

CITATION: *Jetsleaf Pty Ltd t/as Raine & Horne v Meara & Fraser* [2005] NTMC 059

PARTIES: JETSLEAF PTY LTD T/AS RAINE & HORNE

v

STEPHEN MEARA AND KATHLEEN FRASER

TITLE OF COURT: Local Court

JURISDICTION: Residential Tenancies Act

FILE NO(s): 20519823

DELIVERED ON: 13 September 2005

DELIVERED AT: Darwin

HEARING DATE(s): 5 September 2005

JUDGMENT OF: Jenny Blokland SM

CATCHWORDS:

Residential Tenancy – Periodic Tenancy – whether sufficient notice given – whether error in notice capable of cure

Residential Tenancies Act (NT), ss 85, 89, 101, 154

Tenancy Act (NT) (repealed) s 45

Residential Tenancies Act (SA) s 92

Acts Interpretation Act (NT), s 21

Dockerill v Cavanagh (1944) 45 SR (NSW) 78

Hansard, Legislative Assembly (NT), 10 August 1999

REPRESENTATION:

Counsel:

Appellant:	Ms Farmer
First and Second Respondent:	No Appearance
Commissioner's Delegate	Mr Lanyon

Solicitors:

Appellant:	Withnalls
First and Second Respondent:	No Appearance

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 059
Number of paragraphs:	18

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

No. 20519823

BETWEEN:

**JETSLEAF PTY LTD T/AS RAINE &
HORNE**

Appellant

AND:

**STEPHEN MEARA AND KATHLEEN
FRASER**

First and Second Respondent

REASONS FOR JUDGMENT

(Delivered 13 September 2005)

MS JENNY BLOKLAND SM:

Introduction

1. This is an appeal against the determination of the Delegate of the Commissioner of Tenancies made on 16 August 2005. The learned delegate found that there was a periodic tenancy being a holding over under a previous written tenancy agreement. The learned delegate also found that the Landlord sent a notice in letter form dated 15 June 2005 which purported to comply with s 89 and 101 of the *Residential Tenancies Act*. He found that the notice was posted to the address of the tenant at 4 Warrego Court, Larrakeyah N.T. on 15 June 2005. He found that the notice was deemed to have been served in the ordinary course of post on 16 June 2005. He found that *s 89 Residential Tenancies Act* requires 42 days notice of termination and that the 42 days notice must be calculated to be exclusive of the service

date. The learned delegate found the notice given was only 41 days, (the period 17 June 2005 to 27 July 2005 inclusive).

2. The learned delegate referred to s 85 *Residential Tenancies Act*, rejecting the argument that the notice was nevertheless effective. He concluded that the periodical tenancy had not been terminated by the notice.

The Appeal

3. The landlord appealed to the Local Court, the grounds of appeal are as follows:
 - (a) That the Delegate of the Commissioner of Tenancies misconstrued the terms of the notice to quit dated 15 June 2005 on the evidence placed before him.
 - (b) That the Delegate of the Commissioner of Tenancies incorrectly found the notice to quit to take effect at 41 days and 42 days (sic).
 - (c) In the alternative to (b) that the Delegate of the Commissioner of Tenancies failed to consider or apply section 85 of the *Residential Tenancies Act*.
 - (d) That the Delegate of the Commissioner of Tenancies misapplied the effect and operation of section 85 of the *Residential Tenancies Act*.
4. At the commencement of the Appeal Ms Farmer confirmed the advice given to the learned delegate that the first respondent Mr Meara had vacated the premises six months prior to the hearing before the learned delegate. Ms Farmer also advised the court that the remaining tenant, Ms Fraser had vacated the premises. For practical purposes there would appear to be no adverse consequences flowing to Mr Meara and Ms Fraser in the event of a decision that was unfavourable to them. Neither Mr Meara nor Ms Fraser appeared at the hearing. Mr Lanyon appeared amicus and made submissions.

The factual aspects of the appeal

5. On behalf of the Appellant Ms Farmer tendered the affidavit of Sally Paynter sworn on 12 August 2005 enclosing the notice to terminate the tenancy. That notice is dated 15 June and Ms Paynter deposes to forwarding the correspondence on 15 June 2005 to the tenants.
6. In part, that letter reads:

“We have been instructed by the Landlord of the above property that, as from the 27 July 2005 this property will no longer be available for rent and that we will require vacant possession. A final inspection will be carried out within 3 working days of you vacating the premises. Failure to return the keys before 10.00am (28/07/05) will incur an additional day(s) in rental”.
7. I should mention that it is not in dispute that there was a periodic tenancy in existence at the relevant time, being a holding over under a previous written tenancy agreement. There is also no dispute with the Appellant’s submission that the notice was deemed to have been served on 16 June 2005 in the ordinary course of post. Section 154 *Residential Tenancies Act* provides service may be effected by post to the person’s last known place of business or residence or postal address. Section 28(1) *Interpretation Act* provides that “Where in an Act a period of time dating from a given day, act or event is prescribed, allowed or limited for any purpose, the time shall be reckoned exclusive of such day or of the day of such act or event”. It is not in contest that the relevant period is 42 days notice when notice is given in these circumstances by a Landlord. Section 89 *Residential Tenancies Act* provides: “A landlord may terminate a periodic tenancy without specifying a ground for the termination by 42 days notice to the tenant in accordance with section 101”. In my view the application of these rules means that the relevant date at the earliest was 28 July 2005.
8. On my reading of the letter set out in part in paragraph six above, it purports to terminate the tenancy a day earlier than is allowed under the *Residential*

Tenancies Act. I agree with the learned Delegate on that point. Further, to terminate a periodic tenancy pursuant to the *Residential Tenancies Act*, the notice must specify (amongst other matters), “the date on which the tenant is required to give up vacant possession of the premises to the landlord” (s 101(1)(b)). This notice gives the wrong date for vacating the premises (27 July 2005), although there is some ambiguity when it reads of “failure to return the keys by 28/07/05.....”.

Consequences of the Error in the Notice

9. Ms Farmer argued strongly that due to the error in date, the landlord ought not be required to “start again” on the 42 day time period. After all, she argued, on a weekly periodic tenancy, only one week’s notice would need to be given at law; on a fortnightly periodic tenancy, 14 days and so forth. There was discussion before me that the landlord had attempted to correct the error and gave the tenant a further week but the effect of the ruling of the delegate was that the landlord would have to start the 42 days afresh.
10. The landlord relied on s 85 *Residential Tenancies Act* that provides as follows:

“85 Termination of periodic tenancy effective despite inadequate notice.

A notice terminating a periodic tenancy under this Act has effect even though-

- (a) the period of notice is less than would, apart from this act, have been required by law; or
 - (b) the date, stated in the notice, on which the tenancy is to end is not the last day of a period of the tenancy”.
11. The landlord’s argument is that this section cures any defect or error in the notice. At first blush there is an attraction to the argument, however, on deeper analysis and seeing periodic tenancies in context in this legislation, I cannot agree with the landlord’s argument. In terms of the legislative

history, I have checked the Parliamentary Record and from my reading there is no specific reference to s 85 by the Honourable Minister, Mr Baldwin (Debates 10/08/99 Second Reading Speech). Ms Farmer pointed out to me that the previous legislation, *The Tenancy Act* provided a stricter approach, namely by virtue of s 45 that provided:-

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

Ms Farmer invited me to conclude that the newer *Residential Tenancies Act* intended to give more flexibility by virtue of s 85 when compared to the former s 45 of the repealed Act.

12. In my view the former s 45 and the current s 85 do not manifest the legislative intent being argued for the Appellant. The previous “Notice to Quit” covered a range of different circumstances and types of tenancies and was not specifically directed to periodic tenancies.
13. Section 85 *Residential Tenancies Act* is specifically directed to periodic tenancies to, in my view support the other provisions of the *Residential Tenancies Act* regulating periodic tenancies. The nature of periodic tenancies is set out in *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78, Jordan C. J. states:

“Leases are thus of three types, leases for fixed terms, leases at will, and leases creating periodic tenancies. The first terminates at the expiration of the term. A lease at will is terminable by either party at any time, and no period of notice is necessary unless the conditions of the lease require it. A lease for a periodic tenancy, such as a lease from year to year, quarter to quarter, month to month, or week to week, continues indefinitely until either party terminates it by giving notice equal to the length of the period and terminating at the end of the complete period”.

14. Clearly, in the case of periodic tenancies governed by the *Residential Tenancies Act*, there are two periods of statutory notice, 42 days notice

when the grounds are not specified by the landlord (s 89) and 14 days notice when the grounds are not specified by the tenant (s 94). S 85(a) makes it clear that the old rules (required by law) have been subsumed by the statute in terms of notice. It clarifies that those rules do not apply to tenancies governed by the *Residential Tenancies Act*. To interpret the words “apart from this Act” as meaning that the periodic tenancy rules at law may apply (rather than “the Act”) would frustrate a very large part of the legislative regime. Similarly, s 85(b) in my view does permit notice to be given during any stage in the periodic tenancy, not the last day of the tenancy, thus relieving certain restrictions that existed at common law. Similarly, when s 85 is read with s 101, it is clear that the requirements under s 101 (relevant here is the date specified for giving up possession), cannot be effective unless there is compliance: (s 101(3) *Residential Tenancies Act*).

15. The only comparable section I have found is s 92 *Residential Tenancies Act* (S.A), however regrettably I have been unable to find any relevant authorities. To the extent that the “heading” of s 85 might give weight to the Appellant’s argument, it is, with respect misleading and is not in any event part of the Act. I had initially thought about a case stated to the Supreme Court as the argument seemed to potentially take tenancy law into a new dimension. Although I have been unable to find an “on point” authority, it is now my clear view that the delegate was correct. The Appellant can of course take the matter further if this ruling is not accepted.

Orders

16. The appeal will be dismissed. These reasons are to be provided to the parties by close of business 13 September 2005. I will list the matter for mention on 15 September 2005 at 9.45am to make the formal order and hear any arguments relating to costs.

Dated this 13th day of September 2005.

Jenny Blokland
STIPENDIARY MAGISTRATE