

CITATION: *Byrnes v Salter* [2006] NTMC 013

PARTIES: PATRICIA ALISON BYRNES

v

BRYAN JOHN SALTER

TITLE OF COURT: Local Court

JURISDICTION: Residential Tenancies Act

FILE NO(s): 20521013

DELIVERED ON: 9 February 2006

DELIVERED AT: Darwin

HEARING DATE(s): 10 January 2006

JUDGMENT OF: Mr V M Luppino

CATCHWORDS:

Residential Tenancies – Appeal from decision of Delegate of Commissioner of Tenancies – Rent paid in advance – Repayments of rent paid in advance on termination – Inference to be drawn from a party’s failure to call evidence – Admission of fresh evidence

Residential Tenancies Act, s 43

Jones v Dunkel (1959) 101 CLR 298

REPRESENTATION:

Counsel:

Appellant: In Person

Respondent: In Person

Solicitors:

Appellant: In Person

Respondent: In Person

Judgment category classification: C

Judgment ID number: [2006] NTMC 013

Number of paragraphs: 18

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

No. 20521013

BETWEEN:

PATRICIA ALISON BYRNES
Appellant

AND:

BRYAN JOHN SALTER
Respondent

REASONS FOR DECISION

(Delivered 9 February 2006)

Mr V M LUPPINO SM:

1. This is an appeal pursuant to the *Residential Tenancies Act* (“the Act”) from a decision of the Delegate of the Commissioner of Tenancies (“the Delegate”). The Delegate found that the tenant (the Respondent herein), was entitled to repayment of the sum of \$1,291.00 for rent paid in advance consequent upon the early termination of the relevant tenancy.
2. Appeals to this Court from a decision of the Commissioner of Tenancies are as of right. An appeal is by way of a de novo hearing with power for the Court to hear fresh evidence. The Court is not bound by the rules of evidence in any event (section 150 of the Act).
3. As both parties were unrepresented I took great care in ensuring that all relevant documents which were in evidence before the Delegate were put in evidence before me. In addition the Appellant indicated that she had fresh evidence to present. That evidence consisted of various records of the

Commissioner of Police. The Appellant told me that she was unaware of the existence of these documents at the time of the hearing before the Delegate and that the documents were relevant to establishing the termination date. I allowed the fresh evidence.

4. Although the Appellant had a number of allegations of breach of the terms of the tenancy by the Respondent, the appeal before me related solely to the question of the extent of the order for repayment of the advance rental. More precisely, there was no dispute that an early termination had occurred. What is disputed is when the actual termination occurred. The Appellant claims that it was on 5 May 2004. The Respondent claims that it was on 16 February 2004. The Delegate accepted the Respondent's version and made an order accordingly
5. By way of background, the appeal relates to a tenancy agreement entered into in relation to premises at Lot 2321 Leonino Road Darwin River. The actual "Lease Agreement" entered into by the parties was in evidence. The terms of that agreement are set out here under:

Lease Agreement

Between

Trish Byrnes and

Brian Salter

It is agreed that Brian Salter will lease the Block listed below from Trish Byrnes for 12 months at a weekly rate of \$60.00 per week. Total sum (\$3,120.00) to be paid in advance.

Details

Block is Lot 2321 Leonino Road Darwin River.

Brian is to lease the rear half of the Block with access via the front.

Trish is to pay all power bills.

Brian has access to the main dwelling with the exception of locked rooms where Trish's personal possessions are stored.

Brian will keep an eye on the residence and keep plants watered and the breaks maintained.

Brian has access to the phone on condition he pays for his own calls.

Brian can park his caravan adjacent to the house whilst Trish is away to give the impression that the residence is still occupied.

Lease commences on payment of the advance payment.

6. The agreement seems to contemplate that although the Respondent had some limited access to the residence on the relevant property, he would reside in his own caravan on the site. The Delegate was of the view that the agreement entered into by the parties was subject to the Act as it fell within the definition of *tenancy agreement* in section 4 of the Act. I agree.
7. The agreement stipulates that the commencement date was to be the date of the advance payment. The Delegate found that the commencement date was the 17 July 2003 which is the date on which the "Lease Agreement" was purportedly signed. There was some evidence about the date of the advance payment. There was the suggestion by the Respondent that he did not move in until a date in August. There was also some evidence suggesting that the advance payment was not paid on 17 July 2003. It is clear however on the evidence that 17 July 2003, if not the actual date when the advance rent payment was made, was intended by the parties to be the commencement date of the tenancy and I so find.
8. The Appellant challenged the Delegate's acceptance of the Respondent's evidence regarding the date of the eviction. Despite it not being relevant to the issue in the appeal, she also wished to revisit the question as to whether a person by the name of Barbara Finlayson was actually living on the premises as opposed to being a caretaker for a brief period. She also raised the question of the condition that the residence was left in. The Appellant

claimed that she did not get a fair hearing before the Delegate. She claimed that the Respondent was undertaking criminal activities on the premises and had photos to prove that. She complained that the Delegate would not receive those photos.

9. Given the nature of the issues before the Delegate, which are the same issues before me, in my view the Delegate was right in refusing to hear evidence of the nature and effect that the Appellant refers to. It is quite simply irrelevant to the issue at hand. Both parties have ongoing claims against the other. The Appellant has made allegations regarding the use of the premises by the Respondent. She claims that the Respondent's use has not been in accordance with the agreement, particularly in terms of the use of the actual residence and the involvement of Barbara Finlayson. She also claims that the premises were left in a very poor condition. The Respondent claims a loss of income on the basis that the Appellant retained possession of the Respondent's plant and equipment used in the course of his business for some period of time. Those are separate claims, they are being pursued by separate legal action and are not relevant to the appeal.
10. It appears to me that much of the evidence was of background relevance only. It serves as useful background material to put the events leading up to the termination in context. It can and does assist in determining which version of events should be preferred. However when it is all said and done, given that the date of the termination is the only contentious issue, whether the termination was prompted by the improper use of the premises by the Respondent or the state of cleanliness of the premises or the involvement of Barbara Finlayson does not essentially matter. What matters is that an eviction has occurred and that the Act provides that on termination, whether by eviction or otherwise, repayment must be made of any rental paid in advance.
11. Section 43 of the Act provides as follows:

- (1) If rent is paid in advance and the tenancy is terminated before the end of the period for which rent has been paid, the landlord must, as soon as reasonably possible, refund to the tenant the appropriate proportion of the amount paid as rent in advance;

Penalty: 20 penalty units.

- (2) Subsection (1) does not apply in relation to rent, or a part of rent, paid in advance that may be applied towards other liabilities of the tenant to the landlord in accordance with this Act.
- (3) The Commissioner may, on the application of the tenant, order the landlord to refund to the tenant the proportion of the amount paid as rent in advance (not being money for which the tenant is liable under this Act to pay to the landlord as rent or otherwise) that the Commissioner thinks fit.

12. In summary form, the Appellant's evidence was as follows:

- (1) The Appellant returned to the premises on 23 January 2004 because she was informed by a friend that the place was not being looked after.
- (2) On her return she claimed that the house was filthy, there was rubbish within the house, maggots in the kitchen and in the fridge, her new mattress had been urinated on and the place was generally not in a habitable state.
- (3) That on her return the Respondent was not there and Barbara Finlayson was living in the house (not the caravan).
- (4) That the Respondent returned to the premises approximately 31 January 2004.
- (5) That the three locked rooms which the Respondent was not to have access to were unlocked and had been used.
- (6) That Barbara Finlayson told her that she had been living there since September 2003.

- (7) That the Respondent was regularly absent from the premises from a date in February.
- (8) She conceded that at some point the Respondent removed his caravan from the premises but was vague as to when this occurred.
- (9) She claims that between the same date in February as is referred to in sub-paragraph 7 hereof and the date that she claims the eviction occurred (5 May 2004), she left numerous messages for the Respondent at the Litchfield Hotel.
- (10) The Appellant claims that she actually evicted the Respondent from the premises with the assistance of the Police on 5 May 2004. (She gave the date of 9 May 2004 as the eviction date in the hearing before the Delegate. The date has now been refined as she has obtained some documentary evidence in the form of Police Promis records).

13. The Respondent's evidence was as follows:

- (1) That in late December 2003 or early January 2004, as he had to travel out of the Territory for an extended period, he arranged for Barbara Finlayson to stay on to care for premises in his absence.
- (2) That the original "Lease Agreement" had been varied allowing him to reside in the house without restriction.
- (3) That there were no locked rooms in the house at the commencement of the tenancy and that in any event the use of those rooms was permitted by the variation referred to in the preceding sub-paragraph.

- (4) That initially upon her return the Appellant ordered Finlayson off the premises but then relented and let her stay on.
- (5) Finlayson stayed on the premises until again ordered off by the Appellant which was on approximately 2 February 2004.
- (6) Approximately two weeks later ie, 16 February 2004, the Respondent says that the Appellant evicted him from the premises against his wishes. He said that he removed his caravan from the premises.
- (7) He says that upon his eviction he took up temporary residence with friends and then at the Litchfield Hotel where he resided from 8 March to 10 June 2004. (This was largely corroborated by a letter purportedly written by a director of the proprietor of that Hotel.)
- (8) The Respondent claims that the Appellant retained some of his personal possessions and refused to return those items despite repeated attempts by him to retrieve those items. He said that least one such attempt was in the company of Police.
- (9) He said that at some point the Appellant, again in the presence of the Police, served him with a Trespass Notice which then prevented him from retrieving the rest of his belongings.

14. I admitted some further evidence that was not available before the Delegate. The most relevant is exhibit 2. This comprises a bundle of Police Promis entries relating to incidents on 6 May 2004, 11 May 2004 and 26 September 2004. These were tendered by the Appellant. It was by reference to these documents that the Appellant refined the eviction date to 5 May 2004 i.e. the day proceeding the date of the first Promis record. It is of great significance however that for whatever reason the Appellant has not produced and put in evidence Promis records relating to the 5 May 2004. It is clear that such

records exist as they are referred to in the Promis records of 6 May 2004. In part, the incident description in the Promis record of 6 May 2004 reads “...promis 932985 refers to disturbance yesterday”. Query whether this refers to the occasion when the Respondent says he was served with a trespass notice. In my view this is critical. Clearly something occurred on 5 May 2004 and clearly documents exist relative to that. The Appellant claims that the Police assisted in the eviction of the Respondent on 5 May 2004 yet other than making that bare claim she has not produced the available corroborating evidence. I would consider it unlikely in any event that the Police would get involved, absent some court order, in a civil dispute and in particular in the eviction of a tenant in the way which the Appellant described. Leaving that aside, I think this is an obvious case for an adverse inference to be drawn against the Appellant consequent upon her failure to provide the relevant documentary evidence. In accordance with *Jones v Dunkel* (1959) 101 CLR 298 I infer that the Police Promis records referred to would not have assisted the Appellant’s case. In terms of the issues before me, that is quite a significant inference notwithstanding that *Jones v Dunkel* does not allow a failure to produce evidence to be used in a positive way.

15. Additionally I consider it to be remarkable in view of the allegations the Appellant makes, that if the premises were as bad she describes them that she did not take immediate steps to evict the Respondent and Finlayson upon her return in January 2004. I would have expected the Appellant to have been outraged to find that her personal property was being used, that her new mattress had not only been used but had been urinated on and that the premises were so filthy that maggots abounded. Instead the evidence suggests that she permitted Finlayson to stay on, for close to 2 weeks and for another two weeks thereafter in the case of the Respondent and this is on the Respondent’s version. On the Appellant’s version, she allowed the Respondent to stay on until May, which appears even more unlikely.

Moreover, the Appellant's evidence that she was leaving messages for the Respondent at the Litchfield Hotel, a place where the Respondent claims to have been living at after the eviction and which is largely corroborated, fits better with the Respondent's version.

16. Having regard to the evidence produced and the adverse inference to be drawn against the Appellant for her failure to produce evidence in support of the events involving Police on 5 May 2004, in my view the evidence of the Respondent is to be preferred and on the balance of probabilities I find that the tenancy was terminated on 16 February 2004.
17. There being no dispute with the calculation of quantum made by the Delegate, and as I agree with that calculation in any event, on authority of section 150 (4)(a) of the Act, I confirm the order made by the Delegate.
18. As this decision is being handed down by posting it to the parties, I give the parties liberty to apply within 21 days of the date of this decision in relation to any ancillary matters.

Dated this 9th day of February 2006.

V M LUPPINO SM
STIPENDIARY MAGISTRATE