother) at the premises have thrown bottles into the yard of Ms Berger and Mr Jefferies, and some of these bottles have broken;

- All the aforementioned behaviour has been ongoing for at least two years;

- Mr Jefferies has been physically threatened on one occasion by two males at the residence when he tried to get the attention of persons at the residence to get them to turn down loud music;
- The request by Mr Jefferies was ignored;
- The persons causing trouble at the premises are not reasonable people, and they care nothing for the rights or comfort of others;
- Ms Berger and Mr Jefferies have been obliged to call police due to the level of nuisance and annoyance from the premises very many times;
- The behaviour emanating from the premises would be a nuisance and also an annoyance to any reasonable person;
- Ms Berger is an adjoining neighbour to the premises;
- Ms Berger is a reasonable person;
- Ms Berger's use and occupation of her home has been substantially disrupted by the nuisance and annoyance which emanates from the residence;
- Mr Jefferies is an adjoining neighbour to the premises;
- Mr Jefferies is a reasonable person;
- Mr Jefferies' use and occupation of his home has been substantially disrupted by the nuisance and annoyance which emanates from the residence;
- Mr Jefferies has been obliged to call police to the premises "too many times to remember". On one night he called three times in the one night. He has had to call more than once on the same night about

five or six times. In addition there are many times when he has called a single time;

- The attendance of police tends to cause the disturbance to quieten down for a half an hour or so, but then it may start up again;
- When police attend some of the persons at the premises simply depart and return when the police have gone;
- The level of disturbance from the premises is so bad that the respondent has fled the premises with her children on “numerous occasions”;
- The level of disturbance from the premises is so bad that Ms Henwood has called police on several occasions herself even though she does not live there or near there;
- The level of disturbance from the premises is so bad that the respondent herself has called the police ten to 15 times in the last 12 months;
- When the respondent goes away (and she has been away at least six months out of the last fifteen months, and will be going away again soon for another two or three months) persons continue to attend at the premises and drink alcohol, play loud music, argue, scream, and fight;
- When the respondent is away from the premises there is no-one at the premises on behalf of the respondent to send annoying people away or to do anything to control them in any way;
- The nuisance and annoyance from the premises has not ceased since the last hearing day in July but continued up to the time that the evidence herein concluded before me;

- The nuisance and annoyance from the premises is likely to continue so long as the respondent is the lessee of the premises;

- Whilst the respondent has not expressly invited the persons who are causing the nuisance and annoyance to the premises, she has not taken all reasonable steps to prevent the nuisance and annoyance;

- I do not accept that the respondent has told Nora and her family and friends to go away immediately that she attends the residence on all occasions;

- I do not accept that the respondent has called the police to remove Nora and her family and friends on every occasion that they have not left the premises upon request;

- Whilst the respondent has not expressly invited the persons who are causing the nuisance and annoyance to the premises, she has not taken all reasonable steps to exclude these persons from the premises;

- If the respondent had served a trespass notice upon Nora, Kaylene and Isaac about two years ago, when they started to be a nuisance, and not tolerated any breach, the problems emanating from the premises would likely have been substantially reduced;

- If the respondent had taken reasonable steps to authorise somebody to mind the premises whilst she was away and ensure no unwanted visitors, the problems emanating from the premises would likely have been substantially reduced;

- The respondent has in the past chosen to abandon the premises to the trouble-makers rather than comply with her covenants and obligations under the lease;

- It was and is the obligation of the respondent (and no-one else) under the lease to ensure that she complies with her covenants.

124. If the respondent had served trespass orders upon Nora and her family (as I find that she should have) about two years ago, and not tolerated any breach then Nora would have found somewhere else to drink. By not doing so, the problem has escalated. As the respondent herself said in evidence, Nora turns up about three times a week, and has been doing this for twelve months. If she were turned away every time, without exception, I do not accept that Nora would keep coming, other than maybe infrequently in order to see if the situation had changed. By not taking appropriate and consistent action against Nora and her family from the beginning she has contributed to the current unacceptable situation.

125. The respondent appears to have believed that the police should take people away from the residence whenever she asks them to, and then set up some sort of surveillance to prevent their return. The police have a difficult and busy job. They are there to "serve and protect" the whole community. They are not there to provide a taxi service for Nora and other trouble-makers. If the respondent had served appropriate trespass notices (and she was the only one who could as she was the person in occupation of the premises) from the beginning then the police would have been empowered to take appropriate action against Nora and other trouble-makers. The police do not have unlimited power, particularly when dealing with private property.

126. I do not accept the respondents excuse for not serving trespass notices (didn't have time) as genuine or acceptable. By her inaction she has allowed the situation to continue and has taken no reasonable steps to stop it. She needed to do a lot more, a lot sooner, and to have been consistent in that action. It is no good to perhaps verbally exclude Nora

and others on one occasion, but not another (as I find she probably did). She and other identifiable trouble-makers should have been excluded completely and permanently. I find that they were not.

127. Pursuant to section 55 of the Act:

> "Other than a lease, or proposed form of lease, approved under section 55A, every lease of premises, written or otherwise, shall be read as including as terms of that lease the terms set out in schedule 4."

128. As noted above, in paragraph 2 of the notice to quit the applicant alleges that this section has application in the instant case and that the term in schedule 4(2)(c) of the Act is applicable. This schedule contains various implied covenants and conditions on the part of the lessee. (2)(c) states:

> "To conduct himself and to ensure that other persons in the premises with his consent conduct themselves in a manner that will not cause a disturbance or be a nuisance or an annoyance to adjoining or neighbouring occupiers".

129. There is no evidence before me as to whether the lease contained in Exhibit P3, has or has not been approved under section 55A of the Act. There are a number of cases which touch on the question of nuisance and noise generally. Some of those cases I will refer to.

130. In the case of *Sturges v Bridgman* (1879) 11ChD 852 at 865 Thesiger LJ said:

> "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to it's circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the trades or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong".

131. The case of *Tod-Heatly v Benham* (1988)40ChD 80 dealt with a hospital that was established in a residential area for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, and eye, fistula, and other diseases. Cotton LJ said at page 91:

> "No doubt the defendant and those associated with him are doing what they think is very beneficial for the poor people residing round about the place; and, as far as we can judge, it will be a great benefit to them to have the house used in this way on the basis upon which it has been taken. But we have nothing at all to do with that; we have only to put the true construction upon the covenant upon which the defendant is bound".

132. This is an important point, namely that in determining whether a covenant in a lease has been breached the court is not acting as an arbitrator, nor can it proceed on general equitable principles of fairness. Nor can the court balance the competing interests of the applicant and respondent. Only the applicant can waive compliance with a term of it's lease, and if it does not wish to do so, the court cannot do it on behalf of the applicant. A lease is a contract between the lessor and lessee. The court's role is to interpret the terms, determine if a breach has occurred, and if so whether the lessor is entitled to the relief it seeks.

133. His Honour went on to note further at pages 93 to 94:

> "They must decide not upon what their own individual thoughts are, but on what, in their opinion and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V-C.Knight-Bruce in *Walter v Selfe*. It is not sufficient in order to bring the case within the words of the covenant, for the plaintiff's to shew that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done. In my opinion, it is not necessary in order to shew that there has been reasonable ground for annoyance or grievance, to prove absolute danger or risk of infection".

134. In the same case, Lindley LJ said at page 96:

> "Now what is the meaning of annoyance? The meaning is that which annoys, that which raises objections and unpleasant feelings. Anything that raises objections in the minds of reasonable men may be an annoyance within the meaning of the covenant".

135. In the same judgement Bowen LJ said at pages 97 to 98;

> "What is the meaning of the term "annoyance"? It implies more, as it seems to me, "nuisance"…..
>
> It means something different from nuisance….
>
> "Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything that disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must take sensible people, you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case….
>
> And if it is not an unreasonable thing for an ordinary person who lives in the neighbourhood to be troubled in his mind by the apprehension of such risk, it seems to me there is danger of annoyance, though there may not be a nuisance".

136. In the case of *Fraser v Dummett* (1948)67W.N(NSW)129 the court had to consider conduct not by the lessee but of others. At page 130 Jordan CJ said:

> "I think that it would be quite possible for a lessee to be guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers by failing to prevent conduct on the part of persons admitted to the premises which the tenant could have prevented. On the present case it has not been possible to suggest to us anything that the wife could have effectively done to prevent the nuisance or annoyance".

137. In that case the evidence disclosed that the tenants' husband by his drunken and objectionable habits made an intolerable nuisance of

himself to the neighbours. However the Magistrate also found that "the defendant had not personally been guilty of any conduct having the nature of nuisance or noise, nor was any such conduct imputed to her personally, not that she had approved, suffered, permitted or been a party to the same, but she had disapproved of her husbands drinking habits and had tried to induce him to abandon the same". I am not sure that the case would have the same result if it were heard today.

138. In the case of *Downie v Taylor* (1954)VLR 603 at 612 to 613 Sholl J said;

> "It is not, I think, necessary to show in every case repetition of conduct. One act if sufficiently serious may be enough, because of the danger of repetition. But in a proper case the plaintiff may succeed without showing even the probability of repetition, because even an isolated act may in a particular case affect the reputation of premises, or relations between persons in the premises, in a substantial degree. Conduct of an isolated character may be sufficient if it produces in a reasonable man ill-feeling which is likely to continue and to be a source of anxiety, irritation or resentment thereafter. On the other hand, some matters would doubtless be insufficient unless proving a regular course of conduct….
>
> In the case of each of those two incidents the defendant, as I find, may have believed that he had genuine cause to complain to the plaintiff about the interruption in the one case of his bathing and in the other case of his use of the electricity. But in each case he behaved in an excited, rude and threatening manner, wholly unnecessary and unjustified in the circumstances and, in my judgement, inexcusable, having regard to the greater age of the plaintiff. I think that that conduct was capable of constituting and did constitute an annoyance to the plaintiff, been calculated not only to upset him, but to make him apprehensive about further approaches to the defendant. It was calculated to cause strained relations between the parties, and anxiety and resentment on the part of the plaintiff, thereafter. It is not, of course, every outburst by a bad-tempered tenant which should be so regarded, but the evidence must in each case be looked at in the light shed upon the incident by the general history of the relations of the parties, and here I think this conduct is also calculated to lead to a reasonable apprehension of repetition".

139. In the instant case Mr Jefferies was physically threatened by persons at the premises, who also threatened to do harm to his family. It was a serious matter, and one designed to stop Mr Jefferies complaining directly again. In that regard it was successful. There was no evidence from which I could find that the respondent was present when the threats were delivered. But I find that the persons who made the threats were present at the premises with her consent (at least implied), as on the evidence her children were apparently inside the premises at the same time as the two males were also inside and playing loud music.

140. Another case involving conduct by others is *Blee v Kearney* (1962) 79W.N.(NSW)431. In that case at pages 431 to 432 Hardie J stated:

> "The case for possession made on behalf of the lessor was based upon conduct, not of the lessee himself personally, but of his adult son who during the relevant period lived in the subject premises with his parents and who was frequently under the influence of drink and conducted himself in a manner that was annoying and offensive to the occupants of other flats in the building….
>
> the magistrate found that the son in question frequently used offensive and obscene language which constituted a nuisance or annoyance to the adjoining or neighbouring occupiers. He also found that the appellant personally was not guilty of any conduct of the nature referred to, nor had he approved or been party to any such conduct and, on the contrary, had disapproved of his son's drinking habits. However, there was a finding by the magistrate that the appellant had failed to take sufficient steps to prevent the son's conduct, and it is apparent from the statement in the case of the grounds on which the order was made in favour of the lessor that the magistrate was satisfied that the lessee could have prevented the conduct complained of by excluding the son from the premises. …..
>
> I am of opinion that the magistrate came to the conclusion that, although the lessee did not personally commit the wrongful acts, nor did he approve of them, he should be regarded as suffering or permitting them to have taken place, and therefore must accept vicarious responsibility as between himself on one hand and the lessor and also people living in the neighbourhood on the other, for the purposes of the relevant provision of the statute".

141. In the instant case the respondent could have done far more than she did to prevent the nuisance and annoyance herein from happening. In failing to take reasonable steps to prevent offending persons coming to the premises (by serving trespass notices upon them and enforcing them strictly) she must, in my view, be regarded as suffering or permitting it to take place. To simply pack up and leave the premises did not satisfy her obligations under the lease. By suffering the nuisance she was therefore in breach of clause (2)(j) of the lease as alleged in paragraph 1 of the notice to quit.

142. I had cause to consider the Act in the case of *Northern Territory Housing Commission v Taylor*, being an unreported decision delivered on 20 day May 1994. In that case I said at page 7:

> "I find that the word "nuisance" bears its legal technical meaning and does not extend to all acts which might be popularly termed nuisance (*R v Slater* (1881) 8QBD 267 at 272; *Brooking and Chernov "Tenancy Law and Practice Victoria" (second edition)* para 94). I find the word "annoyance" is wider than "nuisance" and includes conduct which:
>
> (a) raises objection and unpleasant feelings in the minds of reasonable persons (*Tod-Heatley v Benham* (1888) 40CHD 80 at 96);
>
> (b) produce in a reasonable person ill feeling which is likely to continue and to be a source of anxiety, irritation or resentment thereafter (*Downie v Taylor* (1954) VLR 607 at 612);
>
> (c) a reasonable man would object to; conduct which would disturb the peace of mind of reasonable persons in the position of the complainer (*Baier & Another v Heinemann* (1962) QdR 192).
>
> Whether particular conduct is in fact an "annoyance" would be a question of fact and degree in which such matters as the locality, usage of the locality, duration of the conduct, timing of the conduct, changes to long standing conduct (and other matters) might be relevant.

I find that the word "adjoining" when it appears in section 47(2)(e) means "next to, touching or immediate". In terms of units it would include those units with a common wall ceiling or floor. In terms of landed properties it would include properties with a shared boundary."

143. In the case of *Mason & Mason v Northern Territory Housing Commission* (1997) NTLR152, Bailey J had cause to consider a not dissimilar issue to the one under consideration now. In that case the Magistrate at first instance had found;

1. activities extending over a period of years at the premises constitute a disturbance, nuisance and annoyance to adjoining or neighbouring occupiers;

2. the persons causing such disturbance, nuisance and annoyance were not the appellants personally, but were a large number of acquaintance's, relatives and extended family of the appellants comprising mainly visitors from Maningrida;

3. on several occasions when a disturbance, nuisance and annoyance to adjoining or neighbouring occupiers had occurred, one of the appellants (Winnie Mason – who is the mother of Anthony Mason, the other appellant) left the premises and slept elsewhere without taking any action to ensure persons on the premises conducted themselves in a manner which would not cause such disturbance, nuisance or annoyance;

4. the appellant Anthony Mason, who was a quadriplegic, is incapable of taking any physical action to remove from the premises, or control the conduct of, anyone causing a

disturbance, nuisance or annoyance; his ability to act is limited to verbal commands;

5. in January 1996, in answer to a question from a Housing Commission employee as to why twenty or more persons were on the premises, the appellant Winnie Mason replied to the effect that she had invited them there, but once there she could not ask them to leave;

6. the appellants made some efforts to exclude from the premises persons causing a disturbance, nuisance and annoyance, in particular by:

   (1) calling for police assistance on a number of occasions;

   (2) obtaining a court order to prohibit Anthony Mason's former wife from entering the premises;

   (3) raising the height of the rear fence of the premises in an attempt to prevent persons climbing over it;

   (4) occasionally used a padlock and chain on the front gate to exclude persons entering; and

   (5) ordering persons to leave the premises – in particular Anthony Mason's brother and sister;

7. some attempts to exclude specific troublemaking visitors had been successful, but generally whatever efforts had been made by the appellants in this regard had been a response "to acute problems arising after discreet intervals in time in response to complaints of neighbours.... passed onto the (appellants) by the Housing Commission";

8. notwithstanding the occasional and, for the most part, largely ineffectual attempts to excludes persons from the premises by command or physical means, the appellants had tacitly allowed the use of the premises by a large number of extended family members, relatives and acquaintances;

9. the tacit permission granted by the appellants amounted to the giving of consent by the appellants to the presence on, and use of, the premises by the large number of persons who had caused disturbance, nuisance and annoyance to adjoining or neighbouring occupiers;

10. neither of the appellants has ensured that such persons, at the premises with the consent of the appellants, conduct themselves in a manner that would not cause a disturbance, nuisance or annoyance to adjoining or neighbouring occupiers.

144. Based on these facts His Honour made the following conclusions at page 155 of his judgement:

> "I do not consider that the construction of the word "consent" posses any difficulties in the present context. It is a common word, widely understood to mean voluntary agreement or "a conscious permitting". Consent may be hesitant, reluctant, even grudging, but if voluntarily and consciously given it remains consent…. The existence, or otherwise, of consent is a question of fact to be decided in the light of all the evidence. Consent can, of course, be implied from conduct. In the present case, the Learned Magistrates reference to "tacit permission", viewed in the context of his reasons for decision as a whole, simply conveys that while the appellants may well have resented the presence of the troublesome visitors, he found as a fact that they consented to such presence. This was a finding open to him on the evidence and in the light of his findings which I have sought to summarise earlier in this judgement.

> It may well be that for cultural reasons the appellants felt themselves obliged to accept the presence on the premises of large numbers of their relatives, members of their extended family and acquaintances. They may well have been reluctant to do so. They may well have preferred that none of the visitors ever came to the premises. None of this, however, contradicts the Learned Magistrates findings that the appellants in fact did consent to the presence of troublemakers."

145. Nora and her family had been attending about three times a week for a long period of time. It is clear that the respondent did not seek to exclude them or remove them every time that they attended. The neighbours were obliged to call the police very often, and did so far more than the respondent did. On about eight to ten occasions police had been called (but not by the respondent) when the respondent was in attendance at the premises. She agreed that there was good cause for the police being called on these occasions, and yet she had not done so herself. On too many occasions the respondent would leave the premises to the troublemakers, knowing and expecting that a nuisance and annoyance would continue from the premises. She simply removed herself to a place where she would no longer be annoyed or have to deal with it, but left the neighbours to suffer.

146. On the evidence taken as a whole that the applicant has satisfied me on the balance of probabilities that on numerous occasions acts which (not only would be but) were an annoyance and nuisance to adjoining neighbours were committed or suffered to be done on the premises. Accordingly, I find that the respondent is in breach of clause (2)(j) of the lease.

147. Whether she also "consented" to Nora and other troublemakers being present is a bit more difficult. She says that she would have preferred that they didn't come there at all, but took no steps to serve any trespass notices upon any of them. No good or satisfactory explanation for this was forthcoming. The frequency of Nora's attendances called

for action, but no appropriate action was forthcoming from the respondent. I find that the respondent by not seeking to exclude Nora and her family had in effect grudgingly consented to her presence at the premises on at least some occasions. She should not have done so. However, I do not find that this was on all occasions. At some times Nora and her associates would turn up intoxicated and the respondent was frightened to deal with them. On such occasions she could not be said to have given consent "voluntarily and consciously". The general nature of the evidence did not enable me to be more specific about dates or times. On some other occasions when Nora turned up the respondent told her to go away and she did, but on other occasions they ignored the respondent. On other occasions people attended when the respondent was not there and simply used the premises to drink and be a nuisance.

148. Further, at pages 158 to 159 of the judgement in *Mason's case* (supra) Bailey J went on to consider whether the Local Court had any discretion as to whether to grant a warrant of possession under the Act. His Honour noted:

> "In substance, the Act provides a code governing the possession of premises….
>
> Act's provisions indicates that the Legislation provides a substantial measure of restriction upon the circumstances in which a lessor can terminate a lease. It should not be overlooked that a lease is a commercial agreement in which both the lessor and lessee undertake various obligations. The Act restricts the grounds upon which a lessor can terminate a lease and thus potentially deprives the lessor of at least some of the value of his property. Against this background, can the legislature have intended that the Local Court would have an overriding general discretion not to order the issue of a warrant of possession where the lessor has established one of the statutory grounds and otherwise complied with the Act?
>
> Considering the Act as a whole, I consider the answer must be no.

> The Act provides a measure of protection for lessee's by restricting the grounds upon which a lessor may issue a notice to quit, by imposing procedural requirements and abolishing the common law right of a lessor to re-enter by way of self help on termination of a lease (whether by expiry of a fixed term or upon contractual breach). Section 47B of the Act expressly limits the operation of an otherwise valid notice to quit in specified circumstances. If the legislature had intended that there should be discretion to mitigate the effects of a valid notice to quit in other circumstances this could – and I'm satisfied would – have been provided for expressly. Section 48(2) does provide the Local Court with power to postpone the date upon which a warrant of possession is to take effect. No limit is placed on the length of such postponement (in contrast to the repealed section 48(7)(a) providing a maximum for postponement of 90 days). Accordingly, the Local Court has a wide discretion to take account of the effect of the warrant of possession on the lessee and alleviate the practical consequences of the lessee's eviction.
>
> I consider that the legislature's intent in part VII of the Act is clear, ie that subject to section 47B, once the Local Court is satisfied that:
>
> (a) pursuant to the Act the Lessor was entitled to give a notice to quit;
>
> (b) the ground specified in the notice has been established; and
>
> (c) such notice complies with the requirements of the Act and has been duly served on the lessee,
>
> the Local Court is required to issue a warrant of possession."

149. I respectfully agree with and adopt the reasoning in this case (which is binding upon me in any event). Accordingly, the fact that the respondent has three children residing with her is irrelevant to my considerations. The issue of a warrant is not a discretionary relief. No balancing of competing interests is permitted. The breaches, which I have found to have occurred, are not minor. In my view, the court would retain a discretion to decline to issue a warrant for minor or one-off breaches (if the one-off breach was not serious), but that is not the

case here. The breaches were serious and ongoing, such that the enjoyment of the property occupied by Berger and Jefferies was significantly and adversely affected for a period of about two years up to the date of them giving evidence.

150. I find that the applicant was entitled to give a notice to quit, as there is no evidence to suggest that the applicant had waived compliance (either directly or indirectly) with the covenants that it now seeks to rely upon.

151. Further, I find that the applicant has made out at least some of the grounds in it's notice to quit; and the notice complies with the requirements of the Act; and was duly served upon the respondent. Accordingly, the applicant is entitled to the warrant that it seeks. I have no discretion, and I am obliged to issue a warrant of possession for the premises.

152. I will hear the parties on the date when the warrant of possession is to take effect from, and any consequential orders that are sought.

Dated this 13th day of October 2004.

_____

**D.TRIGG**
STIPENDIARY MAGISTRATE