

AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: Gino Bartone v Courtenay Hollis and Amanda Downes [2008]
ACTRTT (16)

RT 449 of 2008

Catchwords: No point of principle.

Tribunal: A. Anforth, Member

Date: 26 September 2008

**AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL)NO: RT 449 of 2008**

GINA BARTONE
(Applicant/Lessor)

AND:

COURTENAY HOLLIS and AMANDA DOWNES
(Respondent/Tenant)

DECISION

Tribunal :A. Anforth, Member

Date:31 July 2008

Decision:

1. The Tenants counter claim is adjourned until Monday the 25th day of August 2008 at 10.00am
2. The Lessor's application is dismissed
3. The Office of Rental Bonds is ordered to release the whole of the bond to the Tenants
4. The Tenants are to serve on the Lessor a copy of their counter claim.

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Member

**AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL)NO: RT449 of 2008**

GINA BARTONE
(Applicant/Lessor)

AND

COURTENAY HOLLIS and AMANDA DOWNES
(Respondent/Tenant)

REASONS FOR DECISION

1. This matter is a rental bond dispute in relation to premises at 53 Boronia Drive, O'Connor in the ACT. The tenancy commenced on 13 December 2006 for a fixed term of 12 months at a rent of \$535.00 per week. The premises were new and the tenants were the first occupants. The landscaping of the premises had not been completed at the commencement of the tenancy.
2. The tenants served notice on the lessor dated 12 June of their intention to vacate the premise by reason of the lessor's breaches of their privacy. The tenants in fact vacated the premises and paid rent to 10 July 2007 which was part way through the fixed term. A new tenant was found and the new tenancy commenced on 14 July 2008.
3. The Office of Rental Bonds (ORB) paid \$1662.11 of the original bond to the tenants and retained the balance of \$477.89. The
4. The matter was referred to the Tribunal by the ORB.
5. On 30 June 2008 the lessor filed a statement with the Tribunal setting out his case. The lessor claimed:
 - (a) rent for the 11-13 July inclusive being \$229.28
 - (b) outstanding water consumed by the tenants during the tenancy of \$27.09
 - (c) the costs of replacing garden plants of \$221.00 said to have died due to the tenants' failure to water them.
6. The matter was listed before the Tribunal on 1 July 2008. There was no appearance of the lessor and the tenants appeared in person. The application was adjourned to 31 July 2008.
7. The tenants filed a statutory declaration setting out their response to the lessor's claim which read as follows:

We, Mr. Courtenay Hollis, Ms. Amanda Downes and Ms. Meagan Downes make the following declaration under the *Statutory Declarations Act 1959*:

- (a) Mr. Courtenay Hollis and Ms. Amanda Downes undertook a 12 month lease of 53 Boronia Drive O'Connor ACT 2602 through the property manager (Place Real Estate) Mr. Brian Nancarrow on 8th December 2006. [1]

- (b) A Ms. Meagan Downes joined this lease shortly after.
- (c) This lease was signed under the conditions that:
- (i) The landlord, Mr. Gino Bartone, will be landscaping the property, and as such we, then tenants, were not responsible for removing the current weeds in the garden beds and lawn.
 - (ii) The landlord, Mr. Gino Bartone, has provided a telephone line connection,
 - (iii) The landlord, Mr. Gino Bartone, will construct a pergola for the backyard,
 - (iv) The tenants, Mr. Courtenay Hollis, Ms. Amanda Downes and Ms. Meagan Downes, are to water the plants to the best of their ability with consideration to water restrictions.
- (d) The landlord, Mr. Gino Bartone, never met items (i), (ii) and (iii) as agreed in the lease, and we, the tenants, met item (iv). There was no phone line installed and our request for a line was rejected by the landlord. This meant that our alarm system did not work to its full ability and we had to rely on the excessive use of our mobile phones. (See section 47 of Tenancy Agreement.) Instead of a pergola an umbrella was assembled in the back yard. The plants were brand new, planted on top of building materials and in need of water before we moved in, we were also in drought and under strict water restrictions. [2] [10]
- (e) The tenants, Mr. Courtenay Hollis, Ms. Amanda Downes and Ms. Meagan Downes reported the following defects to the property manager, Mr. Brian Nancarrow:
- (i) The weeds in the garden beds and lawn were getting out of control.
 - (ii) Every second plant is dying as they have been planted to close together, and that we are watering them on the assigned watering days,
 - (iii) the dishwasher is not bolted to the wall correctly and has fallen over on the tenants on several occasions,
 - (iv) There are several bee and wasp nests around the property and one of the tenants is highly allergic to bee/wasp stings.
 - (v) The letter box is not fixed to the ground correctly and could easily fall over on someone,
 - (vi) The gate does not open/close correctly, and we, the tenants, felt our privacy and safety was at risk as our back yard was exposed to the street. [3]
- (f) The landlord, Mr. Gino Bartone, never made an effort to rectify items (i), (ii), (iii), (iv), (v) and (vi). (See section 57 and 60m of tenancy Agreement.)
- (g) We, the tenants, were instructed to purchase a significant amount of weed killer at our own expense, and spray onto all weed infected areas of the property, as the property manager, Mr. Brian Nancarrow, insisted this would ensure the landlord, Mr. Gino Bartone, would landscape the property as agreed upon in the lease. Furthermore, we informed the property manager when we completed the weed treatment ready for landscaping, and the landlord still refused to landscape the property. We were then instructed to manually remove all dead weeds. These were the weeds that we were told to leave when we signed the lease as we were told the garden was being landscaped. (See section 65 of Tenancy Agreement.)
- (h) We, the tenants, sited Mr. Gino Bartone, parked opposite the property on several occasions. This made us feel intimidated so we reported this to the property manager, Mr. Brian Nancarrow as we felt our privacy and safety was being jeopardized by the landlord. After speaking with our neighbours who were also renting one of Mr. Bartone's properties, they informed us that they were having the same problems, (see section 52 of Tenancy Agreement.) They also informed us that they had requested that a phone line be connected and they were granted this, we however, were not. Their plants had also died through no fault of their own. [4]
- (i) A Ms. Meagan Downes and Ms. Amanda Downes took a day off work and sited the landlord, Mr. Gino Bartone, in the backyard of the property on Friday 8th June 2007 without the prior permission from the tenants or the property manager. (See section 75 of Tenancy Agreement.) Furthermore Mr. Gino Bartone verbally abused Ms. Meagan Downes and Ms. Amanda Downes. At this time a verbal agreement was made between Ms. Amanda Downes and Mr. Gino Bartone that both parties were happy to terminate the lease early. A Ms. Amanda Downes reported this immediately to Brain Nancarrow, the property manager and informed him of our intentions to terminate the lease after Mr. Bartone breached the contract. [4]
- (j) We, the tenants, sent a written notice dated 12th June 2007 to vacate the property on 27th June 2007 to the property manager, Mr. Brian Nancarrow, as we were concerned about our privacy and safety at the property and could no longer live under these conditions. (See section 90 of Tenancy Agreement.) [4]
- (k) We, the tenants received an email dated 12th June from the property manager, Mr. Brian Nancarrow, stating that the landlord had said it was acceptable to terminate the lease on the condition that replacement tenants move in. [5]
- (l) We, the tenants, were told that if we did not manually remove the weeds and have the garden prepared for landscaping prior to the final inspection, that our bond money would be withheld.

(m) We, the tenants, during the hours of 10.30am to 5:00pm on Saturday 23rd June 2007 and Sunday 24th June 2007 manually removed all weeds and building waste from the garden beds and lawn as we could not afford to be without bond money. Furthermore, Mrs. Karen Downes and Mrs. Shirley Janson assisted us during these days. Additionally this provided us, the tenants, less time to find a new home and organise moving arrangements. Time from work was taken off to achieve this. The waste was disposed of at the tip at our expense.

(n) We, the tenants, vacated the property on Friday 6th July 2007 after replacement tenants were found. Rent was paid up until 10 July 2007. Ms. Amanda Downes and Ms. Meagan Downes conducted a final inspection with the property manager, Mr. Brian Nancarrow on 9th July 2007. the property manager agreed the property was left in an excellent condition and did not believe we were responsible for the dead plants under the circumstances. Furthermore, the property manager stated that he was instructed by the landlord, Mr. Gino Bartone, to withhold a portion of the bond money to recover costs for plants that had died. \$27.09 was also held for water consumption, we were not disputing this cost and agreed to pay it. Bond was also held for 3 days rent for the period 11th-13th July 2007 which was the period of time the house was vacant before the new tenants moved in on 14th July 2007. This period was not within 2 weeks of us giving notice and receiving approval to vacate. See section 84 and 91c,d & e of Tenancy Agreement. Had we of known our full rights we would have vacated with or without new tenants on the 27th June as stated in our notice to vacate. [6] [10]

(o) ActewAGL conducted significant work in the O'Connor area to improve the sewerage system, resulting in a large portion of the backyard being dug up. Upon completion they returned the backyard to exactly the same state as they found it. However, the landlord, Mr. Bartone, complained to ActewAGL and said they had removed several plants from the backyard, and they must provide him with new ones. ActewAGL took his word on this matter, and in fact delivered approximately 20 plants which the landlord then landscaped the garden with. This was in fact a blatant lie, as there were no plants in the section of the backyard that was dug up. [7]

8. The tenants also filed a cross claim which read as follows:

Due to the circumstances outlined in the Statutory Declaration, we believe we are entitled to the following compensation:

- Compensation for Breach of Section 47 of the RTA: No telephone line provided
 - For further details refer to item (c)(ii) and (d) of the Statutory Declaration
 - The tenants were forced to use their mobile phone for all personal calls to friends
 - and family both locally and interstate
 - The tenants could not get internet access
 - The tenants were told there was a phone line provided when signing the lease and a request for a line was then rejected by the lessor.
- Compensation for Breach of Section 52 of RTA: Continuous interference with reasonable peace, comfort and privacy
 - For further details refer to items (h) and (h)(i) of the Statutory Declaration.
 - The tenants were forced to keep their blinds closed and avoid use of the yard
 - The tenants never felt comfortable or relaxed during the entire lease after having spotted the lessor sitting in his car outside the house on several occasions.
 - Tenants were told by their property manager that the lessor had told him that it looked as though we took good care of the inside of the house. The lessor was never given permission to enter the house.
- Compensation for Breach of Section 57 and 60(m) of the RTA: Failure to undertake emergency repairs that led to the property being unsafe and insecure. Failure to landscape garden and construct a pergola as promised at the start of the lease.
 - For further details refer to items (d) of the Statutory Declaration
 - The tenants were unable to make use of the yard for both pleasure and drying of washing, due to high amounts of dust in the air, several wasp nests, and an insecure gate that could not be closed.
 - The tenants were unable to completely set up the alarm system due to the lack of a telephone line
 - The tenants had the dishwasher fall on top of them on numerous occasions because the lessor failed to securely fit the dishwasher after being advised of the problem.

- Compensation for Breach of Section 65 of the RTA:
 - For further details refer to items (c)(i) and (g) of the Statutory Declaration
 - The tenants were blackmailed into improving the property by removing weeds and waste material to prepare the garden for landscaping to ensure we would be given a full bond refund.
 - This resulted in 13 hours of manual labour by 5 people.
 - Claiming 13 hours of work completed by 5 people
 - Claiming cost of weed killer-\$35
 - Claiming cost of tip fees for the disposal of weeds and waste material - \$30
- Compensation for Breach of Section 75 of the RTA:
 - For further details refer to items (h) and (i) of the Statutory Declaration.
 - The tenants were severely stressed and traumatised by the verbal abuse received by Mr. Bartone the day he trespassed. Tenants feared for their safety while at the premises and never felt at home.
- Compensation for Breach of Section 91(c) and 91(d) of the RTA
 - For further details refer to item (j) of the Statutory Declaration.
 - Tenants were blackmailed into staying on until new tenants were found to ensure we would be given all bond money back.
 - Claiming rent paid from the notice to vacate date provided in a letter dated on the 12th June 2007 to the property manager. This is the period between 27th June 2007 to 10th July 2007, a total of 2 weeks rent = \$1070
- Compensation for relocation costs resulting from being forced to leave the tenancy early
 - Time taken off work to find alternative accommodation and move house-1 day for each tenant
 - Claiming removalist fee's \$470
- Time taken to be available and prepare for court hearing
 - Claim 2 working days for each tenant
- Unpaid bond money
 - Claiming \$477.89

9. On 31 July 2008 the lessor appeared by phone and the tenants both appeared in person.
10. The tenants accepted responsibility for the water account of \$27.09 and said that had since paid that sum to the lessor. The tenants gave evidence that they did in fact carry out some weeding in the back yard as described in the statutory declaration.
11. The lessor's managing real estate agent, Mr Nancarrow, gave evidence by phone. He admitted that he informed the tenants that:
 - (a) the lessor intended to carry out landscaping during the tenancy which never occurred
 - (b) the lessor promised to erect a pergola during the tenancy which did not occur
 - (c) the urgent repairs to the dishwasher were notified to the lessor but the repairs were not done
 - (d) the problem with the letter box was notified to the lessor but not fixed
12. The lessor admitted that he entered the back yard of the premises on 8 June 2008 without the permission of the tenants. He said he was there to inspect the work of ACTEWAGL on the sewer lines. The lessor said he thought Mr Nancarrow had arranged for him to access to the back yard. Mr Nancarrow described this as being "new to me". The lessor denied that he had regularly parked on the road outside

the premises to watch the premises. He said he had occasionally done so when visiting the premises.

13. The lessor said that he had a phone line installed to the premises and it was a matter for the tenants to pay for the connection of the phone to the network if they wanted a phone. At no stage did he promise to supply a phone.
14. There was no evidence from either party concerning the cause of the death of the plants in question other than the existence of the drought and the fact the plants were newly planted.
15. The Tribunal accepted the evidence of the tenants and Mr Nancarrow and to the extent that this evidence conflicted with that of the lessor, the Tribunal preferred the evidence of the tenants and Mr Nancarrow.
16. After hearing the evidence the Tribunal gave the decision recorded above. On that occasion the Tribunal announced its finding of fact that:
 - (a) The lessors attendance at the premises uninvited constituted a breach of the tenants' right to quiet enjoyment (prescribed term 52) which caused the female tenant considerable consternation;
 - (b) The lessors failure to provide the premises pergola and landscaping both constituted a breach of prescribed term 54(1)(c) of the Act in that a non-existent pergola and non-existent landscaping do not constitute a pergola and landscaping in a reasonable state of repair;
 - (c) The lessor's failure to repair the dishwasher was a breach of prescribed term 55 of the Act
 - (d) The tenants had undertaken weeding as they described.
 - (e) The failure of the lessor to pay for the tenants' connection to the phone network was not a breach on the lessor's part.
 - (f) The act of the lessor parking on the road outside the house was not a breach of quiet enjoyment on the lessor's part.
 - (g) The above breaches by the lessor justified the tenants in serving notice to terminate the tenancy. Accordingly no rent was due after 10 July 2007.
 - (h) There was no evidence to account for why the plants died. They may have died due to the drought or simply because the natural attrition rate for new planted plants. In any event it was the lessor to show that the plants died due to the tenants failure to water them and there was simply no evidence to support this assertion.
17. On 15 August the tenants advised the Tribunal that they wished to withdraw their counter claim.
18. The lessors have subsequently sought reasons for the Tribunal's decision of 31 July 2008.

A. Anforth
26th September 2008