CITATION: *Brown & Lemmers v Elenis & Elenis* [2007] NTMC 004

PARTIES:	MELISSA JANE BROWN STEVEN JOE LEMMERS v HRISTOS ELENIS ANASTASIA ELENIS
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Residential Tenancies Act
FILE NO(s):	20623205
DELIVERED ON:	23 January 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	22 December 2006
JUDGMENT OF:	Ms Oliver SM

CATCHWORDS:

DISCRETION OF COMMISSIONER – ORDER FOR TERMINATION OF TENANCY = SS96A & 100A RESIDENTIAL TENANCIES ACT – SERVICE BY POST – S25 INTERPRETATION ACT

REPRESENTATION:

Counsel:

Appellants:	In Person
Respondents:	By Agent, Elders Real Estate

Solicitors:

Appellants:	N/A
Respondents:	N/A

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 004
Number of paragraphs:	30

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

No. 20623205

BETWEEN:

MELISSA JANE BROWN
STEVEN JOE LEMMERS
Appellants

AND:

HRISTOS ELENIS
ANASTASIA ELENIS
Respondents

REASONS FOR DECISION

(Delivered 23 January 2007)

Ms Sue Oliver:

1. The appellants have appealed to the Local Court against an order of the delegate of the Commissioner for Tenancies terminating their tenancy and ordering vacant possession of the residential premises they occupy. The grounds of the appeal are that the orders ought not to have been made in all the circumstances; first, because it was unreasonable and, secondly that the delegate had made an error in law in finding that he did not have a discretion to not make an order for termination under section 100A of the *Residential Tenancies Act*. The appellants sought orders setting aside the order of the Delegate. At the hearing the appellants were represented by the appellant Melissa Jane Brown and the respondents were represented by their agent Ms Wegener of Elders Real Estate. At the conclusion of the hearing I reserved my decision and ordered that the order of the Commissioner of Tenancies be stayed until 4pm on the 2nd of February 2007.

2. The history of the matter was set out in an affidavit of Melissa Jane Brown dated the 12th day of September 2006. In summary, Elders Real Estate on behalf of the respondents had issued a notice pursuant to section 96A of the *Residential Tenancies Act* in relation to a breach of the term of the Tenancy Agreement by failing to pay rent where the rent has been in arrears for not less than 14 days. A copy of that notice was tendered. The notice is dated the 1st of August 2006 and contains a footnote that it was mailed to the tenants on 3 August 2006.

3. Ms Brown's affidavit puts forward an explanation as to why the rent payment was not received as required. She attested that as she was marrying in July 2006 she attempted to perform an advance payment for rent by way of an online banking system. She was unaware that the rent had not gone through because she had been expecting to receive, into her bank account, repayment from a friend of approximately $1000.00 and had been assured that the amount would be received the week prior to her wedding. When she checked the balance of her account she assumed that the rent had come out and the monies owed by the friend had been put in. Her affidavit also states that an inspection of the premises was carried out on or about Thursday the 20th of July 2006 but that she was not informed by the agent at that time that there was any problem with rent monies not having been received. She says that she collected the s96A notice from Elders from her letter box at the residential premises on a Thursday night at approx 5:45pm. The next morning she received a phone call from an employee of Elders who advised her that the notice had expired the previous day. If that is correct, and there was no challenge to this evidence, it is clear that she must have received the notice on Thursday the 10th of August 2006 which is the date on which the notice was said to expire. I note that notwithstanding that the notice itself says that it was mailed to the tenant on the 3rd of August 20006 an affidavit of service tendered by the respondent attests that the notice was posted at 3:30pm on Tuesday the 1st August 2006.

4. Ms Brown's affidavit states further that the employee "April" from Elders informed her that the owners were being "completely unreasonable" and were not willing to negotiate and simply wanted vacant possession. It is apparent that an application must than have been made by the respondents, or on their behalf, to the Commissioner for Tenancies pursuant to s126 of the Act. By that time Ms Brown had paid $400.00 into the agent's bank account and there was another $400.00 outstanding in addition to the usual rental of $800.00 which she had promised to pay on Thursday that week. On the initial hearing the matter was adjourned for one week for the owner to consider withdrawing the request for vacant possession. When the matter came back before the Commissioner the $1200.00 had been paid but the respondents still wished to seek vacant possession. The delegate of the Commissioner is said to have found this to be unreasonable because the failure to pay rent was a one off occurrence but that he did not believe that he had a discretion pursuant to section 100A of the *Residential Tenancies Act* not to make the orders for termination and vacant possession that were sought. None of these facts were disputed by the representative of the respondents.

5. The appellants assert that a discretion does reside in either the Commissioner or the Court under section 100A of the Act because that provision it is expressed in discretionary terms, that is, the section provides "that the Commissioner or a Court **may**, on the application of a landlord, terminate a tenancy and make an order for possession if satisfied that the tenant:

    (a) Has been given notice in accordance with section 96A or 96B; and

    (b) Has failed to remedy the breach as required by the notice."

S100A(2) in relation to notices given under section 96C of the Act is in similar terms.

6. As is said in *Pearce & Geddes Statutory Interpretation in Australia* (6th edition) at page 330 “One of the more difficult problems encountered in the interpretation of legislation is determining whether an office holder or individual is obliged to do something on one hand or has a discretion as to whether or not to do the thing on the other. …..Although the presence of words such as “shall,” “must” or “is required” suggest some kind of obligation, whilst words such as “may”; “if is lawful” or “if he or she thinks fit” suggest a discretion in the officeholder or person concerned, notwithstanding the efforts of the legislatures….the courts have not adopted any rule to that effect.” Consequently, although the word “may” suggests a discretion on the part of the office holder or person concerned it is not necessarily the case that such a provision is to be viewed as discretionary rather than obligatory. For example it may be that the use of the word “may” indicates simply that the Commissioner or the Court under section 100A is empowered to make orders terminating a tenancy upon satisfaction of the requirements of s100A(1)(a) and (b) and of possession of the premises rather than conferring a discretion as to the making of those orders.

7. The starting point for determining whether a provision is discretionary or obligatory is set out in the joint judgement of the High Court in *Ward v Williams* (1954-55) 92 CLR 496 at 505-506. In simple terms whilst starting from a prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning, the true meaning is to be ascertained by considering the construction of the Act taken as a whole. According to that judgement, the burden lies on the party who asserts that the word “may” has a compulsory meaning to show that it does have such a meaning.

8. Section 96A and 96B and 96C were inserted into the *Residential Tenancies Act* by the *Residential Tenancies Act Amendment Act 2005* (“the 2005 Act”). Section 100A was likewise inserted by the same amending Act. Section 96A replaced the former section 87 of the Act whilst sections 88 and 93 were

replaced by sections 96B and 96C respectively placed in a new Division 3A – Notice of intention to terminate for failure to remedy breach.

9. The former section 87 is in very similar terms to the current section 96A with one important exception. Section 87 had provided that where a notice of breach of a tenancy agreement by failure to pay rent had been given, the tenancy automatically terminated on the day specified in the notice as the termination day and the tenant was to give up vacant possession of the premises to the landlord on the termination day. Section 96A on the other hand provides in terms of the notice to be given under sub section (2) that if the tenant does not remedy the breach as required the landlord intends to apply to the Commissioner or a Court for an order for termination of the tenancy and possession of the premises. In other words, section 87 provided for automatic termination of the tenancy on the expiration of the period of notice given in the event that the breach was not rectified, whereas the current section 96A provides instead that the landlord may, if the breach has not been remedied within the time period provided for in the notice, apply to the Commission or a Court for an order for termination of the tenancy and possession of the premises. The same distinction is made in relation to section 96B, that is, breach of a term of a tenancy agreement by a tenant other than for a term relating to payment of rent and for breach of a tenancy agreement by a landlord. There is no obligation to do so and, absent an application by the landlord, the tenancy remains on foot. A 14 day period is allowed for application to be made.

10. In his second reading speech the Attorney General made reference to these amendments.

> "The Act currently provides that a landlord or tenant may give the other a notice of breach of a tenancy agreement, and if the breach is not rectified by the dates supplied in the notice, the tenancy agreement is automatically terminated. This automatic termination can at times be undesirable, particularly if the parties come to an agreement but the notice is not withdrawn as required under the Act.

> The Bill amends the Act so that if a notice of breach of tenancy agreement is given and the breach is not remedied, then application can be made to the Commissioner or, as is currently the case in some circumstances, the Court, for an order terminating the tenancy and giving an order for possession. This is similar to the situation in other jurisdictions."

11. It is apparent then that the intent of the Bill to amend the *Residential Tenancies Act* was to remove automatic termination of a tenancy agreement upon particular breaches by either a tenant or a landlord and instead establish a system by which following failure of either a tenant or a landlord to rectify a breach, of which a notice is given under either section 96A, 96B or 96C, an application could be made to the Commissioner or a Court for an order terminating the tenancy. The Honourable Attorney General in his second reading speech gave one example of why an automatic termination was no longer desirable. Using that example, if the intent of the Legislature were, that notwithstanding the removal of a provision for automatic termination of a tenancy agreement, the Commissioner or the Court was nevertheless bound, upon being satisfied that a notice was provided in accordance with the requirements of the Act and that the breach had not been remedied in the time frame given under the notice, would in effect simply shift automatic termination to the time at which the Commissioner or the Court heard an application. This could lead to a circumstance in which, using again, the example provided by the Attorney General, a tenant who had remedied the breach of failure to pay rent but had not done so within the notice period given, would, if the landlord decided not to proceed with an application, not face any consequence from that breach whereas a similar tenant faced with a landlord who nevertheless determined to make application to the Commissioner would automatically face a situation in which their tenancy would be terminated and an order for possession made. It may be noted that landlords would similarly be in such a position in relation to their respective tenants where a tenant gives notice of a breach to be rectified by the landlord. Such an outcome seems inconsistent with one

of the objectives of the Act, as stated in section 3, which is to fairly balance the rights and duties of tenants and landlords. In the examples I have given, termination of the tenancy becomes a matter of form and whim of the party giving the notice as opposed to the Commissioner or the Court being able to give fair consideration as to whether the breach in question is such as should justify termination of the tenancy notwithstanding that the breach was not remedied within the time period provided for under the notice. It would add an unnecessary step into a process of automatic termination, creating extra cost and time for the parties involved.

12. I note also that in changing the process for determining termination of tenancy pursuant to sections 96A, 96B or 96C that the process is placed under the general scheme for determination of applications by the Commissioner. Part 14 entitled "Dispute Resolution" provides for a system of pre-conciliation and conciliation conferences and, where such processes are not successful in achieving a negotiated settlement, for an enquiry to be held by the Commission in relation to a matter subject of an application.

13. In my view then the proper construction of section 100A of the *Residential Tenancies Act* is that it requires the Commissioner of Tenancies or a Court to first, determine whether the requirements of sub-sections (a) and (b) have been met, that is, that the tenant has been given notice in accordance with section 96A and secondly that the tenant has failed to remedy the breach as required by the notice. However the Commissioner or the Court may nevertheless determine that in the circumstances an order for termination of the tenancy agreement should not be made because of circumstances peculiar to that case. Such matters might include for example that the rental monies that were in arrear have now all been paid, the frequency of the failure to pay rental monies on time, and, any circumstances which explain or mitigate the failure to pay the rental monies due on the occasion in question. Only following a consideration of all of those circumstances can

the objective of the Act to fairly balance the rights and duties of tenants and landlords be properly achieved.

14. One further matter follows from what I have said which is in relation to the compliance with the requirements for notice under section 96A. Section 96A(2)(d) refers to the time period to be provided in the notice within which the tenant is required to remedy the breach. It provides that the tenant is required to remedy the breach before the date specified in the notice which must be more than seven days after the notice is given. Section 96A does not provide for the manner in which a tenant is to be given notice. However section 154 provides for the service of notices in the following terms

> "Unless otherwise provided by or under this Act, a notice required by or under this Act to be given to a person may be delivered personally to the person or sent by post addressed –
>
> (a) in the case of a natural person – to the person's last-known place of business or residence or postal address; or
>
> (b) in the case of a body corporate –
>
> (i) if it is a company within the meaning of the Corporations Act 2001 – by serving a document in accordance with section 109X of that Act; or
>
> (ii) if it is a registered body within the meaning of the Corporations Act 2001 – by serving a document in accordance with section 601CX of that Act."

15. The addition of service upon a postal address was an amendment also made by the 2005 Act.

16. Section 154 does not however make provision for the time at which service of a notice posted to a residence is deemed to occur. This is of particular importance because the notice given under s96A requires the breach to be remedied by a date given in the notice which must be more than 7 days after the notice is given. In this case the notice required the breach to be remedied before the 10th of August 2006. Notice would therefore be

required to be given no later than the 2nd of August 2006. This is because section 28 of the Interpretation Act provides in relation to the reckoning of time

> (1) 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.

Accordingly, the day on which the notice is received is not counted into the period of the 7 days notice so that the day before which the breach is to be remedied must be more than 7 days after and exclusive of the date on which the notice is served. It follows then if the 10th is the day before which the breach must be remedied and the 10th is at least 7 days after and exclusive of the date of service then service must be no later than the 2nd of August.

17. Until the 1st of July 2006 the *Interpretation Act* contained a provision that dealt with service of notices. The then section 25 provided, in similar terms to provisions in other jurisdictions interpretation legislation (for example section 29 of the Commonwealth *Acts Interpretation Act*):

> "Where an Act authorises or requires a document, parcel or other thing to be served by post, whether the expression serve or give or send or any other expression is used, service shall be deemed to be affected by properly addressing and posting it by prepaid post, and service is deemed to been affected at the time at which the package would be delivered in the ordinary course of post."

18. Accordingly in the past it would have been possible to show the date for service of a notice under s96A by reference to delivery in the ordinary course of the post. However, section 25 of the *Interpretation Act* was repealed and replaced by a new section 25 by the *Justice Legislation Amendment Act* (No. 13 of 2006) by the time of the service of the notice to the appellants in this matter. The current section 25 provides as follows for

various modes of service of a document (which includes notices) on an individual or body.

> (1) A person may serve a document on an individual or body (the "recipient"):
>
> (a) by giving it to:
>
> (i) if the recipient is an individual – the recipient; or
>
> (ii) if the recipient is a body – an executive officer of the body; or
>
> (iii) in any case – a person authorised by the recipient to receive the document; or
>
> (b) by sending it by prepaid post addressed to the recipient at the recipient's address; or
>
> (c) by sending it to the recipient by fax; or
>
> (d) by leaving it, addressed to the recipient, at the recipient's address with someone who appears to be at least 16 years old and appears to live or be employed there.

The “address” of a recipient for the purposes of this section is defined by subsection (6) to include the latest home and business addresses of the recipient that are recorded for a law in force in the Territory. It is apparent from the terms of the section that “address” will not therefore include a postal address where the postal address is not a residential address. In other words postage to a post office box is not a mode of delivery allowed for service under section 25.

19. Section 25(2) provides that a document served under 25(1)(b), that is sent by prepaid post, it is taken to be served when it would have been delivered in the ordinary course of post.

20. It is apparent that the difference between the former section 25 and the current section 25 of the *Interpretation Act* is that the former provision dealt with the question of **when** service was deemed to take affect where an Act authorised or required a document to be served by post and therefore was

able directly to apply to s154 of the *Residential Tenancies Act* which provided for the **means** of service of a notice under the Act. The current section 25 however provides instead for various **means** by which documents may be served with subsection (2) providing for **when** service is deemed to take effect where the means of service by post under subsection (1)(b) has been used. It will have application to other Northern Territory legislation except, in accordance with section 3(3) of the *Interpretation Act* where "in the application of a provision of this Act to a provision, whether in this Act or in another law, the first-mentioned provision yields to the appearance of an intention to the contrary in that other provision".

21. Neither of these modes of service by post pursuant to s154 of the *Residential Tenancies Act* is identical to the mode of service by post specified in section 25(1)(b) of the *Interpretation Act.* In accordance with the application provision of the *Interpretation Act* that I have referred to, section 25 is a provision of general application to provisions of other acts provided that there does not appear to be an intention to the contrary in the provision in the other Act (s3(3)). The issue then is whether section 154 of the *Residential Tenancies Act* evidences an intention to limit the modes of delivery to those specified in that section or whether a person serving a notice may elect to serve the notice according to the modes of service provided by section 25 of the *Interpretation Act*.

22. It is relevant to consider the objects of the *Residential Tenancies Act* and the purpose for which the section 96A notice is to be served. Failure to comply with a section 96A notice and remedy the breach of non payment of rent leads to a consequence that the tenancy may be terminated by the Commissioner or a Court and vacant possession of the premises ordered. It provides for a very short time frame in which the breach is to be remedied and affects fundamentally the parties' agreement and rights. The *Residential Tenancies Act* provides a regulatory framework for the enforcement of the rights of parties under tenancy agreements and seeks to

fairly balance those rights and obligations (s3(a) and (c)). Parties cannot contract out of the provisions of the Act.

23. Significantly, section 154 begins with the introductory words "*Unless otherwise provided by or under this Act*" before describing the modes of service of notices. In my view these words, considered in terms of the objects of the Act, indicate an intention that service of notices under the Act is limited to the modes of service described in section 154.

24. Section 154 may be considered to be a protective provision designed to ensure that notice is given to a tenant in a manner that that will readily bring the alleged breach to their attention to avoid the consequence of termination.

25. Where an notice is served by post it is served therefore under section 154 of the *Residential Tenancies Act* not pursuant to section 25(1)(b) of the *Interpretation Act*. Section 25(2) which provides that a document served under subsection (1)(b) is taken to be served when it would have been delivered in the ordinary course of the post, unlike the repealed section 25, cannot have application to the *Residential Tenancies Act* because service of the notice is made under section 154 of that Act not under section 25(1)(b). It would therefore appear that no provision presently exists to provide a date by which the s96A notice (or those required under ss96B or 96C) may be taken to have been delivered. That being the case there is no mechanism for fixing the date required under those notices by which the breach is to be remedied.

26. In passing I observe that even if section 25(2) of the *Interpretation Act* did apply, evidence of when a letter posted in Darwin would be delivered to Leanyer, would need to be presented. It is not a matter where either the Commissioner or the Court can simply assume that, as is suggested by the affidavit, that delivery occurs 2 days after postage. Section 64 of the *Evidence Act* is instructive of the manner in which delivery by the ordinary post may be proved to a court. No evidence was placed before me and it is

not known to me whether the Commissioner was presented with that evidence. There was therefore nothing before me to suggest that delivery of the notice took place on the 2 August following posting on 1 August according to the affidavit of service to allow for a date of 10 August as the date by which the breach must be remedied in accordance with s96A even if a "delivery by ordinary post" provision applied.

27. In any event the appellant, Ms Brown, gave evidence in her affidavit, that was not challenged, that the notice was in her mail box on the day before the telephone call from the agent's representative advising that the notice period had expired on that day. Such evidence, if accepted, would displace a presumption that delivery had occurred in the ordinary course of the post.

28. It follows that the delegate of the Commissioner erred in finding that he had no option but to terminate the tenancy and order possession. It is necessary as a preliminary step under section 100A for the Commissioner to be satisfied that notice has been given in accordance with s96A. The date for remedy of the breach in that notice was 10 August 2006. The notice must therefore be delivered no later than 2 August for the reasons given above. In the absence of any evidence that a letter posted in Darwin at 3.30 pm on 1 August would be delivered at Leanyer on 2 August the notice becomes defective because of insufficient time between delivery and the date given for the breach to be remedied. I find therefore that the notice given to Ms Brown and Mr Lemmens as tenants was not in accordance with s96A and therefore ineffective to found an application to the Commissioner for an order under s100A for termination of the tenancy.

29. I order that the decision of the delegate of the Commissioner made on 29 August 2006 be quashed.

30. The question of whether the exercise of power to terminate the tenancy under section 100A is discretionary or obligatory was not therefore strictly necessary for me to answer, however as I was informed by the parties that

there was some interest in that point, I have set out in this decision my view of the power conferred by that provision.

Dated this 23rd day of January 2007.

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Ms Sue Oliver
STIPENDIARY MAGISTRATE