

## AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

**CITATION:** MOON, MCINNES, WALKER & DALE V MURRAY [2008] ACTRRT 9  
(24 June 2008)

**RT 269 of 2008**

**Catchwords:**

**Issues:** Residential Tenancy Agreement as a partly oral, partly written agreement.  
Failure by lessor to comply with terms of agreement.

**Tribunal:** J. Lennard, Member

**Date:** 24 June 2008

AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL

)  
) NO: RT 269 of 2008

RE: **Tristan MOON, Robert MCINNES,  
Jason WALKER & Andrew DALE**  
(Applicant/Tenant)

AND: **Robert & Michelle MURRAY**  
(Respondent/Lessor)

**DECISION**

**Tribunal** : J. Lennard, Member

**Date** : 28 May 2008

**Decision** :

1. That the lessors are to pay the tenants the sum of **\$4750.00** being compensation.
2. That the abovementioned amount is to be paid by the **11<sup>th</sup> of June, 2008.**

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Member

AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL

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RE: **Tristan MOON, Robert MCINNES,  
Jason WALKER & Andrew DALE**  
(Applicant/Tenant)

AND: **Robert & Michelle MURRAY**  
(Respondent/Lessor)

### REASONS FOR DECISION

24 June 2008

J. Lennard, Member

1. The parties entered in to a Residential Tenancy Agreement in relation to the premises at 22 Mary Gillespie Avenue, Gungahlin ACT for a fixed term of 24 months from 12 January 2007.
2. Mr James Folk was the builder of the premises and other houses in the same street. He acted as the lessors' agent and conducted the pre-contractual negotiations with the tenants.
3. At the time the tenants viewed the premises, they were newly constructed and some landscaping work was being undertaken. HiClass Gardening has completed the landscaping at other premises, built and managed by Mr Folk, in the same vicinity.
4. The tenants allege that those pre-contractual negotiations included a promise that the landscaping of the gardens in the premises would be completed in the very near future. The tenants gave evidence that the landscaping had not been completed, despite complaints to, and promises from, the lessor through Mr Folk that the landscaping would be completed as soon as possible. At the date of the hearing (28 May 2008) it was not contested by either party that there had been a promise to complete the landscaping and that it had not yet been completed.
5. The content of the representation made in relation to the landscaping and the issue of whether it had become a term of the contract was the issue before the Tribunal.
6. Mr Folk gave evidence that he had indicated to the tenants prior to the entering into of the tenancy agreement that the landscaping would be completed as soon as possible and that he told the tenants that he was obtaining quotes from HiClass Gardening. Mr Folk told the Tribunal that he had indicated to the tenants at the time of entering into the agreement that he was 'sorting out' the issue of the landscaping.
7. The Tribunal heard evidence from the tenants, Mr Folk that the tenants had raised the issue of the failure to complete the landscaping on a number of occasions since the commencement of the tenancy. The tenants explained that they had not made application to the Tribunal prior to this because they were continually promised that the work would be completed 'soon'. The Tribunal also received written evidence that the lessor and Mr Folk had been endeavouring to arrange the completion of the landscaping but that HiClass had proved extremely unreliable. In a letter dated 20 February 2008 Mr Folk stated that 'We are profoundly sorry that our tenants are

upset with us as landlords, it was never our intention to have the landscaping take so long to start, but this was not due to lack of trying on our behalf'.

8. Upon hearing the tenants and Mr Lester, solicitor for the lessor, and taking into account the evidence of the tenants and Mr Folk the Tribunal concludes:
  - a. That the representation as to the landscaping being completed was a term of the contract. That is that the agreement consisted of the express written terms contained in the Standard Residential Tenancy terms and the express oral promise that the landscaping would be completed as soon as possible. It matters not whether the agreement is characterised as partly oral and partly written, or, as two contracts: one in writing and the other an oral contract collateral to the main contract.
  - b. That this representation was a key factor in inducing the tenants to enter the agreement. This was a promissory statement, intended to be binding and operative in inducing the tenants to contract.
9. As to the content and meaning to be given to the representation the tenants say they understood the promise to be that the landscaping would be completed as soon as possible, the lessor agrees with the content but argues that they have not been able to complete the landscaping prior to this and that therefore they are completing the work 'as soon as possible'. The term must be interpreted in the context of the contract as a whole and in all the relevant circumstances.
10. The fact is the lessor endeavoured to have the landscaping done on several occasions throughout the tenancy but has not been successful in keeping HiClass to its promises. The meaning pressed by the lessor would make the promise empty and worthless. The fixed term agreement was for 24 months. The Tribunal does not accept that a promise to do something 'as soon as possible' is fulfilled by completing that work more than 75% of the way through the contract period. The requirement is that the promise be fulfilled within a reasonable time. This promise has not been fulfilled within a reasonable time, and probably would not have fulfilled at all but for the application to the Residential Tenancies Tribunal.
11. The Residential Tenancies Tribunal finds that the lessor has breached the agreement by failing to complete the landscaping in a manner that complies with their promises.
12. The tenants gave evidence that as a result of this breach they suffered the following damage:
  - a. Severe reduction in use of the premises. There was no use to be made of a bare, dry and dusty exterior yard. The tenants were denied the use of the yard for entertainment, relaxation and privacy.
  - b. The dust and dirt from the yard increased the need for and frequency of cleaning of the interior of the premises.
  - c. A reduction in security and privacy within the premises.
  - d. A significant reduction in quiet enjoyment. A garden is an integral part of premises consisting of a house and a yard, the enjoyment, relaxation and well being that comes from having a garden has been lost.

13. Taking into account the damages suffered, the length of time since the promise was made, and the rent paid for the premises the Residential Tenancies Tribunal assesses the damages to be \$4,750.
14. The lessors have informed the Tribunal that work on the garden will be completed by the end of June and that arrangements are in place to ensure this. Therefore the Tribunal makes no order for specific performance of the promise. Section 104(d) provides that the Tribunal may make an order for compensation for any loss caused by a breach of the tenancy agreement. The Residential Tenancies Tribunal made orders that an amount of \$4,750.00 be paid by way of compensation by the lessors to the tenants, such payment to be made prior to 11 June 2008.