

AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: JILL DEXTER –v- DONG RONG LUN [2009] ACTRTT (7)

RT 839 of 2008

Catchwords: Reletting fee, fair posting clause; termination via fair posting clause; endorsement of fair posting clauses.

Tribunal: A. Anforth, Member

Date: 16 February 2009

**AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL**

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No: RT 839 of 2008

JILL DEXTER
(Applicant/Landlord)

AND:

DONG RONG LUN
(Respondent/Tenant)

DECISION

The Office of Rental Bonds is to return the residue of the rent retained to the tenant.

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A. Anforth, Member
16th February 2009

**AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL**

NO: RT 839 of 2008

JILL DEXTER

(Applicant/Landlord)

DONG RONG LUN

(Respondent/Tenant)

REASONS FOR DECISION

1. The facts are not in dispute. The dispute between the parties is wholly one of law.
2. This matter concerns the residue of a rental bond dispute between the parties. The tenancy commenced on 25 December 2007 for a fixed term of 12 months at a rent of \$320.00 per week and a bond of 1280.00. The tenancy was terminated on 23 August 2008 when the tenant vacated to take a posting outside the ACT in the course of his employment. The landlord secured a new tenant on 26 August 2008 at a rent of \$330.00 per week.
3. Part of the bond has been dispersed in accordance with the parties consent. There is a residue of \$365.72 held by the Office of Rental Bonds which relates to the dispute between the parties over the landlord's claim for compensation for a reletting fee and foregone rent pending the signing of a new tenant to the premises.
4. The original tenancy agreement contained the standard posting clause of section 8 of the Act which read:
 - (1) The tenancy agreement may be terminated—
 - (a) if the lessor is posted to Canberra in the course of the lessor's employment—by the lessor giving the tenant at least 4 weeks written notice; or
 - (b) if the tenant is posted away from Canberra in the course of the tenant's employment—by the tenant giving the lessor at least 4 weeks written notice.
 - (2) The tenancy ends—
 - (a) 4 weeks after the day a notice is received under subclause (1); or
 - (b) if a later date is stated in the notice—on the stated date.
5. The matter was listed before the Tribunal on 21 January 2009. Ms Hawkins, real estate agent appeared for the landlord and the tenant appeared in person by phone.
6. Three issues of law arose for resolution at the hearing. The parties had their say and the Tribunal reserved the matter for written decision. The issues were:
 - (a) Whether the posting clause required endorsement under section 10 of the *Residential Tenancies Act 1997* (the Act) in order to be valid;
 - (b) The extent to which the landlord was entitled to any part of the reletting fee as part of her damages

- (c) The relevance of the fact that the landlord managed to relet the premises for the balance of the fixed term at an increased rent.

The posting clause:

7. Section 10(1) of the Act provides for the endorsement by the Tribunal of any term that would otherwise be inconsistent with a standard residential tenancy agreement. Section 8 provides that a residential tenancy agreement contains the prescribed terms set out in the Schedule to the Act and may contain a fair posting clause in the terms set out in section 8:

8(1) A residential tenancy agreement—

- (a) must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1; and
- (b) if the lessor and tenant agree—may contain a fair clause for posted people; and
- (c) may contain any other term—
 - (i) that is consistent with the standard residential tenancy terms; or
 - (ii) that is inconsistent with a standard residential tenancy term if the term has been endorsed by the tribunal under section 10.

10(1) The parties to a residential tenancy agreement may apply in writing to the tribunal for endorsement of a term of the agreement (the *inconsistent term*) that is inconsistent with a standard residential tenancy term.

(2) If the parties apply for endorsement of the inconsistent term, the tribunal must do 1 of the following:

- (a) endorse the inconsistent term;
- (b) substitute the equivalent standard residential tenancy term for the inconsistent term.

(3) In making a decision under subsection (2), the tribunal must consider—

- (a) the criteria determined under subsection (6); and
- (b) whether the inclusion of the inconsistent term in the residential tenancy agreement was obtained by fraud or undue influence.

(4) The tribunal must not endorse a term that is inconsistent with this Act (other than a standard residential tenancy term).

(5) The tribunal must not endorse a term mentioned in section 15 (5) in relation to a tenant unless satisfied that the tenant owes an amount to the commissioner for housing.

(6) The Minister may determine criteria for subsection (3) (a).

(7) A determination is a disallowable instrument.

8. Section 8(1)(b) does not require that the fair posting clause be endorsed under section 10, rather it states that by agreement the parties can simply insert the fair posting clause into the residential tenancy. Put simply, a fair posting clause inserted by this process forms part of the residential tenancy agreement and therefore cannot be inconsistent with the residential tenancy agreement and therefore does not require endorsement pursuant to section 10.
9. If the fair posting clause of section 8 merely formed part of the Act then it may be arguable that an endorsement under section 10 may be required in order to introduce the fair posting clause into the residential tenancy agreement itself. This is because section 10 requires endorsement of any terms that is inconsistent with

the prescribed terms of Schedule, as opposed to being inconsistent with any term of the Act itself, and the fair posting clause is arguably inconsistent with prescribed term 88. However, section 8 does not merely introduce the fair posting clause as a term of the Act, it goes further and permits the fair posting clause to be incorporated into the residential tenancy agreement itself and therefore to have contractual application. In this event the fair posting clause clearly forms an exception to prescribed term 88 and is not therefore inconsistent with prescribed term 88.

10. Notwithstanding the above the Tribunal is still deluged with applications by landlord's and their agents to endorse fair posting clauses. As long as the fair posting clause is in the terms set out in section 8 of the Act, the endorsement is not necessary and is a waste of resources by all concerned. If the fair posting clause differs materially from the standard fair posting clause in section 8 then endorsement may still be required.

The reletting fee:

11. The claim for the reletting fee arises under either 62(1)(b) or section 84(1)(b)(ii) of the Act which both permit the Tribunal to award compensation for "the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to another person". Sections 62(3)(b) and 84(3)(b) respectively limit the total compensation for these claims to one weeks rent.
12. The reletting fees arises from the landlord's contract for services with its agent. Under the standard terms of retainer the agent is entitled to the first weeks rent upon the reletting of the premises under a new tenancy. Thus when a tenant vacates premature in the fixed term the agent is required to find a new tenant and bills the landlord for the first week of rent under the new tenancy thereby causing loss to the landlord.
13. The traditional approach taken by the Tribunal and by its NSW counterpart is to view the reletting fee in the context of an abandonment of a fixed term tenancy as a brought forward cost rather than as an entirely new cost. The rationale is that the tenant could have lawfully terminated the tenancy at the end of the fixed term and the landlord would then have been up for the same reletting fee at that point in time. The premature vacation of the premises by the tenant merely brought forward this cost. For this reason the approach taken is to permit the reletting fee at a pro-rata rate depending on the extent of the fixed term that had expired at the time the tenant abandoned the property (Residential Tenancies Law and Practice in NSW 4th ed Anforth and Christensen at [2.16.10]). In the present case the tenant left the premises 2/3 of the way through the fixed term and thus the landlord would ordinarily be entitled to a reletting fee of 1/3 of one weeks rent.
14. The total amount allowable for the reletting fee must be aggregated with the advertisement costs under sections 64 84(1)(b)(ii) and the total of these two sums is capped at 1 week of rent by section 8(3)(b)(ii).
15. The abandonment of premises during a fixed term operates to terminate the lease (section 36(e) of the Act). The landlords entitlements to compensation in these

circumstances, whether under section 62 or 84 has been addressed at length by the presently constituted Tribunal in *Mies v Phillips* 2006 ACTRTT 1; *Elvin v Meischke and Lee* 2008 ACTRTT 18, *Hutcheson v McMaster* 2008 ACTRTT 14 and *Hookway v Boxsell* 2008 ACTRTT 19 the content of which is not repeated here.

16. However if the tenant vacates part way through a fixed term in accordance with a valid posting clause, then there has been no abandonment or other unlawful termination of the fixed term lease by the tenant. If the parties agree as a term of the residential tenancy agreement that the tenant may vacate during a fixed term in accordance with a fair posting clause then the landlord has not been unlawfully or unfair treated by the tenant who relies upon that clause.
17. Thus there is no “abandonment” of the premises for the purposes of section 62 and the landlord is not entitled to any compensation arising from the tenant’s reliance on the fair posting clause.
18. Section 84 is a little less clear than section 62 because section 84 does not use the terminology of “abandonment”. Nevertheless is clear that section 84 is premised on an unlawful termination by the tenant, albeit that the tenant has provided notice to the landlord of that unlawful intention. It is inconceivable to the Tribunal that the legislature and the parties intended to confer a right on a tenant to terminate a fixed term lease in the circumstances of the fair posting clause but then to permit the landlord, via an order of the Tribunal under section 84, to abrogate the statutory and contractual right of the tenant.
19. Section 84 must be read consistent with section 8 with the result that no application of section 84 arises if the tenant vacates in accordance with the fair posting clause.
20. In the present case the tenant did in fact vacate in accordance with fair posting clause in his tenancy agreement and therefore has committed no breach that gives rise to any claim for compensation at all.
21. In the light of this finding it is not necessary to address the third issue referred to at paragraph 6 above as to which *Mies v Phillips* 2006 ACTRTT 1; *Elvin v Meischke and Lee* 2008 ACTRTT 18 and *Hutcheson v McMaster* 2008 ACTRTT 14 are relevant.
22. In consequences of the above finding, the Office of Rental Bond is to return to the whole of the remaining bond to the tenant.

A. Anforth
16th February 2009