

CITATION: *Chief Executive Officer (Housing) v Pearce [2007] NTMC 029*

PARTIES: CHIEF EXECUTIVE OFFICER (HOUSING)  
Appellant

v

COMMISSIONER OF TENANCIES  
1<sup>st</sup> Respondent

and

KERRY-ANNE PEARCE  
2<sup>nd</sup> Respondent

TITLE OF COURT: LOCAL COURT

JURISDICTION: RESIDENTIAL TENANCIES ACT

FILE NO(s): 20702900

DELIVERED ON: 4 June 2007

DELIVERED AT: ALICE SPRINGS

HEARING DATE(s): 26 April 2007

JUDGMENT OF: MR J.W.A. BIRCH MAGISTRATE

**CATCHWORDS:**

APPEAL - APPEAL FROM DECISION OF DELEGATE OF COMMISSIONER OF  
TENANCIES - TERMINATION AND POSSESSION COMPENSATION

Residential Tenancies Act ss 3, 20, 51, 55, 57, 58, 63, 96B, 97, 100A.

**REPRESENTATION:**

*Counsel:*

Appellant:	Mr Whitelum, Morgan Buckley
First Respondent:	Mr Butler
Second Respondent:	Mr Shield, CAALAS

Judgment category classification:	B
Judgment ID number:	[2007] NTMC 029
Number of paragraphs:	28

IN THE LOCAL COURT  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20702900

[2007] NTMC 029

BETWEEN:

**CHIEF EXECUTIVE OFFICER  
(HOUSING)**  
Appellant

AND:

**COMMISSIONER OF TENANCIES**  
First Respondent

And

**KERRY-ANNE PEARCE**  
Second Respondent

REASONS FOR JUDGMENT

(Delivered 4 June 2007)

Mr BIRCH SM:

1. This is an appeal to the Local Court from a decision of the Delegate of the Commissioner of Tenancies ("the delegate") made in relation to an application pursuant to 100A of the Residential Tenancies Act (NT) ("the Act") seeking an order for possession of premises being 161 Woods Terrace, Alice Springs in the Northern Territory of Australia.
2. The Appellant sought orders from the Delegate for termination of the tenancy and possession to the appellant based upon the Second Respondent's failure to comply with the *Notice by Landlord to Tenant to Remedy Breach of Term of Agreement* in pursuance of section 96B of the Act. The notice required the Second Respondent to repair the damaged items as set out in Exhibit A.

3. Following an inquiry conducted on Friday 12 January 2007 the Delegate dismissed the Appellant's application as he was not satisfied there was any obligation on the Second Respondent to carry out repairs. Furthermore, for a tenant to be required to remedy a breach under section 96B there must be a requirement to do so in accordance with the Act.
4. The Notice of Appeal filed and dated the 25 January 2007 sets out ten (10) grounds of appeal. Mr Whitelum for the Appellant now relies on grounds 1, 2, 4 and 6 only. The grounds are:

"The Delegate erred in finding that:

1. There was no obligation on the Tennant to carry out repairs under Division 3, Part 7 of the Residential Tenancies Act.
2. Section 96B cannot require a Tennant to carry out repairs.
4. A breach of section 51(b) does not form a legal basis for a notice under section 96B.
6. In not finding a failure by the Tennant to notify of damage under section 51(a) was a ground for a section 96B notice and termination under section 100A.

*The Residential Tenancies Act 1999*

5. The Act commenced on 1 March 2000 following it initially being tabled in Parliament in April 1999. In his second reading speech the Minister for Industries and Business the Honourable Mr Baldwin MLA said:

“Members of this Assembly will be aware that the tenancy legislation has been under review for some time with a view to replacing the current Tenancy Act with more contemporary legislation. The current Tenancy Act was enacted in 1979 and has become inadequate in many ways in regulating residential tenancy relationships in the Northern Territory.”

6. The Honourable Minister went on to say:

“The bill provides a framework which will enable the parties to residential tenancy agreements to interact with clear and consistent guidelines. One of the major objectives of the bill is to present in a logical structure, a set of rules governing residential tenancies so as to reduce disputes between the parties. In the event of a dispute, the bill establishes a streamlined and easily accessible dispute resolution process. To this end, the bill sets out the minimum terms of residential tenancy agreements. It also sets out the procedures relating to bonds and the handling of security deposits, condition reports and payments of rent. It clarifies the respective rights and responsibilities of tenants and landlords in respect to repairs and the maintenance of the premises, including provisions allowing tenants to make minor repairs under some circumstances or to seek an order that the essential repairs or maintenance must be carried out. The bill also sets out the situations in which a landlord may exercise a right to enter premises during the term of a tenancy, and also sets out the rules for the termination of a tenancy by a tenant or a landlord.’

The second reading speech has been placed before me and is marked Exhibit D. What then are the ‘respective rights and responsibilities of tenants and landlords in respect to repairs and the maintenance of the premises’?

7. The Objectives of the Act are set out in section 3. Section 3(c) provides:

“to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements and this Act”.

Clearly then, it is the Act which is to be relied on by parties in dispute when coming to a resolution of their disagreement.

8. The Act places responsibilities on a landlord and a tenant. A tenant’s responsibilities are set out in s 51 of the Act and are a term of a tenancy agreement. Section 51(a) requires that:

‘A tenant will not maintain the premises and ancillary property in an unreasonably dirty condition, allowing for reasonable wear and tear.’

Section 51(b) requires that:

‘A tenant must notify the landlord of any damage or apparent potential damage to the premises or ancillary property, other than damage of a negligible kind.’

Section 51(c) requires that:

‘A tenant must not intentionally or negligently cause or permit damage to the premises or ancillary property.’

The Delegate was satisfied on the evidence before him “that damage existed (Exh A) and that repair was required”. It also is apparent from his reasons, and accepted by the Appellant and Respondents, that the Second Respondent failed to notify the Appellant in accordance with section 51(b) of the Act.

9. It is the Appellant’s submission that sections 51(b) and 51(c) impose an implied term of agreement on the Second Respondent to repair damage caused or permitted to be caused intentionally or negligently. In support of this submission the Appellant says the failure by the Second Respondent to effect repairs during the course of the tenancy would at the end of the tenancy breach the provisions of section 51(2) as the premises would not be handed back in a reasonable state of repair. Secondly, if there is only an obligation to notify and do nothing else the objectives and intent of the Act would not be met.
10. The Second Respondent submits a tenant has no duty to repair and repairs fall to the landlord except where provided by the Act. Section 51(b) does nothing more than require a tenant to notify a landlord of damage other than where such damage is negligible. It was not submitted by Mr Shield, the damage set out in Exhibit A was negligible. Therefore, the Second Respondent was under a duty to notify the Appellant. Notification did not take place until the premises were inspected by the Appellant.

11. Mr Shield also submits for the Court to find an implied obligation, as submitted by the Appellant, for the Second Respondent to carry out repairs pursuant to section 51 would be unjust in all the circumstances.
12. I am not satisfied an implied term to repair by a tenant can be found in section 51. This is so because of the operation of section 51(3) and its relationship with section 51(b) which places an obligation on a tenant to notify the landlord of damage. It is only a breach where there is no notification. The tenant is not in breach of the agreement if the cause is a landlord's failure to repair after notice by a tenant. If the tenant was required to notify a landlord and repair property pursuant to sections 51(a), (b) or (c) then section 51(3) would be superfluous.
13. My interpretation of section 51 is further supported by section 58 which requires a tenant, as a term of tenancy agreement, *as soon as reasonably practicable after becoming aware of the need for repairs to notify the landlord*. A landlord is then obliged to repair in accordance with section 57(1)(b) of the Act otherwise the landlord would be in breach of the tenancy agreement except as provided in the section. It is relevant that a landlord is not in breach of a tenancy agreement were notice has not been give – section 57(2)(a).
14. The Delegate found after hearing evidence and submissions:

“I am not satisfied that the landlord (or any landlord) may require a tenant to carry out repairs, or to put it in terms of the Act, I can find nothing in the Act that places an obligation on a tenant to carry out repairs ... There is nothing in the Act (except for an exceptional provision, section 55 relating to damage caused by tenant's fixtures) that places an obligation on a tenant to actually carry out or cause to have carried out, repairs to the property or ancillary property. His only obligation (apart from not causing damage in the first place) is to notify the landlord of the need for repairs”.
15. Even section 55 relating to damage by removal of fixtures does not permit a tenant to repair or have damage repaired except at the option of the landlord – section 55(3)(b). Further supporting the view of a tenant's lack of obligation to repair.

16. I respectively agree with the findings of the Delegate that there is no obligation on a tenant to carry out repairs to property (including ancillary property) under Division 3 Part 7 of the Act. To find an implied obligation to do so in the Act is just untenable. I therefore dismiss ground 1 of the grounds of appeal.
17. The notice issued by the Appellant pursuant 96B to the Second Respondent was found to be valid by the Delegate. It did not breach section 20 of the Act, service upon the Second Respondent only, complied with Section 155 of the Act and the other provisions of section 96B were complied with. Section 96B of the Act provides, inter alia;
  - (1) This section applies if a tenant breaches a term of a tenancy agreement (other than a term relating to payment of rent) that –
    - (a) is a term of the agreement by virtue of this Act; or
    - (b) is specified to be a term a breach of which permits the landlord to terminate the agreement.
18. The tenancy agreement between the parties was not put into evidence. The section 96B notice did not become an exhibit in the appeal. Exhibit A sets out the damage which required repair and some clauses of the common provisions pertaining to the lease. The Delegate referred to these matters in his judgment. Although the appeal before me is a hearing de novo and it was necessary for the parties to present all their evidence in full, having regard to the material placed before me and there being no objection by the respondents, and taking into account the limited nature of the questions to be decided, I have proceeded to determine the appeal on that basis. The Appellant does not seek an order for termination and possession and the outcome of the appeal will not be detrimental to the Second Respondent.
19. Proceeding as I have, the Delegate found:

“It seems that if there is no obligation on the tenant under the Act to carry out repairs then a notice under section 96B (RT4) cannot reasonably require a tenant to carry out repairs. A tenant can only

be required to remedy a breach if there is an obligation to do so in the Act ... Accordingly, the landlord's case, based on notice under section 96B (RT4), requiring the tenant to remedy breaches where the tenant has no obligation to remedy the breaches in the manner required by the landlord fails for want of a legal bases".

20. It is this finding against which the Appellant appeals. It is the Appellant's submission that if section 96B cannot be relied on by a landlord for the rectification of repairs which may not or cannot be *considered serious damage to the premises* then the intention of the legislation will not be fulfilled. Likewise, when property is damaged by a tenant and the landlord wants repair rather than termination if section 96B is not available the intention of the legislation is not achieved.
21. The Second Respondent submits that section 96B cannot apply as the tenancy agreement between the parties, the terms of which are contained in the Act and the common provisions, does not create a breach of the agreement by the tenant for a failure to repair damaged property. To require the tenant to carry out the repairs is asking the tenant to perform a duty specifically required of the landlord and is outside the duties and responsibilities set out in the Act. The tenant would therefore be required to remedy a breach which a tenant cannot lawfully do under the Act.
22. I agree with the findings of the Delegate and submissions of the Second Respondent. The act makes no provision for repair by a tenant except in the limited circumstances set out in the Act pursuant to sections 55 and 63. Accordingly, section 96B cannot apply as there is no breach of a term of the tenancy agreement provided by the Act or a specified term. Should a specified term purport to place an obligation upon a tenant to repair other than in accordance with the Act it would be *void to the extent of the inconsistency* (section 20).
23. Section 51(1)(a) requires a tenant not to maintain premises in a dirty condition. To do so would amount to a breach of a tenancy agreement and provide for the



valid issue of a notice pursuant to section 96B. The Delegate in his findings stated:

“In this case the only requirement in the RT4 which could relate to that requirement might be the demand to ‘treat the house for cockroaches’. However, in this case I am not prepared to make an order for termination and possession on this one ground”.

I agree with the Delegates finding. Of course, this finding is not subject to a ground of appeal but demonstrates the application of section 96B. I dismiss ground 2 of the grounds of appeal.

24. Ground of Appeal number (4) is:

The Delegate erred in finding that a breach of section 51(b) does not form a legal basis for a notice under section 96B.

Upon consideration of the Delegates findings I am not satisfied he reached such a conclusion. The Delegate stated:

“On the other hand section 51(1)(a) requires a tenant to maintain the premises in a reasonably clean condition. In contrast to section 51(1)(b) requiring a tenant to notify the landlord when repairs are required, the former section appears to me to place a positive obligation on the tenant to keep the place clean ... Therefore there is a clear distinction between keeping the place clean and ensuring that it is repaired. The former requires the tenant’s positive action and therefore could be the subject of a notice under section 96B”.

The Delegate further stated:

“I would further amplify my view by pointing out that in order to use a notice requiring a tenant to remedy a situation for example a section 96B (RT4), in order to obtain an order for termination of a tenancy, it needs to be shown that the Act requires a tenant to either do or not do something within the compliance period ... In

other words, provided the tenant can remedy the breach by desisting from doing something or by doing something which the Act requires him to do, then section 96B may be appropriate.”

25. Clearly section 51(1)(b) requires a tenant to do something namely notify a landlord of any damage to premises. Section 51 (1)(a) requires a tenant to keep premises clean. Both subsections place a positive duty on a tenant. When that duty is breached a landlord is entitled to rely on section 96B. I am satisfied, when the Delegate stated “the former section appear to me to place a positive obligation on the tenant to keep the place clean ... Therefore there is a clear distinction between keeping the place clean and ensuring that it is repaired”, he was not saying there is not a positive obligation on the tenant to inform a landlord of damage. The Delegate was saying it is not a positive obligation on a tenant to ensure repairs are carried out. Both section 51(1)(a) and (1)(b) require a tenant to do something which the Act requires him to do. I am satisfied this ground of appeal (4) is not made out and it is dismissed.
26. Ground 6 of the Grounds of Appeal is answered in my reasons for dismissing ground 4. Furthermore, there is nothing in the Delegates findings which indicate the Appellant sought in its section 96B notice to the Second Respondent to remedy anything other than the matters set out in Exhibit A. This Ground is also dismissed.
27. The scheme of the Act allows a landlord such as the Appellant, to remedy a breach of a term of the tenancy agreement by the issue and service of a notice pursuant to section 96B of the Act. Should a tenant fail to act on the notice, the landlord may within the prescribed periods apply pursuant to section 100A to terminate the tenancy and obtain possession of the property. In a case of serious breach of a tenancy agreement by a tenant or landlord the remedy for either lies with application to the Local Court. In any case, it is not open for a landlord to seek a remedy requiring a tenant to carry out repairs. The Act requires the landlord to carry out repairs and if necessary seek compensation pursuant to section 122 of the Act. In this case it was the landlord’s responsibility to make the repairs set out in Exhibit A and seek compensation from the tenant.

28. For these reasons the appeal is dismissed. I will hear the parties as to costs

Dated this 4<sup>th</sup> day of June 2007.

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**J.W.A. BIRCH**  
MAGISTRATE