

AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: Gayle MARANDO –v- James GREENHALGH [2009] ACTRTT (6)

RT 972 of 2008

Catchwords: Reletting at a higher rent for balance of the fixed term; reletting fees; surrender of joint tenancies in the fixed term.

Tribunal: A. Anforth, Member

Date: 16 February 2009

**AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL**

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NO: RT 972 of 2008

GAYLE MARANDO
(Applicant/Lessor)

AND:

JAMES GREENHALGH
(Respondent/Tenant)

DECISION

1. The tenant, Mr Greenhalgh, is to pay the landlord the sum of \$618.57 forthwith.
2. The Office of Rental Bonds is to pay to the landlord the sum of \$618.57 in satisfaction of the above judgement and the balance of the bond is to be paid to Mr Greenhalgh.

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Member
16th February 2009

**AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL**

NO: RT 972 of 2008

GAYLE MARANDO
(Applicant/Landlord)

JAMES GREENHALGH
(Respondent/Tenant)

REASONS FOR DECISION

1. This matter concerns a residential tenancy at Watson in the ACT. The tenancy was commenced on 16 May 2008 with Michael James Warren and James Michael Greenhalgh as tenants. The tenancy was for a period of 12 months at a rent of \$400.000 per week. A bond of \$1600.00 was lodged with the Office of Rental Bonds.
2. The tenancy contained a special clause that read:
 1. If any one tenant advises they wish to vacate during a fixed term, the tenancy for all parties may cease and all parties will be responsible to pay compensation for this breach.
 2. If any one tenant advised they wish to vacate during a periodic tenancy 21 days written notice is required, a partial checkout will be conducted on the nominated date and all remaining tenants are responsible to pay a new bond, sign a new tenancy agreement and inventory and condition report.
3. On 24 November 2008 Mr Greenhalgh served notice on the landlord of his intention to vacate the premises on 24 December 2008. No reasons were given and Mr Greenhalgh said "I understand that I am liable for payment of the rent until such time as a new tenants are found". Mr Greenhalgh in fact vacated the premises on 24 December 2008 at which point in time the rent was only paid to that date.
4. On 1 December 2008 the landlord's agent responded to Mr Greenhalgh advising that he would not be released from the tenancy and that the landlord would expect rent to be paid until a new tenant was found. The landlord's agent advised that they would be applying to the Tribunal under section 84(2)(b) *Residential Tenancies Act 1997* for an order confirming the ongoing existence of the tenancy.
5. On 11 December 2008 the landlord applied to the Tribunal for an order for confirmation of the fixed term tenancy and compensation by way of foregone rent pursuant to section 107 of the Act (which has subsequently be renumbered section 84)
6. The matter was listed before the Tribunal on 21 January 2009. Ms Gill, real estate agent, appeared for the landlord and the tenant Mr Greenhalgh appeared in person.

7. The Tribunal was informed that Mr Warren, the second tenant on the original tenancy agreement, vacated the premises on 12 November 2008. The parties advised the Tribunal that there was agreement between the landlord and both tenants to release Mr Warren from the tenancy at the time he left on 12 November 2008 and for Mr Greenhalgh to take sole responsibility for the tenancy thereafter.
8. By the date the matter was listed before the Tribunal Mr Greenhalgh had in fact also vacated the premises and a new a new tenant had been found and a new tenancy commenced on 29 December 2008 at a rent of \$410.00 per week. The landlord claimed from Mr Greenhalgh the rent for 25 December to 28 December inclusive i.e. 4 days @ \$57.14 per day = \$228.57.
9. Before the Tribunal, in view of the development that had occurred since the application was lodged, the landlord sought to amend her application for an order for the foregone rent between 24 December and 29 December 2008 and for the reletting fee and advertising costs. There was clearly no possibility then of an order confirming the original tenancy. There was also a claim for damage to a book case, the cost of repair of which was \$190.00. Mr Greenhalgh accepted responsibility for this item.

The issues:

10. The facts in this matter were not in dispute. The dispute concerned the relevant principles of law. In particular the following issues arose for resolution:
 - (a) What was the effect at law of Mr Warren's release from the tenancy on 12 November 2008:
 - (b) Is the landlord entitled to a reletting fee and advertising costs
 - (c) What is the effect of the landlord reletting the premises to the new tenants within the original fixed term at a higher rent.

The release of Mr Warrant from the tenancy:

11. The issue of the termination of joint tenancies was dealt with by the Tribunal at length in *Baird v Campbell* [2005] ACTRTT 8 which the present Tribunal adopts in full without repeating here.
12. In short, both original joint tenants were committed to the tenancy for the full fixed term and no one tenant had the right to unilaterally terminate that fixed term tenancy until the expiration of the fixed term. Nevertheless the fixed term joint tenancy could be terminated by way of surrender of the fixed term tenancy (section 36(g)) which required the consent of all parties i.e. the landlord and the other tenant.
13. In the present case it seems that the landlord and Mr Greenhalgh both consented to the release of Mr Warren from the fixed term lease on 12 November 2008 and so a surrender of the original fixed term lease was effected on that date. This interpretation of the events is consistent with special clause 1 of the tenancy agreement.

14. The surrender of the fixed term tenancy on 12 November 2008 by definition brought that tenancy to an end and required an accounting between the parties and resolution of any outstanding rent or bond issues. In the present case the Tribunal was informed that there was no rent arrears at the date of surrender on 12 November 2008 nor were there any relevant bond related issues.
15. The fact that Mr Greenhalgh then stayed on in the premises after 12 November 2008 exercising the full rights of a tenant indicates that from 13 November 2008 he occupied the premises as a sole tenant under a new tenancy agreement. The evidence from the parties was to the effect that the resulting sole tenancy was to be for the balance of the fixed term i.e. Mr Greenhalgh was a sole tenant for a fixed term from 13 November 2008-14 May 2009 at a rent of \$400.00.
16. In so far as Mr Greenhalgh then abandoned that fixed term sole tenancy on 24 December 2008, he has breached the terms of his tenancy agreement and the landlord rightly seeks compensation.

The reletting fee:

17. The circumstances in which a landlord is entitled to re-letting fee and advertising costs was addressed at length by the Tribunal in *Dexter v Lun* 2008 ACTRTT (..) which is adopted in full for present purposes. Prima facie the landlord is entitled to a pro-rata reletting fee of about 5/6 of \$400.00 plus any proven advertisement costs. The total of the pro-rata reletting fee and advertising costs cannot exceed one week rent i.e. \$400.00. In the present case, and subject to what is said below, the sum of these costs exceeded \$400.00 and therefore the statutory cap of one weeks rent (\$400.00) applies.

What is the effect of reletting the premises at an increased rent during the balance of the fixed term of the original lease.

18. The point was made by the presently constituted Tribunal in *Hookway v Boxsell* 2008 ACTRTT 19 and *Elvin v Meischke and Lee* 2008 ACTRTT 18 that there is no rule of law prohibiting a landlord from advertising at a higher rent for the balance of the fixed term.
19. The point was made by the presently constituted Tribunal in *Hutcheson v McMaster* 2008 ACTRTT 14 that if the landlord does achieve a higher rent from a new tenant in the balance of the fixed term then the concept of "indemnity" underlying the computation of compensation, whether in section 62 or 84 of the Act, requires the amount of gain obtained by the landlord by reason of the increased rent for the balance of the fixed term to the statutory cap of 25 weeks be set off against the landlord's other losses.

Conclusion:

20. In the present case the landlord obtained \$10 per week in higher rent over the period commencing 29 December 2008 to 14 May 2009 which is about 20 weeks i.e. the landlord made a gain of about \$200.00 for which credit must be given.

21. The landlord's other losses are \$228.57 for the rent deficient prior to the new tenant being found, \$190.00 for the bookcase and \$400.00 for reletting and advertising, being a total of \$818.57. From this sum the \$200.00 rent gain for the balance of the fixed term is set off leaving a balance owing of \$618.57.

A. Anforth
16th February 2009