

CITATION: *Darcy v Kruhse-Mountburton* [2009] NTMC 001

PARTIES: WONITA DARCY
v
SUZY KRUHSE-MOUNTBURTON

TITLE OF COURT: LOCAL COURT

JURISDICTION: Darwin

FILE NO(s): 20827435

DELIVERED ON: 19 January 2009

DELIVERED AT: Darwin

HEARING DATE(s): 28 November 2008

JUDGMENT OF: Ms Melanie Little SM

CATCHWORDS:

Residential Tenancies Act – Sections 96A, 100A, 122, 150. Appeal against orders of the Commissioner of Tenancies.

REPRESENTATION:

Counsel:

Appellant: In person
Respondent: Through Agent

Solicitors:

Appellant: In person
Respondent: Through Agent

Judgment category classification: C
Judgment ID number: [2009] NTMC 001
Number of paragraphs: 28

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

No. 20827435

[2009] NTMC 001

BETWEEN:

WONITA DARCY
Appellant

AND:

SUZY KRUHSE-MOUNTBURTON
Respondent

REASONS FOR DECISION

(Delivered 19 January 2009)

Ms Melanie Little SM:

1. The appellant has appealed a decision of the delegate of the Commissioner of Tenancies. The appellant was the tenant and is referred to as the respondent in the Commissioner's decision. On 3 October 2008 it was ordered as follows:
 1. The tenancy is terminated effective forthwith and the Applicant have vacant possession of the premises being Flat 1/316 Casuarina Drive, Rapid Creek NT, effective as at 9.00am on Friday, 10 October 2008.
 2. The Respondent pay the Applicant compensation in pursuance of section 122 of the Act in the amount of \$1,220.00 being for unpaid rent up to and including 3 October 2008.
2. The Notice of Appeal sets out grounds of appeal:
 1. Appellant was ill and could not attend the Inquiry on Friday, 3 October 2008.
 2. There is discrepancies and incorrect details in the rental records.

3. The amount of \$1,220 being for unpaid rent up to and including 3 October 2008 is incorrect.
3. The appeal is made to the Local Court against an order, determination or decision of the Commissioner (s 150 of the *Residential Tenancies Act*). The appeal is an appeal de novo. The Court may re-hear evidence taken before the Commissioner or take further evidence. The Court is not bound by the rules of evidence and may inform itself in any manner it thinks fit (sub-sections 1, 2 and 3 of s 150 of the *Residential Tenancies Act*).
4. On appeal, the Court may do one or more of the following:-
 - (a) confirm, vary or quash the order, determination or decision of the Commissioner;
 - (b) make an order that should have been made in the first instance by the Commissioner;
 - (c) make incidental and ancillary orders. (Sub section 150(4) of the *Residential Tenancies Act*).
5. The appeal was lodged within time and a stay of proceedings was granted by the Court until determination of the appeal.
6. Evidence was given by the appellant and documents tendered on her behalf. Evidence was given by the Agent of the respondent and documents tendered. All relevant evidence has been taken into account.
7. The notice of appeal was filed on 8 October 2008. On 9 November 2008 the landlord served the tenant with a RT5 Form – Notice to Terminate Tenancy Agreement. Throughout the hearing of the appeal, there was confusion with respect to the issues which were to be determined by the Court. The RT5 notice is not the relevant notice in this appeal. The RT5 notice may become the subject of future proceedings.
8. The appeal relates to an RT3 notice served on the appellant with respect to non-payment of rent. The RT3 notice is headed “Notice by Landlord to

Tenant to Remedy Breach of Agreement – Unpaid Rent” and was served pursuant to s 96A of the *Residential Tenancies Act*. The relevant parts of that section are:

96A Tenant's failure to pay rent

(1) This section applies if a tenant breaches a term of a tenancy agreement by failing to pay rent and the rent has been in arrears for not less than 14 days.

(2) The landlord may give the tenant a notice, signed by the landlord, stating the following:

- (a) the address of the premises to which the tenancy agreement relates;
- (b) the tenant is in breach of the tenancy agreement by failing to pay rent in accordance with the agreement and the rent is in arrears;
- (c) the amount of rent payable by the tenant in order to remedy the breach and any prescribed information relevant to that amount;
- (d) the tenant is required to remedy the breach before the date specified in the notice (which must be more than 7 days after the notice is given);
- (e) 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.

(3) The notice has effect even if the landlord has not previously made a formal demand for payment of the rent.

...

(5) If the tenant does not remedy the breach as required by the notice, the landlord may apply under section 100A for an order for termination of the tenancy and possession of the premises.

(6) The landlord must make the application no later than 14 days after the date specified in the notice under subsection (2)(d).

9. The landlord claimed that the tenant did not remedy the breach before the date specified in the notice (which was 14 days from the date of the notice – s 96A(2)(d) sets out that the tenant must have more than seven days to remedy the breach). Accordingly, an application was made pursuant to s 100A of the *Residential Tenancies Act* for an order for the termination of the

tenancy and possession of the premises. This application was on a form RT1.

10. S 100A of the *Residential Tenancies Act* sets out as follows:

100A Failure to remedy breach after notice given

(1) 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 a notice in accordance with section 96A or 96B; and
- (b) has failed to remedy the breach as required by the notice.

(2) The Commissioner or a court may, on the application of a tenant, make an order terminating a tenancy and permitting the tenant to give up possession of the premises if satisfied that the landlord –

- (a) has been given a notice in accordance with section 96C; and
- (b) has failed to remedy the breach as required by the notice.

(3) An order for possession has effect on the date specified in the order, which must be no later than 5 business days after the date of the order, unless the operation of the order is suspended under section 105.

11. The delegate of the Commissioner of Tenancies gave reasons for the orders made on 3 October 2008. While the appeal is a hearing de novo, the findings and reasons of the Commissioner will be considered. The tenant did not appear at the hearing before the Commissioner. The landlord's agent appeared. The Court is not aware of the documentary and oral evidence before the Inquiry. Findings were made and in particular, it was found that the premises of 1/316 Casuarina Drive, Rapid Creek had a tenancy commencing between the parties from 10 January 2008 for a period of six months and then there was a periodic tenancy from 1 July 2008. That finding was made in the face of the RT1 documentation which set out that the tenancy was not to expire until January 2009 (see Exhibit A2 RT1 document dated 19 September 2008). A finding was made that rental payments due to the landlord were more than 14 days in arrears at the time a notice was issued in accordance with s 96A of the Act. The Commissioner was satisfied that the rent arrears were not paid by the rent payment day

specified in the notice (18 September 2008). The Commissioner found that, as a consequence, the tenancy should be terminated. A further order was made with respect to compensation in the sum of \$1,220.00. That order was made pursuant to s 122 of the *Residential Tenancies Act*. No material was provided in the decision to explain how that figure was arrived at.

12. At the hearing of the appeal, issues were raised with respect to the RT1 and RT3 documentation, in particular the amount of monies owing as at the date of the notice of 4 September 2008, the type of tenancy and the tenancy period. It was agreed as between the parties that some of these matters were inaccurately described in the RT1 and RT3 documentation. It is not disputed by the appellant that, as at the date of the RT3 notice, she owed some rentals arrears. She disputes the amount owed.
13. There is an assertion in the RT3 documentation that the appellant was in arrears in her rent of “not less than fourteen days”. As stated it is not disputed by the appellant that there were some arrears. As at the date of the hearing of the matter before the Commissioner of Tenancies (3 October 2008), the appellant had made good most of those arrears.
14. One issue to be considered on appeal is whether the inaccurate information in the RT1 and RT3 documentation affected the ability of the Commissioner to make the orders that were made on 3 October 2008. The grounds upon which the application to the Commissioner was made are “The tenant was more than fourteen days in arrears and was issued an RT3 notice. Monies owing were not paid in full by due date” (see clause 2 of the RT1). An application pursuant to s 100A of the *Residential Tenancies Act* can only be made if the rent in arrears for “not less than 14 days” and notice has been given under s 96A of the Act (or section 96B which is not relevant in this case). The RT1 application was not in those terms. It was alleged that the tenant was *more than fourteen days in arrears*. Further, the details of the

tenancy were not correct. It was asserted in the RT1 that there was a fixed term tenancy ending on 9 January 2009. This was not accurate.

15. Pursuant to clause 3 of the Tenancy Agreement (Exhibit A3) and pursuant to s 83 of the *Residential Tenancies Act*, the tenancy became a periodic tenancy as at 1 July 2008. The tenancy agreement sets out that the parties have then entered into a periodic tenancy from fortnight to fortnight on the same terms and conditions as set out in the Tenancy Agreement. The rental payments are set out *to be paid fortnightly in advance in the sum of \$760.00 per fortnight* (based on a weekly rental of \$380.00 per week).
16. The RT3 document alleges that the appellant has failed to pay rent and that she has been in rent arrears for *not less than fourteen days*. The notice was given on 4 September 2008. The sum of \$1,751.49 is said to be required to remedy the breach. The document asserts that, if that amount was paid, that would take her rent up to and including 17 September 2008. The appellant is given until 18 September 2008 to remedy that breach. If the breach is remedied, she has been notified that the next rent amount due would be payable on 18 September 2008 in the sum of \$760.00. (That is the next payment for the fortnightly rent to be paid in advance).
17. The RT3 form has included the \$760.00 payable for the rent period between 4 September 2008 and 17 September 2008 as part of the arrears. Section 96A of the *Residential Tenancies Act* sets out that the rent must have been in arrears for not less than 14 days. Section 28(1) of the *Interpretation Act* applies and time is to be reckoned exclusive of the day from which the period of “not less than 14 days” is to be calculated from. I find that the sum of \$760 for the period from 2 September to 17 September 2008 was not in arrears for not less than fourteen days. The RT3 form is dated 4 September 2008 and I find that that part of the rent had been in arrears for 13 days as at 4 September 2008. Accordingly, I am of the view that the sum of \$760.00 relating to the rent period from 4 September to 17 September

2008 should be deleted from the monies to be paid to remedy the breach. That sum should have read \$991.49.

18. The appellant paid the sum of \$400.00 on 22 September 2008 (see Exhibit R5), leaving the sum of \$591.49 payable pursuant to the notice to remedy the breach. The appellant then paid a further \$1,000.00 on 2 October 2008 (noted as 3 October 2008 on Exhibit R5). These sums fall outside the fourteen day period given by the landlord to meet the arrears in the rent. Nevertheless, it was monies paid prior to the date of the hearing before the Commissioner and ought to have affected any compensation payable.
19. The RT3 document contains both accurate and inaccurate information. The name of the tenant and the address of the premises, the date of the last rental payment received and the date of the next rent payment and the amount due are correct. The amount to remedy the breach is incorrect. The allegation that these arrears included rent up to and including 17 September 2008 is incorrect. In the RT1 document, the type of tenancy is incorrect. These inaccuracies are significant.
20. An issue to be ascertained is whether the notification by a landlord to a tenant to remedy a breach of agreement for unpaid rent can be a valid notification where there are relevant inaccuracies. I have come to the conclusion that the RT1 notice is not a valid notice in the circumstances of this case. One of the important considerations leading to this decision is the fact that the amount which said to be needed to be paid to remedy the breach is not correct. Not only is the sum inaccurate, the RT3 notice claims monies which have not become rent in arrears for not less than 14 days. The sum of \$760.00 for the rent period from 4 September to 17 September 2008 is anticipated to be in arrears for not less than 14 days, but has not in fact become rent in arrears for not less than 14 days. Had the notice been inaccurate but claimed less monies than was actually owed, the fact of the inaccuracy may not have operated to invalidate the RT3 notice.

21. The decision of the Commissioner has been made on the basis that rental payments due to the landlord were *more than 14 days in arrears* at the time the landlord, by his agent, issued a Notice to Remedy Unpaid Rent (dated 4 September 2008 – the RT3 notice), in accordance with s 96A of the Act. The RT3 notice did not purport to assert such a breach – it was a notice setting out that there was a failure to pay rent and the rent had been in arrears *for not less than 14 days*. These are the words required by s 96A of the *Residential Tenancies Act*. The RT1 application by the landlord imported the words “more than 14 days in arrears” into the equation. The Commissioner then made findings based upon that trigger. That is not the trigger. Even if it was the trigger, I would have found that the period of *more than 14 days in arrears* was not relevant to the whole of the rent said to be in arrears, given that the rent for the period 4 September to 17 September 2008 was claimed as part of the arrears. Section 96A of the *Residential Tenancies Act* provides a remedy for landlords which is relatively swift and easy to action. If the notices and processes are complied with, orders will be made, and a tenancy terminated effective forthwith and tenant can be ordered to vacate premises within five business days. Given these provisions, it is my view that compliance with the requirements of the *Residential Tenancies Act* must be complete. That did not occur in this case.
22. One complication in this case is the fact that rent is to be paid in advance and then there was a calculation of rental arrears. Care must be taken to ensure that the RT3 notice only includes rent arrears which are alleged to be in arrears for not less than 14 days.
23. I find that the error on the RT3 notice was so integral to the basis of the Notice that the RT3 notice was not issued in accordance with s 96A of the *Residential Tenancies Act*. I find that the s 100A application for termination and possession should have been dismissed.

24. Pursuant to s 150(4)(a) of the *Residential Tenancies Act*, Order 1 of the Delegate of the Commissioner of Tenancies dated 3 October 2008 is quashed. Pursuant to s 150(4)(b) of the *Residential Tenancies Act*, I order that the s 100A application for termination of the tenancy and vacant possession is dismissed.
25. Order 2 of the Delegate of the Commissioner of Tenancies dated 3 October 2008 relates to a separate application in the RT1 application. An application was made for compensation pursuant to s 122 of the *Residential Tenancies Act*. That application is separate and discrete from the s 100A application.
26. The relevant parts of s 122 of the *Residential Tenancies Act* are as follows:-

122 Compensation and civil penalties

(1) Subject to subsection (2), the Commissioner may, on the application of a landlord or the tenant under a tenancy agreement, order compensation for loss or damage suffered by the applicant be paid to the applicant by the other party to the agreement because –

(a) the other party has failed to comply with the agreement or an obligation under this Act relating to the tenancy agreement; or

(b) the applicant has paid to the other party more than the applicant is required to pay to that other party in accordance with this Act and the agreement.

...

(5) The Commissioner is not to make an order under this section –

(a) for the payment of compensation in respect of death, physical injury, pain or suffering; or

(b) in respect of a failure to pay rent unless –

(i) the rent has been unpaid for at least 14 days after it is due and payable; or

(ii) the tenant has failed on at least 2 previous occasions to pay rent under the same agreement within 14 days after it was due and payable.

27. It is not possible to ascertain from the material before the Court what sum (if any) should have been ordered to be paid by way of compensation. Certainly there is no material before the Court establishing that the sum of \$1,220.00 should have been ordered payable. The s 122 application will be quashed and remitted to the Delegate for the Commissioner for Tenancies for re-hearing, should the landlord wish to pursue that application. Alternatively, the landlord is able to lodge a further application pursuant to s 122 of the *Residential Tenancies Act*.
28. Pursuant to s 150(4)(a) of the *Residential Tenancies Act*, Order 2 of the Delegate of the Commissioner of Tenancies dated 3 October 2008 is quashed and I will hear submissions as to whether the compensation application pursuant to s 122 is remitted to the Delegate of the Commissioner of Tenancies for rehearing or further heard in this court.

Dated this 19th day of January 2009.

Melanie Little
STIPENDIARY MAGISTRATE