CITATION: *Sutherland v East Arnhem Shire Council* [2011] NTMC 044

PARTIES:	YVONNE SUTHERLAND
	V
	EAST ARNHEM SHIRE COUNCIL
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Local Court
FILE NO(s):	21113265
DELIVERED ON:	11 October 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	24 June 2011
JUDGMENT OF:	RJ Wallace SM

CATCHWORDS:

Landlord and Tenant – Tenancy Act (NT) – Remote Areas – Landlord the Tenant's Employer – "Harsh or unconscionable" terms

Fair Work Act 2009 (C'th) s 326 "reasonable deduction".

REPRESENTATION:

Counsel:

Applicant:	In person
Respondent:	M. Crawley

Solicitors:

Applicant:	-
Respondent:	Cridlands

Judgment category classification:	C
Judgment ID number:	[2011] NTMC 044
Number of paragraphs:	54

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

No. 21113265

BETWEEN:

YVONNE SUTHERLAND
Plaintiff

AND:

IAN BODILL, CHIEF EXECUTIVE OFFICER
EAST ARNHEM SHIRE COUNCIL
Defendant

REASONS FOR JUDGMENT

(Delivered 11 October 2011)

Mr R J Wallace SM:

BACKGROUND

1. The Applicant ("Ms Sutherland") has brought this action seeking orders pursuant to s 22 of the *Residential Tenancies Act* ("the Act"), which reads:

Harsh or unconscionable terms.

1) A Court may, on the application of a tenant, make an order rescinding or varying a term of a tenancy agreement (other than a term that is specified under this Act to be a term of an agreement) if it is satisfied that term is harsh or unconscionable.

2) On making an order under subsection (1), the Court may make consequential changes to the tenancy agreement or another related document, including an ancillary agreement.

2. The named Respondent is Ian Bodill, Chief Executive Office of the East Arnhem Shire Council. I shall refer to the Respondent usually as "the Council".

3. The hearing of the Application was conducted with great efficiency by Ms Sutherland, appearing in person, and by Mr Crawley, for the Council. The evidence is essentially contained in the affidavits, two by Ms Sutherland (of which the first, served 20 April 2011 is by far the larger, and one by a Mr Ty Johnson, the Director of the Council's Technical Services). Few of the assertions in any of these affidavits are disputed, and the disputes that exist are more matters of perception or emphasis than of substance.

4. Having conducted the brief hearing on Friday 24 June 2011 I was able to announce in on Monday 27 June 2011 that the Application was discussed and to promise to publish my reasons for Decision later. These are the Reasons:

GALIWINKU

5. Ms Sutherland lives and works at Galiwinku, on Elcho Island, which lies in the Arafura Sea north of Arnhem Land. It is perhaps worth remarking, for those unused to the general state of affairs in Aboriginal communities (of which Galiwinku is one) in the Territory that the housing situation is tight, and always has been. Mr Johnson's affidavit explains that there is presently higher than usual demand for accommodation, create by an influx of workers with Territory Alliance, engaged to rebuild and refurbish housing, in connexion with the Commonwealth intervention. Only an optimist could believe that the stock of housing for the Aboriginal residents will become abundant any time soon, notwithstanding the unprecedented expenditure on

housing now taking place. Nor is there ever likely to be a plethora of accommodation for workers from outside, like Ms Sutherland, not least because of the need to bring in more such workers if the aims of diminishing Aboriginal disadvantage (in health education and so on) are to begun to be met.

6. It should also be borne in mind that Galiwinku is remote and difficult of access. The nearest hardware store is at Nhulunbuy, on the mainland. Supplies are delivered to the island mostly by barge from Darwin. Consequently, tenants – and no one owns a house in Galiwinku – are more than most dependant upon the landlord to maintain the fabric and finish of their residences. One can sometimes grow inpatient with tenants in the city who refuse to lift a finger to fix some small defect in their homes, but in Galiwinku, and in other remote settlements, tenants really have no choice.

MS SUTHERLAND'S COMPLAINTS

7. In her affidavit of 20 April 2011, Ms Sutherland says:

> 1. I have been employed in my role as the Manager of Aged Care and Disability Services at Galiwin'ku since the 13th August 2008. A condition of my employment is that the East Arnhem Shire Council (EASC) will provide housing **(Attachment 1)**.
>
> 2. On the 19th November 2010 all employees received an email from Shane Marshall (Building Infrastructure Manager) stating that EASC has adopted the Council Controlled Housing Policy **(Attachment 2)**.
>
> 3. On the 23rd February 2011, I received a letter from Ian Bodill (CEO) stating that Residential Tenancy Agreements for all employees who occupy EASC provided accommodation would take effect from the 7th March 2011 **(Attachment 3)**.

4. On Friday the 25th February 2011, I received an email from Emma Clay (Technical Officer) informing me that an essential meeting of all shire-housed employees was scheduled for Tuesday the 1st March 2011. **(Attachment 4)** This email also contained three attachments: Residential Tenancy Agreement **(Attachment 5)**; Tenancy Agreement Consent Form **(Attachment 6)**; and Lot 85 Property Condition Report **(Attachment 7)**. On the same day, I informed Emma that I was unable to attend the meeting due to a prior scheduled all day visit by an external agency, to the Aged Care and Disability Service **(Attachment 8)**.

5. At the request of John Ives (Shire Services Manager – Galiwin'ku) I attended a meeting on the 2nd March 2011 at 10.30am in his office. Present in the office were John Ives, Ian Bodhill (CEO) and myself. Also in attendance by telephone link-up was Dianne Yali (Employee and Industrial Relations Manager) and Shane Marshall (Building Infrastructure Manager). At this meeting I raised a wide range of concerns about the content and fairness of the EASC Residential Tenancy Agreement including but not limited to the following items:

Clause 3: Employee Covenants

(d) I stated that the clause was irrelevant to the house that I occupied as there was no telephone connection and power was provided through a meter that operated on purchased power cards.

(h) I stressed that I was more than happy to pay for wilful or negligent damages of glass, however if I was to trip on the

uneven floorboards, fall and break a window, I would not be willing to pay for the broken glass. I stated that the same argument applied to (k) with the accidental damage to property or furniture.

(l) I stated that I was unhappy about EASC having absolute discretion about repairs and maintenance outside emergencies and raised issues about the list or repairs on the Property Condition Report **(Attachment 7)**. I enquired as to whether listing the repairs currently required, on the Property Condition Report ensured that EASC met Item 57 (3) (a) of the Residential Tenancy Act (NT), because the repairs required would be known to the tenant prior to entering into the residential tenancy agreement. I requested a clause to be added to the contract to state that listing the repairs on the Property Condition Report did not indicate that I accepted EASC had the right to not repair the defects.

(q) I stated that I was not able to agree to this clause as I did not know what this clause actually meant, as I had no access to EASC insurance policies and I was concerned there was obviously a financial penalty as outlined in (r).

(s) I asked whether the indemnity sought by EASC under (i) was in fact EASC's responsibility under house insurance and (ii) their responsibility under public liability insurance.

(t) I stated that the collection of rubbish is the responsibility of EASC. The tenant is responsible for the disposal of rubbish in bins, but not for the collection of the bins.

(v) Sub clause (vii) I stated that I refused to accept responsibility for damage or staining caused to the property by fridges as they are EASC property.

(ii) and (jj) I stated that as my house is not adequately secure, due to double glass front doors with no screens, and inadequate security screens on most windows and none on some windows, I am unable to take responsibility for the adequate provision of security in my absence. I live on a remote Indigenous community in which there are regular property crimes as stated in (jj)(ii) of the tenancy agreement.

(kk) I stated that I will not agree to be financially responsible for the property damage incurred when I am on leave, for the reasons outlined in the previous item.

Clause 5: Mutual Covenants

(f) I stated that I didn't believe this sub clause about increasing the rent payable, met the requirements of Section 41 (b) of the Residential Tenancy Act (NT).

(g) I stated that this clause was likely to be deemed harsh and unconscionable under the Act, as the Act clearly states that the cost of a bond can be no more than 4 weeks rent and does not provide for employers who are also the landlords, to withhold salary and entitlements owed to employees, to pay for repairs and damages.

(k) I raised the issue that the Property Condition Report **(Attachment 7)** was completed without my knowledge, even though I resided in the property. This appears to be in direct contravention of the Section 25 (1) of the Act. I also raised

the issue that the Property Condition Report does not meeting the requirements of Section 25 (2) (a) of the Residential Tenancy Act (NT) which clearly states that the Property Condition Report must 'specify the conditions of walls, floors and ceilings in each room of the premises'. I requested a new Property Condition Report be completed in a format that meets the requirement of the Act.

Clause 6: Head Lease

As there is currently no Head Lease, I requested that the clause be removed.

I did inform senior management at the meeting, that I would be raising a number of issues with my union, Fair Work Australia, The Tenancy Advice Service and Consumer Affairs. Though I felt pressured, which I raised with senior officer, I refused to sign the Residential Tenancy Agreement, the Tenancy Agreement Consent Form and the Property Condition Report at the meeting. The meeting ended approximately two hours later.

8. And in paragraph 9 she says:

9. On Friday the 18th of March I received an email from Ty Johnson **(Attachment 11)** which clearly stated that EASC believes that the Tenancy Agreement is fair and reasonable for both parties and complies with relevant legislation. I was advised that '…your continued occupation of the Council dwelling in which you reside shall be deemed to be your acceptance of the attached Tenancy Agreement, with or without your signature on the document.' I was also provided a copy of an amended Tenancy Agreement **(Attachment 12)**,

which has some minor adjustments to Clauses 3.s.iii; 3.kk and 6.1.a.iii.

9. The paragraphs not reproduced, 6, 7, 8 and 10, speak mainly of unavailing meetings and discussions between Ms Sutherland and various officers of the Council.

IS THERE A TENANCY AGREEMENT?

10. It remained the case that the time of the hearing Ms Sutherland had not signed the contract proffered by the Council. She was still the occupier in the house at Galiwinku; the Council's position was that she was deemed to have signed the agreement.

11. In my opinion there is a profound difficulty with the Council's "deeming" acceptance of their proffered Agreement. The difficulty is not so much the overtone of at least potential oppression – the employer / landlord telling the employee / tenant to take it or leave it, apropos of a tenancy in a location where there is no alternative housing and the house comes with the job – although that would be worrying enough. The greater difficulty for the Council is that s 19(4) of the Act says:

> If a tenancy agreement is not in accordance with subsection (1) [the Council's Agreement is] or is not signed by all parties to the agreement, a tenancy agreement, if any, prescribed for the purpose of this section is to be taken to be the agreement between the parties for the purpose of this Act.

12. Regulation 10 of the Residential Tenancies Regulation provides that the tenancy agreement set out in Schedule 2 of these Regulations is to be the agreement for the purposes of s 19(4). As a matter of law, that agreement ("the Schedule 2 agreement"), not the document put forward by the Council, would appear to be the ruling agreement between Ms Sutherland and the

Council, because she has not signed the Council's Agreement. And the Schedule 2 agreement is, ex hypothesi, not harsh or unconscionable. Accordingly, the Application must be dismissed.

13. In case I am wrong about this, and the Council's "deeming" is effective, I turn to consider Ms Sutherland's individual objectives to the Council's agreement.

14. First, in paragraph 5(d) of her affidavit, she objected to Clause 3(d) of the Council's agreement, on the ground that it had no application to her house at Galiwinku. Clause 3 is a list of covenants by the Employee i.e. tenant. Clause 3(d) obliges the Employee to:

> Ensure that the power and telephone services are connected in the Employee's name at the commencement of the Tenancy.

15. Ms Sutherland's concern is that she can't do either of these things. There is no connected telephone, and the electricity service is in no one's name: it works on purchased power cards (the modern equivalent of putting shillings in the meter). I take it that her position is that it would be unwise for her to contract to do something that she knows to be impossible. (It could be that she is merely making the point that this Clause of the Council's agreement is silly, as applied to her and her residence, but I prefer to deal with her objection as one made seriously.)

16. Ms Sutherland's prudence in this regard would in many contexts be warranted, bearing in mind the rule in *Paradine v Jane* (1647) Aleyn 26; 82 ER 897, that a person who binds himself by contract to do a thing, absolutely and without reservation, will be liable for damages even if performance of the thing turns out to be impossible, or utterly futile.

17. In Ms Sutherland's case, I cannot see how she could be liable in damages as a result of her non-performance of her obligations under this Clause, so long as performance remains impossible. And it may turn out – circumstances

may change – to be possible to do one or both of these things during her tenancy. A telephone might be connected, even in the apparent twilight hours of the landline, and the electricity supply might one day go through an ordinary meter. So it seems to me that the proposed Clause 3(d) does no harm so long as it is impossible, and will not be harsh or unconscionable if circumstances change to make compliance by the tenant possible.

18. Secondly, in paragraph 5(h) of her affidavit, Ms Sutherland speaks of her reservations about the Employee covenants (h) and (k) of the Council's agreement. These clauses are in a familiar form, and require the tenant to pay for broken windows and damage to furniture.

19. Ms Sutherland's reservations (and, again, I treat them as being made seriously, rather than characterise them as her taking an opportunity to have a dig at her employer for the physical state of her house) provide a hint of some of the privations common to those who occupy even "good" housing on remote communities. She accepts that the requirement would be reasonable on many circumstances, but not if the damage (to windows or furniture) were occasioned by her, or someone else, tripping over on account of the unevenness of the floor. An accident so occasioned ought, she argues, to be held to be the Council's fault, and the Council should pay for any resulting damage.

20. In my opinion, even if the clause stands, that would probably be the decision of any court if such a claim arose. Furthermore, as Mr Crawley (counsel for the Council) points out in his Scott Schedule, Ex B, Ms Sutherland could strengthen her future position in any such litigation by making an immediate demand on the Council to remedy any dangerous defect known to her.

21. In short, the proposed clauses do not change the tenant's liability from what it would be. If one person (e.g. the tenant) deliberately, negligently, or accidentally damages second person's property, the first person will ordinarily have to pay the cost of the damage. In the rare case when the

accident is caused by the fault of the second person, the first person may have to pay nothing. In many cases in between, both parties are at fault: the first person will have to contribute towards the cost of the damage. None of this is novel, and nothing is harsh or oppressive about (h) or (k).

22. Thirdly, Ms Sutherland is unhappy with the discretion vested in the Council via this clause of the Council's agreement:

> (l) Notify EASC of any accident, damage or defect, or the need for any repairs and maintenance to the Property and/or furniture (if provided) as soon as practicable after the Employee becomes aware of the accident, damage or defect or the need for repairs or maintenance, other than damage of the trivial kind. With the exception of emergencies, all maintenance items and repairs must be advised in writing to EASC. Consent to the repair of any damage may be given or refused in EASC's absolute discretion and upon such terms as EASC thinks is in the best interest in maintaining the financial and visual viability of the Property.

23. If it were the case that the Council's obligations concerning repair were defined by this clause, Ms Sutherland's unhappiness would be entirely justified. But in my view this is not the case. That Clause (e) is in the list of "Employee Covenants", that is, obligations of the Employee / Tenant. The Council's agreement also, contains a list of "EASC's Obligations", among them:

> (e) Provide and maintain the Property in good and tenantable repair and fit for human habitation subject to the obligations of the Employee under this Tenancy and having regard to the age, character and prospective life of the Property.

24. That clause, (e), is, if anything, more demanding of the Council than the statutory provision to similar effect (s 57 (1)(b)):

> …the landlord…must maintain the premises and ancillary property in a reasonable state of repair, having regard to their age, character and prospective life.

25. There is no contracting out of the provisions of the Act (see s 20) so, at the very least, the landlords obligation to repair cannot be less than provided for in s 57 (1)(b). The Council's obligation, pursuant to Clause (e) of its agreement, may be slightly greater than that. Clause (e) does not allow any discretion in the Council, nor does s 57 (1)(b).

26. At best, the reference in Clause (e) to "EASC's absolute discretion" can in law only apply to repairs that the Council is not obliged to make, and that rather alarming part of Clause (e) must, in my opinion, be regarded as no more than fair warning by the Council that the tenant will not necessarily get every repair / home improvement that the tenant asks for. In any event, on this score Ms Sutherland is protected by the Council's obligations in the Council's agreement, and by the Act. There is nothing harsh or oppressive in Clause (e).

27. Fourthly, Ms Sutherland, at paragraph 5q, speaks of her concerns regarding two clauses of the Council's agreement pertaining to the Council's insurance on the property:

> (q) Not create or suffer to be done anything that might render void or voidable or otherwise prejudice any insurance on the property or cause any premiums on the Property to be increased.

(r) Pay EASC on demand all sums paid by EASC by way of increased insurance premiums due to a breach of clause (q) by the Employee.

28. Ms Sutherland makes the reasonable point that she does not understand what this clause means. She has not been provided with a copy of any relevant policy by the Council. Even if she had, she might not be able to understand everything in it relevant to this point. Insurance policies are not quite as opaque as they once were, but they are not easy reading. And who knows whether the policy spells out in sufficient detail the kinds of acts that might render void or voidable the policy?

29. Mr Crawley's answer is twofold. First, he says (in his Scott Schedule) that "the same clause exists in the Act and is therefore a permitted clause in a tenancy agreement". Secondly, in order to allay Ms Sutherland's fears, the Council undertakes to provide any interested employee a copy of the relevant policies, "as an addendum to the tenancy agreement".

30. In respect of that second point, that is all well and good, and even better if the relevant sections of those policies are highlighted and explained. But what happens if the terms of the insurance change during tenancy? In respect of the first point, I am very sorry to say I cannot find any such clause in the Act. If I could, I would agree with Mr Crawley that the clause, however gnomic, is permitted.

31. Mr Crawley makes a similar and I believe similarly mistaken submission in relation to Ms Sutherland's next (and fifth) objection to clause (s).

(s) Indemnify EASC against:

(i) Any injury, loss or damage which may be caused to the Property

(ii) The death or injury of the Employee, the members of their family or household, their guests and invitees; and/or

(iii) Loss of or damage to the Employee's property or the property of other persons

resulting from the use or misuse of the Property by the Employee or other persons on the Property with their consent.

Again, I cannot locate any such provision in the Act. But that does not end the matter. Mr Crawley also submits that this clause is not at all unreasonable or oppressive – all it does is to hold Ms Sutherland responsible for liabilities arising from her own actions in her use of the property, actions over which the Council has control at all. I agree with that submission.

32. Sixthly, Ms Sutherland objects to clause (t).

(t) Place all household rubbish and recyclables in wheelie bins or receptacles that are provided for such purpose and ensure the collection of rubbish and recyclables from the Property on a weekly basis.

33. Her objection is, on its face, reasonable. The collection of rubbish is someone else's responsibility – she asserts the Council's – but certainly not hers. Mr Crawley's answer is, on its face equally reasonable: that Ms Sutherland's reading of the clause is unduly literal, and that what is intended is that she should do everything expected of a householder in that respect – to put the bin out in time for the rubbish collection; to report any failure of the collectors to do their job, etc.

34. In this instance I am confident that Mr Crawley's interpretation would prevail if a dispute arose. No Tribunal would expect Ms Sutherland or any other tenant to drive the rubbish truck or load the rubbish onto it. That being

so, something less than the full literal meaning must be intended, and Mr Crawley's suggestion is in my view not far from the practicable meaning of the clause.

35. It is perhaps worth noting that many residents on Aboriginal communities including Galiwinku, have high fences and padlocked gates, in order to dissuade the less determined among the property offenders in the community. It is understandable that the Council would want those of its tenants – I do not know if Ms Sutherland is one – living in premises so secured to be bound to put the bins out: if the tenant does not, the dustman cannot get at them.

36. Once again, in this instance, I cannot agree with Mr Crawley that the term sought by the Council is in the Act.

37. Seventhly, Ms Sutherland objects in part to clause (v)(vi):

> (v)(vi) Allow any damage or staining to be caused to the Property by fridges or pot plants.

38. Her objection again is a reasonable one. It relates to fridges, not pot plants, and she points out that the fridge in her house is the property of the Council, not her so why should she accept any responsibility for damage or staining caused by it?

39. In this case, notwithstanding the interpretation put forward by Mr Crawley, I am of the opinion that Ms Sutherland's objection is sound, and the clause should perhaps be amended by adding the words "owned by the tenant", or something of the sort. Mr Crawley's interpretation is in my view no more than a recapitulation of Ms Sutherland's obligations under clause (e).

40. Eighthly, Ms Sutherland objects to two clauses, (ii) and (jj) concerned with securing the property deeming certain absences of hers from it:

(ii) Make proper and adequate provision for the security of the Property where the property is left unoccupied for any period in excess of two days.

(jj) Notify EASC before leaving the Property unoccupied for more than 30 days and will make proper and adequate provision for the security of the Property during the period the property is unoccupied. The Employee expressly acknowledges that where the Property is left unoccupied for more than 30 dayss, EASC may, at their discretion, either:

(i) Take further measures to secure the property at the Employee's cost (which may include engaging third parties) if EASC is not satisfied the Employee has made proper and adequate provision to secure the Property; or

(ii) Terminate the Tenancy on two days notice under section 86 of the Act if EASC believes, given the remote location of the Property and the high risk of vandalism to vacant properties in the area, that the continued occupation of the premises by the Employee is a threat to the safety of the Property.

41. Ms Sutherland's objections begin with her assessment that the house is less securable than it should be – with some inadequate security screens and some lacking entirely. I have no reason to doubt what she says. I would not, however, interpret the clauses as impressing upon her any obligation to install better, or additional screens, a higher fence, more locks and bolts, or anything of that sort. In my view, "proper and adequate provision for the securing of the Property" would entail her locking the windows and doors, and gate, as far as she can using the locks etc provided by the Council with the house, and perhaps letting the neighbours and local police know that she

will be away for so many days, and asking them to keep an eye on the place. If her absence is to be for more than 30 days, she must also notify the Council , in its capacity as her landlord (it would no doubt already know, in its capacity as her employer).

42. Mr Crawley correctly points out that s 49 of the Act requires the landlord to provide locks etc to ensure that the premises are reasonably secure. Clause (jj) is evidence that the Council anticipates that in at least some of its territories vandalism will be a very foreseeable problem. If Galiwinku is such a territory, "reasonably secure" might be much more physically fortified than in other, more law abiding places. If Ms Sutherland has any complaint about the level of physical security, she has her remedies under the Act. Such complaints do not bear on the reasonableness of these clauses.

43. Ninthly, there is Ms Sutherland's related objected to clause (kk).

44. There are in the material before me two versions of (kk). The one Ms Sutherland objects to, in the draft agreement attached to her affidavit reads:

> (kk) In the event damage occurs to the Property as a result of the Property being left unoccupied, the Employee will be prima facie responsible for the costs of repairing the damage. The Employee further acknowledges that, in accordance with clause 5(g) of this Agreement, EASC has the ability to deduct from any wages or salary owing to the Employee (including any accrued leave and other entitlements) the costs of repairing the damage.

45. Any tenant might well feel nervous about signing up to that. What does "damage occurs to the Property as a result of the Property being left unoccupied" include?

46. The second version appears on Mr Crawley's Scott Schedule, and reads:

(kk) In the event damage occurs to the Property as a result of the Property being left unoccupied, the Employee will be prima facie responsible for the costs of repairing the damage unless the damage occurs to the property by either:

(i) a criminal act committed by a person other than the Tenant or his servants, agents or any other person in or on the Property with his consent; or

(ii) act of god;

and provided that the Employee has:

(iii) complied with the notice and security provisions of clause 3.jj; and

(iv) reported any damages caused by a criminal act to the relevant authorities.

If damage to the property has occurred as described in clauses 3.k.i and 3.kk.ii and the Employee has complied with the provisions of clauses 3.kk.iii and 3.kk.iv then EASC shall be liable for costs associated with rectifying the damages to the property only. EASC's liability does not extend to the Employees personal items. The Employee further acknowledges that, in accordance with clause 5(g) of this Agreement, EASC has the ability to deduct from any wages or salary owing to the Employee (including any accrued leave and other entitlements) the costs of repairing that damage.

47. In my opinion that clause is reasonable and not oppressive, and Ms Sutherland's version, given its uncertainty, is unreasonable and oppressive.

48. Ms Sutherland's tenth objection arises from the section of the tenancy agreement headed "Mutual Covenants", and concerns the provisions therein for increases in rent. I do not understand her to be committedly pursuing this objection, perhaps because the rent presently being charge is low (not to say nominal) and because the Council says, and the proposed term requires, that rent be set at no more than a rate sufficient for the Council to recover costs

49. It must be conceded that, if a dispute ever arose over a proposed rent increase, it would be a long and difficult task to demonstrate that the increase was or was not justified by the contractual clause. It would not, however be impossible. More importantly, it seems almost unimaginable that the rent would be increased to a level where Ms Sutherland could seriously feel she was being gouged by the Council. In any event, I am satisfied that the clause complies with s 41 of the Act.

50. Ms Sutherland's eleventh and last active concern arises out of another of the mutual covenants, this one being to the effect that, in the event of Ms Sutherland being liable to pay the Council for some sort of damage to her house, the Council may deduct the amount from any wages or salary owed by the Council to her. Ms Sutherland had two objections to this clause, neither of them, in my view, being soundly based. In the first place she was of the view – I think she is now disabused of it – that the Act placed a limitation on the amount a landlord could recover from a tenant for damage to the property and that that limit was the amount of the bond money put up by the tenant. If that was her belief, she was simply wrong.

51. Secondly, and more pertinently, she refers me to s 326 of the *Fair Work Act 2009 (Commonwealth)* and says that pursuant to that provision the term must be of no effect. In particular she took me to Regulation 2.12, made pursuant to s 326(2) of the Act and argued, perhaps correctly, that the clause was not among these provisions defended by Regulation 212(l) as "reasonable".

52. I do not need to decide that, because, as Mr Crawley submitted, Regulation 2.12(2) provides:

> For subsection 326(2) of the Act, a circumstance in which a deduction mentioned in subsection 326(i) is reasonable is that the deduction is per the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by the employee (whether authorised or not).

53. In my opinion that is the applicable regulation. Consequently the clause is not voided by the *Fair Work Act.*

54. For the reason given in paragraph 12 above, the application is dismissed. This hardly amounts to a victory for the respondent, and I order that each party bear its, or her, own costs. I hope that the venting of the issues through the Court's process will have given the parties an opportunity to rethink their positions on the dispute between them, and that they can arrive at terms for a lasting lease acceptable to them both.

Dated this day of 2011

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STIPENDIARY MAGISTRATE