

## AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

**CITATION:** David Hutcheson and Helen Hutcheson v Baden Cameron  
McMaster and Sonia Mary McMaster [2008] ACTRTT (14)

**RT 572** of 2008

**Catchwords:** Section 107; compensation for abandonment.

**Tribunal:** A. Anforth, Member

**Date:** 26 September 2008

**AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL ) NO: RT 572 of 2008**

**David Hutcheson and Helen Hutcheson**  
(Applicant/Tenant)

AND:

**Baden Cameron McMaster and Sonia Mary McMaster**  
(Respondent/Landlord)

**DECISION**

**Tribunal :A. Anforth, Member**

**Date :4 August 2008**

**Decision :**

- 1. The landlords application is dismissed.**
- 2. The tenants counter claim for a refund of rent is dismissed.**

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Member

**AUSTRALIAN CAPITAL TERRITORY )  
RESIDENTIAL TENANCIES TRIBUNAL ) NO: RT 572 of 2008**

**David Hutcheson and Helen Hutcheson**  
(Applicant/Landlord)

**AND**

**Baden Cameron McMaster and Sonia Mary McMaster**  
(Respondent/Tenant)

**REASONS FOR DECISION**

1. This matter relates to a tenancy at 11/18 Kenyon Circuit Monash in the ACT. The parties entered a residential tenancy agreement on 13 November 2007 for a term of 12 months commencing on 13 December 2007. The rent was \$300 per week and a bond of \$880.00 was paid.
2. On 27 March 2008 the tenants advised the landlords that they intended to terminate the tenancy on 24 April 2008 and in fact vacate the premises on 18 April 2008, which is within the fixed term of the lease. The tenants did in fact vacate on 18 April 2008. The rent was paid to 11 May 2008 and no rent has been paid since this time.
3. A new tenant was found for the premises from 31 May 2008 at a rent of \$360.00 per week.
4. Following some negotiation between the parties, the landlords filed an application with the Tribunal dated 7 July 2008 seeking compensation from the tenants arising from their abandonment of the premises on 24 April 2008. Annexed to the application was a range of documents including:
  - (a) A copy of the tenancy agreement;
  - (b) A copy of an email from the tenants to the landlords advising their intention to terminate the tenancy on 24 April 2008 and asking for an inspection of the premises to be arranged for 18 April 2008. The email referred to the damage to vertical blinds caused by the tenants' dog and the tenants intention to have them replaced.
  - (c) A letter from the landlords agents to the tenants dated 27 March 2008 in which the landlords declined to release the tenants from the tenancy and required them to pay rent until a new tenant was found.
  - (d) An email from the tenants to the landlords in which the tenants said that they would vacate by 18 April 2008 and would prefer no inspections by prospective tenants until after this date.
  - (e) An email from the tenants to the landlords agent enclosing a bond release form to permit the bond of \$880 to be paid to the landlords and advising that a further \$300 in rent would be paid that day.
  - (f) Extracts from All Homes net site showing the advertisement of the premises from 21 May 2008 onwards

- (g) A document created by the landlords agent called an Action & Conversion Diary for the premises. This document contains chronological entries relating to various events relevant to the tenancy.
5. On 1 August 2008 the tenants filed a statement setting out their response to the landlords' claim. In that statement the tenants seek a refund of rent said to have been overpaid. The Tribunal construed this assertion to constituted a counter claim by the tenants.
6. The matter was listed before the Tribunal on 4 August 2008. Ms Hoare, real estate agent appeared for the landlords and Baden McMaster appeared for both tenants.
7. The parties each put their case to the Tribunal. From these discussions it emerged that:
- (a) The new tenant commenced on 31 May 2008 at a rent of \$360 pw
  - (b) The landlords had not rejected any application for tenancy prior to accepting the new tenant who commenced on 31 May 2008
  - (c) The landlords agent had advertised the premises on relevant net sites and in their own advertising material
  - (d) The rental bond has been surrendered by the tenants to the landlord as rent bringing the date to which the rent was paid to 11 May 2008
  - (e) The issue of the blinds did not feature in the application made by the landlord and was not raised at the hearing
8. In their statement of 1 August 2008 the tenants raised two principle contentions. The first contention concerned the implications of what the tenants described as their Notice Of Intention To Terminate The Tenancy on 24 April 2008. The tenants point to section 107 *Residential Tenancies Act 1997* and contend that because the landlords did not apply to the Tribunal for compensation prior to 24 April 2008 in response to the tenants' notice, the landlords are deemed to have accepted the tenants termination and foregone the right to compensation.
9. Section 107 provides:
- (1) Where a lessor received a notice of intention to vacate before the expiration of a fixed term agreement, and the date nominated in the notice as the date on which the tenant intends to vacate is a date before the expiration of the agreement, the lessor may—
    - (a) accept the notice; or
    - (b) apply to the Tribunal for compensation for—
      - (i) the loss of the rent which the lessor would have received had the agreement continued to the end of its term; and
      - (ii) the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to another person.
  - (2) On application, the Tribunal may award compensation of the kind referred to in paragraph (1) (b).
  - (3) The amount of compensation the Tribunal may award—
    - (a) under subparagraph (1) (b) (i) shall not exceed an amount equal to—
      - (i) 25 weeks rent; or

- (ii) rent in respect of the unexpired portion of the agreement;  
whichever is the lesser; and
- (b) under subparagraph (1) (b) (ii) shall not exceed an amount equal to 1 weeks rent.

(4) In determining the amount of compensation that may be awarded in relation to the reasonable costs of advertising, the Tribunal shall have regard to when, but for the vacation of the premises—

- (a) the agreement would have expired; and
- (b) the lessor would have incurred those costs.

10. I have previously addressed and rejected the tenants' first principle contention in *Mies v Phillips* [2006] ACTRTT 1 in which I held that section 107(1)(b) does not important any time limit in which the landlords must make application to the Tribunal beyond the concept of a reasonable time.

11. In determining what is a reasonable time it is necessary to have regard to the following issues:

- (a) If section 107(1) is read literally then a landlord must make application to the Tribunal solely on the basis of a tenant's expressed intention to vacate the premises. But until such time as the tenant does in fact vacate the premises the fixed term tenancy still subsists. A fixed term tenancy is not terminated pursuant to section 36(j) unless and until the tenant vacates the premises. If the tenant does not in fact vacate the premises then no abandonment has occurred and there is no breach on the tenant's part that gives rise to any claim for compensation under section 107. The tenant may change his/her mind at any time after giving notice of intention to vacate and before actually vacating the premises.
- (b) Assuming the tenant does in fact vacate the premises in accordance with their notice- if section 107(1) is read literally then the landlord may be required to apply to the Tribunal for compensation before a new tenant has been found. The extent of the landlord's right to compensation depends upon how long it takes to find a new tenant. If the landlord makes application as soon as the existing tenant serves notice of intention to vacate, then the landlord's losses will not crystallise until the existing tenant has in fact vacated the premise and a new tenant is found. Thus even if the landlord does make application to the Tribunal immediately following an notice of intention to vacate, the Tribunal cannot do anything with the application which will need to be adjourned until the landlord's losses have crystallised i.e. until the existing tenant does in fact vacate and until a new tenant is found.

12. For these reasons it seems to the presently constituted Tribunal that a reasonable time in which the landlords should make application under section 107 is at a point of time shortly after a new tenant has been found. In the present case the landlords made their application within such a reasonable time after allowing for the time consumed in the negotiation between the parties.

13. The second of the tenants' principle contentions is that the landlords in fact lost nothing by reason of the tenants abandonment of the premises because they secured a new tenant after 31 May 2008 for the balance of the tenants fixed term



at an increased rent. The increase in the rent for the period 31 May 2008 to the end of the tenants fixed term on 12 December 2008 more than off set the rent due for the period 11 May 2008 to 30 May 2008.

14. The factual content of the tenants assertion is clearly correct. The tenants' rent of \$300 per week is equivalent to a daily rate of \$42.85. Thus the total rent unpaid by the tenants and due for the period 11 May -30 May is 19 days @ \$42.85 = \$814.15.
15. The daily rate for the new tenants is \$51.42 which is \$8.57 per day more than existing rent.
16. The profit made by the landlords over the balance of the tenants' fixed term, being 31 May -12 December, is 195 days @ 8.57 = \$1671.15. This profit of \$1671.15 exceeds the rental loss of \$814.15 due to the tenants abandonment and thus the landlords' loss arising from the abandonment is nil.
17. Even when account is taken of the landlords advertisement costs and re-letting fee under section 107(1)(b) which are capped at 1 weeks rent under section 107(3)(b), the landlords still have not suffered a loss by reason of the abandonment.
18. The landlords entitlement to recover compensation from the tenants is contingent upon the landlords demonstrating that a loss has been suffered. In *Eldridge v. Brunger & Callender* 1997 RTT 116 I expressed myself as follows on the point:

"In the context of remedies for breach of contract, the objective is that the plaintiff should recover what would have been received under the contract, or an equivalent. When damages are awarded in contract the plaintiff is, so far as money can do it, to be placed in the same situation with respect to damages, as the contract had been performed (*Commonwealth v. Amann Aviation Pty Ltd* (1991) 174 CLR 64)'. "

The Court of Appeal in the UK long ago considered the issue, namely whether the use of the term 'compensation' in tenancy legislation should be construed as a synonym for common law damages. The Court said:

"With regard to the word "compensation" we incline to the view that the word "damages" was not used because that is more appropriate to the compensation for a breach when ascertained by the verdict of a Court; but that compensation under the section in question is to be measured by the same rule as damages in an action for the breach.' (*Skinnners' Co v. Knight* [1891] 2 QB 542 at 544)

A similar view was taken in New Zealand in *Lowe v. Ellbogen* [1959] NZLR 103 at 105.

I am satisfied, that the term 'compensation' as used in the section 16(2) is concerned with 'indemnifying' a party for losses stemming from a breach of the lease, which after all, is a specie of contract (*Progressive Mailing House Pty Ltd v. Tabali Pty Ltd* (1985) 57 ALR 609), to which all the usual doctrines of contract law apply.

This then raises the issue of the nature of 'indemnification'. The 'Australian Legal Dictionary' defines it thus:

'A payment to compensate for loss or injury sustained or expense incurred; making good a loss which one person has suffered in consequence of the act or default of another...'

'Blacks Legal Dictionary' is in similar terms.

'I construe these statements to mean that compensation is based on the indemnity principle, which requires the injured party be paid compensation to the extent of the loss suffered, but not more. The sum is to be identified by reference to the breach of the lease and the causal consequences thereof. An injured party is not entitled to make a profit from compensation, and the amount of compensation is to be calculated by reference to the final net loss to the injured party.'

19. The tenants contend that they should be entitled to a repayment of the amount by which the landlords have profited from the new tenancy at the higher rent or at least a return of the bond. The tenants are only entitled to a repayment of an amount if that amount has been unlawfully paid by them to the landlords (*Jeffrey v Fitzroy Collingwood Rental Housing Association Ltd* [1999] VSC 335; *Fenson v Cootamundra Racecourse Reserve Trust* [2000] NSWSC 1072; *Brodziak v Lowrey* 1997 NSWRT 1) which can arise in a range of circumstances under the Act. However in the present case the rent payments by the tenants to 11 May 2008, which included the bond release as rent, were due and owing at the time they were paid and therefore lawfully made. The fact that the landlords ultimately made a profit out of the new tenancy at the higher rent is just a quirk of the quickly rising rental market in Canberra, and is just good luck for the landlords. Had the rental markets been falling the converse would have applied to the tenants. The tenants have no lawful right to share in the landlords good luck save to the extent that the tenants are relieved from the obligation to pay the balance of the rent from 12 May 2008-30 May 2008 which but for the landlords windfall gain via the increased rent would otherwise have been payable and the advertising and reletting fee.
20. The tenant has made the point that had they not released the bond to the landlords prior to the new tenant having been found on 31 May 2008 then they would now be entitled to retain the bond. This conclusion follows from the fact that the extent of the landlords profit from the increased rent from the new tenant over the residue of the presents tenants fixed term would have covered the rent period for which the bond was in fact paid, and therefore the tenants would have retained the bond. As a matter of logic this appears to be so. The problem for the tenants is that at the time the bond was paid on 9 May 2008 no new tenant had been found and therefore the present tenants still retained the obligation to pay the rent as it fell due until a new tenant was found. As the payment of rent via the release of the bond was lawfully paid at the time, it cannot now be recovered by the tenants.
21. The net result is that the landlords application is dismissed because the landlords have sustained no losses from the tenants abandonment and therefore the Tribunal can give no remedy. The tenants counter claim is dismissed for the reasons given above.

A. Anforth  
26<sup>th</sup> September 2008