

## AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

**CITATION:** The Commissioner for Social Housing in the ACT v Norman FAULL  
[2008] ACTRTT (20)

**RT 758 of 2008**

**Catchwords:** Injury

Serious or continuous interference with quiet enjoyment of premises

**Legislation:** *Residential Tenancies Act 1997 (ACT)*

Sections: 51; 104

**Tribunal:** J Lennard, Member

**Date:** 12 October 2008

AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL

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) NO: RT 758 of 2008

RE: **The Commissioner for Social  
Housing in the ACT**  
(Applicant/Lessor)

AND: **Norman FAULL**  
(Respondent/Tenant)

**DECISION**

**Tribunal : Jann Lennard, Member**

**Date : 12 October 2008**

**Orders:**

1. That the residential tenancy relating to the respondents tenant's occupancy of premises at 13/5 Cerutty Crescent, Gordon, ACT, shall terminate at 10am on 13 October 2008.
2. That the tenant is to vacate the premises and grant vacant possession to the lessor by 4pm, 14 October 2008.
3. In default of Order 2, the Registrar is to issue a warrant of eviction. The need for service of the warrant is dispensed with.

.....  
Jann Lennard, Member  
12 October 2008

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RE: **The Commissioner for Social  
Housing in the ACT**  
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AND: **Norman FAULL**  
(Respondent/Tenant)

### REASONS FOR DECISION

Jann Lennard, Member

**Re: Premises at 13/5 Cerutti Crescent, GORDON. A.C.T.**

### DECISION

#### THE TENANCY

1. The applicant lessor and the respondent tenant entered into a residential tenancy agreement in relation to premises at 13/5 Cerutti Crescent, GORDON, ACT on 12 January 2006.
2. The unit occupied by Mr Faull is in a complex also known as Barrington Gardens. Most of the people who are tenants in the property are elderly.

#### THE APPLICATION

3. The lessor made application to the Residential Tenancies Tribunal for a termination and possession order pursuant to section 51 of the residential Tenancies Act 1997.

#### **51 Damage, injury or intention to damage or injure**

On application by a lessor, the tribunal may make a termination and possession order effective immediately if satisfied that the tenant has intentionally or recklessly caused or allowed, or is likely to cause or allow –

...

- (c) if the lessor is a corporation – injury to a representative of the corporation or a member of the representative's family;
- (d) serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of the premises.

## PROCEDURE

4. The lessor's application was filed on 17 September 2008.
5. The application was listed for a directions hearing on 22 September 2008. Mr Robert Clynes of Counsel appeared for the applicant and Ms Jaleh Johannessen (WRLC) appeared for the respondent. In view of the serious allegations made by the applicant the Tribunal directly addressed Mr Faull and sought, and was given, an undertaking that he would refrain from contact with his neighbours and in particular would avoid any loud, aggressive or abusive behaviour. Mr Faull told the Tribunal that he was "off the alcohol". The tribunal made the following orders:

That the application was adjourned for a hearing on 1 October 2008.

That the Applicant and Respondent are to provide witness lists by 26/09/08.

That the Applicant and Respondent are to file and serve any further documents upon which they seek to rely by 26/09/08.

That the Applicant has leave to serve a subpoena on the Australian Federal Police returnable by 30/09/08.

6. On 30 September 2008 the respondent made an application for an adjournment. The statement of particulars attached to the original application was incomplete in that several pages were missing. In order to allow the respondent sufficient time to properly instruct Ms Johannessen, the matter was adjourned to 8 October 2008. The subpoena was returned and the Tribunal determined to accept all police reports relating to the tenant's premises.

7. The matter was heard on 8 October 2008. Mr McCarthy of Counsel and Ms Rebekah Knox ACT Government Solicitor, appeared for the applicant, and, Ms Jaleh Johannessen (WRLC) appeared for the respondent.

## **THE EVIDENCE BEFORE THE TRIBUNAL**

### **8. Documents attached to the application:**

#### **a. Statement of particulars - detailed chronology of the tenancy.**

- i. Complaints received by the lessor from other residents in the Barrington Gardens complex - the first complaint was received on 9 February 2006. Complaints continued to be received throughout the tenancy. The complaints concerned Mr Faull's conduct when intoxicated and the conduct of many visitors to his unit. In particular bad language, loud music, shouting and arguments.
- ii. The lessor had served notices upon the tenant requiring the tenant to remedy the breach of the tenancy agreement constituted by this conduct.

#### **b. Internal documents of the lessor:**

- i. Copies of notices and letters sent to Mr Faull and file notes and internal minutes as well as copies of letters of complaint received from residents of neighbouring premises. These also detail Mr Fall's antisocial behaviour, in particular abusive and foul language, threats made to residents of nearby premises, loud shouting and loud music as well as harassment of women.
- ii. These internal documents are evidence of the number of complaints, the regularity of the complaints and the actions taken by the lessor to deal with the issues. Mr Faull has been informed of the complaints and told that his conduct is not acceptable. Conferences, case meetings with Mr Faull's support workers are documented.



- iii. Some of these documents indicate that Mr Faull has threatened retribution upon his neighbours should he be evicted.
- iv. These documents included a letter from Directions ACT to ACT Housing, dated 6 December 2007. This letter is asking that ACT Housing review the Notice to Vacate served upon Mr Faull. Its contents are summarised as follows:

1. Mr Faull is a lifelong alcoholic. When he is intoxicated his level of functioning is diminished. He recognises the difficulties caused for his neighbours by his conduct but is not able to tell his friends to leave the premises
2. Mr Faull is functioning well in the premises he enjoys living there. The writer stated that living in the complex works *for Norman but not the other residents*.
3. If ACT housing were to allocate a different property to Mr Faull, where he could have a garden and a place to keep his dog, and, be in close proximity to support services this would address the problems caused by the impact of his conduct on his neighbours.
4. If Mr Faull were to be evicted without reallocation he will end up "on the streets". This would be detrimental to his physical and emotional health and wellbeing.

c. **Written statements** – these people gave oral evidence in the hearing and the content of their statements is summarised below.

- i. Anna Howell, Housing Manager.
- ii. Catharina (Karen) Hughes - resident of complex.
- iii. Kenneth Slater - resident of complex.
- iv. Leone Peters - resident of complex.
- v. Roslyn James - resident of complex

## 9. Documents filed prior to hearing

- a. Written statement by Brendan Paul Jones, Security Guard. Mr Jones was not called to give evidence, therefore the contents of his statement, although not denied by Mr Faull, must be assessed with caution by the Tribunal. The statement deals with events in the early hours of September 19 2008. The Security firm had been engaged by the lessor to patrol the premises about one week previous to these events. Mr Jones states that while he was driving past unit 13 a male person from the unit came out and *was running toward my car and yelling abuse and saying he was going to kill me. I think he yelled twice that he was "going to kill" me.*
- b. Supplementary statements from Catherina Hughes
- c. Medical Report from Dr Reeni Sathiamala dated 25 September and regarding Catherina Hughes
- d. Handwritten diary entry of Leone Peters regarding incident on 25 September 2008
- e. Typed transcript of diary notes of Leone Peters for the period 11 January 2008 to 12 September 2008.

## 10. Evidence provided by witnesses at the hearing

### a. Anna Louise Howell, Housing Manager

- i. Ms Howell gave evidence of her contact with Mr Faull and with other residents of the complex. In general she stated that the other residents were distressed by the loud music, abusive conduct and bad language used by Mr Faull and his visitors. She also stated that many of the residents had complained to her that they were in fear of Mr Faull.
- ii. Ms Howell gave evidence an incident on 10 April 2008. She was visiting the complex to visit another resident Mr Faull approached her to discuss complaints being made by other residents about his conduct. Mr Faull stated *that people around here were making complaints about him and if he gets evicted*

*he will kill them. He stated that it was the woman in the corner at number 15 and the 'bastard next door'.*

*...I'm going to get them killed if they evict me*

*... I don't hurt women but I will organise to have them killed*

*...I have been in jail for murder*

Following this incident ACT Housing put in place a policy that required more than one person to attend the complex if the visit was to Mr Faull.

- iii. Ms Howell gave evidence of an incident on 11 September 2008. She was visiting the complex to visit another resident. Mr Faull came out of his unit and objected to her looking into his unit. As Ms Howell, accompanied by another resident, Ms Catherina Hughes, returned from the visit Mr Faull shouted at her *I am going to damage you you cunt. This threat was repeated several times.* Mr Faull apologise for his conduct.
- iv. Ms Howell stated that she was genuinely afraid and feared for her safety. She stated that, although he was intoxicated, Mr Faull's tone and manner as aggressive and serious and she formed the view that he really meant what he said.
- v. Ms Howell gave evidence of the effect that this incident had upon her. She has suffered high levels of stress and anxiety, and has difficulty sleeping. She is receiving counselling to assist her in dealing with this. Due to the concerns she has for her personal safety she no longer visits the Barrington Gardens complex.

**b. Catherina Hughes, Unit 15/5 Cerutti Crescent Gordon.**

- i. Ms Hughes ' unit is diagonally opposite Mr Faull's unit she can see the front of his unit from hers. Ms Hughes is a pensioner and is at home most of the time.



ii. Ms Hughes gave extensive evidence of the conduct of Mr Faull and of his visitors:

1. Mr Faull is more often than not intoxicated. This witness was of the view that intoxication made his behaviour worse. She stated that the conduct complained of was usually at its worst from early afternoon to about 2am.
2. In general the conduct complained of consists of:
  - a. Loud and abusive language
  - b. Foul language – the words ‘fucking’ and ‘cunt’ are constantly used
  - c. Aggressive behaviour
  - d. Noise from the visitors coming and going and their arguments.
3. Ms Hughes gave corroborative evidence of the incident involving the first witness on 11 September 2008. She confirmed that Mr Faull had threatened and abused Ms Howell.
4. Ms Hughes gave evidence that Mr Faull used abusive language to herself and other residents of the complex. She described his conduct as aggressive. In particular she stated that on 8 March 2008 she had twice heard Mr Faull yelling at Les (Mr Faull’s Neighbour) that he was going to ‘get him’ and he was going to ‘kill him’. Police reports obtained in response to subpoena confirmed that police had attended the premises twice on 8 March and each time had arrested Mr Faull for breach of the peace. The police report describes Mr Fall as heavily intoxicated, aggressive to both police and his neighbours and as making threats to his neighbours.

5. Ms Hughes gave evidence that Mr Faull had threatened her and had come to her residence and abused her 'on a number of occasions'. MS Hughes stated that Mr Faull had told her that he had killed someone and had gone to jail for murder.
- iii. Ms Hughes described the effect that Mr Faull's conduct had had upon her: the noise and disturbances are described as almost daily. She stated that she was constantly in fear for her personal safety and afraid to go out of her unit or to walk past Mr Faull's unit. She locks her house and keeps all windows shut even in the heat of summer, in an attempt to keep out the noise. Ms Hughes stated that she was a prisoner in her own home. In her written statement Ms Hughes says *I constantly feel threatened by him. Sometimes I just lock myself in and try to tune out to what is going on.* She states that she cannot sleep, she is frightened of Mr Faull and that his intimidating and abusive manner has caused her stress. She is receiving medical attention for this stress. Dr Sathiamal gave evidence via phone to the tribunal. This evidence confirmed that Ms Hughes' levels of anxiety and stress had increased and that an increase in medication was required.
- iv. Ms Hughes stated that in the last two week she had seen Mr Faull intoxicated but that there had been no yelling or threats over the past two weeks. ACT Housing has a security guard at the complex every day from 4pm to midnight.
- c. The evidence of the other witnesses called by the applicant was in similar terms. The tribunal found each of theses witnesses to be reliable and credible. The constant themes were of loud noise, aggressive conduct, foul language and threatening behaviour. Each witness stated that their own use and enjoyment of their premises had been significantly diminished by the conduct of Mr Faull and his

visitors, each spoke of being afraid, having to keep windows closed.

Ms James gave evidence of not being able to use the back garden, of not being able to have her grandchildren visit and of any visitors having to stay inside the house to avoid the bad language and interfering behaviour of Mr Faull.

- d. The documents supplied by the AFP reveal that from May of 2007 to August of 2008 there were 19 visits by the police to the complex. Each of these visits was related to Mr Faull's conduct. The police reports describe conduct similar that described in the evidence of the witnesses.

11. **Mr Faull's evidence.** Mr Faull did not deny the conduct described by the witnesses. He stated that he was an alcoholic and that when he was drunk he did behave in the manner described by his neighbours. When specific incidents were put to him he said he could not remember and that when he was intoxicated he often 'blacked out' so that he does not know what he is doing and has no memory of his conduct. Mr Faull acknowledged that he had yelled at his neighbours, that he was unable to control the conduct of 'outsiders' who visit his premises. He knew that his neighbours were upset and he didn't blame them for being so upset.

12. Mr Faull said that he is now going to detox and was trying to 'get off' alcohol. He said he had told the troublemakers to stay away from his unit and he had a friend who had been dry for 8 weeks who was supporting him. He did however acknowledge that he had tried many times in the past to give up alcohol but always fell off the wagon after a few weeks. Although Mr Faull stated that he was receiving support from counsellors there was no independent evidence of this.

13. The application for a termination and possession order is brought under s51 of the Act. If the tribunal is satisfied that the Mr Faull has intentionally or recklessly caused or allowed, or is likely to cause or allow injury to a representative of the applicant lessor or serious or continuous interference

with the quiet enjoyment of their premises by Mr Faull's neighbours, then the tribunal may make a termination and possession order.

14. The applicant lessor argues that Ms Howell has been injured. The lessor must prove on the balance of probabilities that the tenant has intentionally caused such injury. *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. There must be sufficient evidence for the tribunal to be satisfied that more likely than not there has been an injury. Injury can be physical or mental damage to a person. Stress caused by threats or abuse is such an injury. Ms Johannessen argued that while mental distress and the consequent depression, stress and anxiety caused may be an injury there was no medical evidence to support Ms Howell's evidence. Ms Johannessen argued that the counselling Ms Howell was having could be seen as a duty of care issue for the applicant rather than evidence of injury. Ms Johannessen referred the tribunal to *Department of Housing v Johnstone* [2001] NSWRT 85 (30 April 2001) and argued that in the absence of medical evidence the injury could not be made out. In *Department of Housing v Crook* [2003] NSWCTTT 268 (14 March 2003) the NSW tribunal held that it was possible to find that there is an injury without medical evidence. The Tribunal is satisfied that Ms Howell has suffered an injury as a result of the verbal abuse and threats made to her by Mr Faull on 11 September 2008. In this case it seems that Mr Faull's conduct is not likely to change and therefore it is likely that his conduct could cause similar injury to representatives of the lessor.

15. Mr Faull's conduct constitutes a serious and continuous interference with the quiet enjoyment of their premises by Mr Faull's neighbours. Quiet enjoyment is the legal concept of a tenant being entitled to hold the premises and use them for normal residential purposes without interference. It is a right in the tenant to enjoy the premises for all usual purposes free from interference. This would encompass the notion of reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises and would include, but is not confined to, the right to prevent others from entering the premises, the right to prevent others from damaging the premises, the right to enter and exit the premises without fear of threats or abuse while using common areas to do so,



and the right to use the house and surrounding gardens for relaxation and enjoyment without being abused, threatened or made to feel unsafe.

16. A wide range of conduct has been found to amount to interference with quiet enjoyment: violent and abusive behaviour *Sampson v Floyd* [1989] 33 EG 41; noise alone *Hawkesbury Nominees P/L v Battik P/L*, [2000] FCA 185 (1 March 2000) and failure by the lessor to take steps to prevent others from causing interference with quiet enjoyment *Aussie Traveller P/L v Marklea P/L*, [1997] QCA 2(11 February 1997), continual loud swearing and abuse *ACT Housing v Frank* [2006] ACTRTT 8, noise of many cars coming and going, loud music, loud voices, bad language, abusive behaviour and making of threats *ACT Housing v Margules* [2003] ACTRTT 6.
17. The tenants right to quiet enjoyment arises out of their use of residential premises, and the interference must be one that involves the use of the residential premises leased to them by the lessor. Personal discomfort may be caused by being prevented, through the conduct of neighbours, from being able to make full use of premises or land. The definition of 'premises' as set out in the Residential Tenancies Act 1997 includes land and part of any premises. If fear of abuse, violence or assault prevents a householder from entering a garden or opening windows, this is a direct and fundamental interference with the usual use of premises and thus an interference with quiet enjoyment. Where a tenant's daily activities are interfered with by noise or abuse emanating from adjoining premises, this is also interference with quiet enjoyment.
18. The evidence of the neighbours of Mr Faull was that their use of their premises was diminished as a direct result of his conduct. The noise, abuse, threats and foul language caused stress and loss of sleep. Residents kept their windows closed and so suffered from heat in the summer and felt that they were prisoners in their own homes. Some gave evidence, of not being able to use their gardens and of not being able to have visitors. Some gave evidence of being afraid for their personal safety. The tribunal finds that Mr Faull has caused serious and continuous interference with the quiet enjoyment of their premises by his neighbours.



19. Upon finding that the factors in section 51 (c) and (d) are established on the evidence, the tribunal may make a termination and possession order. In *Eastman v Commissioner for Housing in the Australian Capital Territory* [2006] ACTSC 52 the court held that the use of the word may confers upon the tribunal a discretion to be exercised in deciding whether to make a termination and possession order. Although that case related to an application under s47, the tribunal is of the view that the discretion also exists in relation to s51.
20. The tribunal must exercise the discretion in the light of the purpose and scope of the Act. The factors, which may be considered in the exercise of that discretion, are to be determined by the interpretation of the legislation conferring that discretion. Thus the Residential Tenancy Tribunal may consider relevant factors relating to its discretion under s51 in light of the rest of the Act. Elsewhere in the Act the Tribunal has discretion to refuse to make termination and possession orders, albeit somewhat limited. The tribunal is of the opinion that matters which go to the fundamental nature of a residential tenancy, which reflect the balance of the interests of the lessor as a provider of housing and the interests of tenants as householders would fall within the range of factors to be taken into account in the exercise by the Residential Tenancy Tribunal of the discretion conferred in s 51.
21. Ms Johannessen urged the tribunal to take into account a number of factors:
- a. *that s51 was not the appropriate section for such an application because it was an emergency measure and there are other processes available to the lessor.* The tribunal sees some force in this argument because any order made under s51 is effective immediately. However, the evidence of the lessor's internal documents attached to the application suggests that the lessor had employed other measures to solve the issue, but with no success. The incidents of 11 September 2008 (described above at para 10) and 19 September 2008 (described above in para 9), combined with the evidence of Mr Faull's threats of retaliation plus the need to employ a security guard at the premises on a daily basis are also important matter to consider.

- b. *That Mr Faull was attempting to deal with his alcohol problem and that the abuse and bad behaviour had been less in the past few weeks.*

If the tribunal could be satisfied that the complained of conduct was more likely than not to cease this would be an important matter to weigh in consideration of the exercise of its discretion. However, there was no evidence before the tribunal of any program or counselling that Mr Faull was participating in; on his own admission, Mr Faull had tried to deal with his alcohol problems in the past. At the hearing on 22 September Mr Faull told the Tribunal that he was “off the alcohol”. The evidence before the tribunal suggests that he has been drunk on most days between then and this hearing. In the absence of any real evidence that Mr Faull has taken positive steps to deal with his alcoholism and the associated behavioural problems the tribunal is of the view that his statements to the tribunal should be given little weight.

22. The tribunal also takes into account that the lessor is the ‘landlord of last resort’ in the territory and that if a termination and possession order is made, Mr Faull is likely to be homeless. Living on the streets will put him in danger and be detrimental to his physical and emotional health and wellbeing.
23. The tribunal is aware of the difficulties that Mr Faull will face if evicted from his unit. The tribunal has no power to order the lessor to transfer Mr Faull to other more suitable premises, but urges the lessor to consider this course of action. The cost to the territory is likely to be great if Mr Faull becomes a homeless person this includes police, medical and hospital costs.
24. Against Mr Faull's interest the tribunal must weigh those of the lessor and his neighbours. There is no doubt that the neighbours have been significantly and adversely affected by Mr Faull's conduct. They are entitled to the full use and quiet enjoyment of their homes, and have been denied this. Representatives of the lessor, whose employment may involve dealing with difficult situations, are nonetheless entitled to go about their daily work without threat of or actual injury.

25. Taking all matters into account the tribunal makes the following orders.;

**ORDERS**

1. That the residential tenancy relating to the respondent tenant's occupancy of premises at 13/5 Cerutti Crescent, GORDON, ACT, shall terminate at 10am on 13 October 2008.
2. That the tenant is to vacate the premises and grant vacant possession to the lessor by 4pm 14 October 2008.
3. In default of order 2 the Registrar is to issue a warrant of eviction. The need for service of the warrant is dispensed with.

**JANN LENNARD**

**12 OCTOBER 2008**