

IN THE RESIDENTIAL
TENANCIES TRIBUNAL
OF THE AUSTRALIAN
CAPITAL TERRITORY)
)
)
)

RT 142 of 2008

Peter Barry NEW -v-
(Occupant)

Havelock Housing Association Inc. ACTRRT 8 [2008]
(Grantor)

CATCHWORDS

Termination of Agreement

ISSUES

Termination by implication
Termination by agreement
Termination by repudiation

LEGISLATION

Residential Tenancies Act 1997 (ACT)

Sections:

Prescribed terms:

Tribunal:

J. Lennard, Member

Date:

26th March 2008

Case Reference Number: 142 OF 2008

Re: Premises at Unit 4B, Ainslie Village, Quick Street, Campbell

REASONS FOR DECISION

BACKGROUND

1. Peter Barry NEW, the Applicant, has lived at Ainslie Village, Campbell since 1999.
2. On or about 16 March 2005 the Applicant entered into an occupancy agreement in relation to Unit 4B, Ainslie Village with Centacare. Havelock Housing Association Inc, (HHA) took over the Management of Ainslie Village in 2006, and it is not disputed before this Tribunal that the parties to the matter are the parties to the occupancy agreement. That is HHA is the grantor and Mr New is the occupant.
3. The Applicant asserted in his written statement of particulars that there was an executed occupancy agreement between the parties. This was not denied by HHA. The Residential Tenancies Tribunal has before it a blank 'Occupancy Agreement' as evidence of the content of the agreement between the parties.
4. In August 2007, the Applicant expressed an interest in moving to a unit in a complex, owned and managed by HHA at Gunghalin. It appears from the correspondence between the parties that the Applicant wrote to HHA formally requesting a move from Ainslie Village to the Gungahlin complex in September 2007.

5. On 16 November 2007 the parties signed a Residential Tenancy Agreement in relation to premises at 6 Newcomb, 68 Anthony Rolfe Avenue, Gungahlin. Although the rent was not specified on the front page of the agreement, Attachment B (1) to the agreement calculated rebated rent at \$207.65 per fortnight and the front page provided that market rent for the premises was \$220 per week. The Residential Tenancies Tribunal notes that HHA provides rebated rent to eligible tenants and Attachment B (1) to the agreement stated that Mr New was entitled to a rebate. This attachment was signed by Mr New and the lessor on 16 November 2007.
6. HHA agreed to allow the Applicant to remain in his unit at Ainslie Village, rent-free, for two weeks from 16 November 2007, to assist in the move to Gungahlin.
7. The Applicant did not move to Gungahlin, and although he had keys and accessed the premises, he did not take up occupation.
8. On or about 26 November 2007, the Applicant returned the keys to the Unit at Gungahlin and on 27 November 2007 he wrote to HHA stating that "as of today, I no longer wish to transfer out of Ainslie Village."
9. On 29 November the Chief Executive Officer of HHA, wrote to the applicant and stated, inter alia:

You approached me in written [sic] seeking to be transferred to Gungahlin in early September for a number of reasons as stated in your letter.

I made every effort to meet you [sic] needs and provided you with a tenancy at Gungahlin. You agreed and accepted the key of which you've signed. I agreed for you to stay for 2 weeks at AV at no rent to help in your move across to Gungahlin.

...

With regards to you now wishing to remain as a tenant of AV, it is not so easily changed as we have confirmed your transfer to Gungahlin and we have an obligation to house those on the waiting list.

10. There has been from late November to the date of the hearing a great deal of written and verbal correspondence between the parties. The applicant has supplied some of this, and a copy of his submission to a meeting of the Board of Ainslie Village. It appears from this evidence that HHA continued to regard Mr New as a tenant of the Gungahlin property and invoiced him for rent for those premises.
11. On 21 December 2007 Mr New wrote to Mr Loc Luu, CEO of HHA in the following terms:

Yesterday I received an Invoice, ANTH68/06, from HHA for the sum of \$224.95 in respect of 6/68 Anthony Rolfe Avenue, Gungahlin for rent claimed for that property between dates of 30th November to 27th December 2007.

I again draw your attention to the facts that, although tenancy documents regarding this property were signed on 16th November, this tenancy, had it ever existed, never took effect and I remain a resident of Ainslie Village.

Reasons why I am not a resident at the Gungahlin address, as claimed by HHA, are several and include the following: -

- I was required to sign the Tenancy Agreement on 16th November in circumstances which were quite unconscionable in that I was refused the opportunity to study the terms of the contract in which, inter alia, HHA were unable to indicate the rent payable.
- I was denied physical access to the property, even as late as Sunday 25th November, as the barrel to the entrance lock was visibly missing causing the key to be totally inoperable.

- Paintwork was still, as noted on the condition report supplied on 16th November to be carried out by HHA which, along with the missing lock barrel, meant the premises were not ready for occupation.
- On Tuesday 27th November I returned all the keys to HHA and notified the fact that I no longer wished to re-locate from Ainslie Village to Gungahlin, a point demonstrably reinforced by the fact that at no time did I contact the appropriate authorities to have the electricity or water meters read & re-connected in my name.
- On Wednesday 28th November I delivered written confirmation of the fact that I had returned the keys and no longer wished to re-locate (a letter dated 29th November, from yourself to Terri Stiller with cc to myself, confirms that HHA was fully aware of my decision not to assume tenancy of the Gungahlin property but remain a resident of Ainslie Village).
- In the (highly questionable) situation that the aforementioned Tenancy Agreement ever existed as an actionable instrument (something which possibly might be resolved only by a decision of the Residential Tenancies Tribunal), then such a situation certainly ceased to exist, under Term 84(1) of that very same Agreement, the moment I notified HHA of my intention not to re-locate to Gungahlin and returned the keys.

Reasons why I remain a lawful occupant of Unit 4, House B, Ainslie Village include the following: -

- I have an Occupancy Agreement dated 5 March 2005 for this property.
- In November 2005 a formal Notice of Attornment was issued to me by which HHA assumed the role and responsibilities of landlord in regard to this Occupancy Agreement.
- HHA are fully aware that I have maintained that occupancy uninterrupted to the present day and that no residency of the Gungahlin [premises] ever came into effect.
- At no time have I submitted to HHA any Notice terminating my occupancy of the property at Ainslie Village.
- I have tendered rent & service charges for this property on Tuesday 27th November and again on Tuesday/Wednesday 11th/12th December (on each occasion HHA declined to accept).
- This property is, and for the past 8 years has been, by (sic) sole home (prior to March 2005, under a different occupancy agreement).
- I therefore ask you to confirm:-
 - 1) My lawful occupancy of Unit 4, House B, Ainslie Village,
 - 2) That the invoice dated 19/12/07 regarding Anthony Rolfe avenue has been rescinded,
 - 3) That my application to transfer to another HHA property has been withdrawn.

And I ask that these be confirmed in writing at your earliest convenience.

12. There followed some correspondence between the parties; Mr New tendered rental payments in relation to his premise at Ainslie Village, this was refused by the management. Mr New continued to reside at Ainslie Village. The management of HHA regarded his continued occupancy at Ainslie Village as inappropriate since they regarded the occupancy agreement as terminated and HHA continued to levy rent at the premises at Gungahlin despite the fact that they had been informed by Mr New that he had returned the keys and did not intend to reside there.

13. It is evident to the Residential Tenancies Tribunal that the parties had reached the situation where no sensible correspondence or negotiation was possible.
14. On 25 February 2008 Mr New made an application to the Residential Tenancies Tribunal seeking the following orders:
 - a. The lessor ...recognize my continuing occupancy of Unit B4 Ainslie Village as per my occupancy agreement signed 16th March 2005.
 - b. A tenancy Agreement signed on 16th November 2007 between The Lessor, ... and myself and in relation to 6/68 Anthony Rolfe Avenue, Gungahlin, ACT, was properly terminated by written notices of termination in accordance with s84(1) of the Act and which was delivered by myself to the Lessor on 28th November 2007 and 21st December 2007.
 - c. In regard to Ainslie Village, rent shall be deemed to have abated from 29th November 2007, being the approximate date when the lessor claims to have unilaterally terminated that Agreement without valid cause and without giving any Notice to Vacate.
 - d. The Lessor pay compensation to the sum of \$2,500 in respect of costs incurred and the suffering & pain caused by the harassment by management since November.
15. The Residential Tenancies Tribunal heard the application on 26 March 2008. Mr New represented himself and Mr Glenn Cable and Mr Nicholas Spence represented the Respondent.
16. The evidence before the Residential Tenancies Tribunal indicates that between signing the Residential Tenancy Agreement in relation to the property at Gungahlin and returning the keys to HHA on 27th November, Mr New did not communicate any concerns relating to inability to access the premises at Gungahlin or any of the concerns relating to the lack of completeness of the Agreement executed by the parties nor the question of unconscionable conduct by HHA in relation to that execution. He puts these matters to the Tribunal as ex post facto justification for his conduct.
17. Mr Cable, representing HHA put to the Tribunal the explanation that Mr New changed his mind about taking up residency at the Gungahlin premises because he discovered that his membership of the Board of HHA might cease upon his vacation of Ainslie Village.
18. Mr New's aggressive, evasive and difficult manner before the Residential Tenancies Tribunal made the task of the Tribunal difficult. He frequently took opportunities to attack the management and officers of HHA in a manner that was unhelpful to the Residential Tenancies Tribunal. Mr New's demeanour and conduct in the hearing of this matter were such that the Residential Tenancies Tribunal formed the opinion that if any of the issues now put forward as reasons for not wanting to take up residence in the property at Gungahlin, had exercised his mind then he would have raised them and pressed his view forcefully at his earliest opportunity. There was no evidence before the Tribunal that this happened, nor indeed that these matters actually arose at the time in question.
19. Mr Cable gave evidence to the Tribunal that HHA regarded the Occupancy Agreement relation to Unit 4B Ainslie Village as having been terminated by the entering into of the Residential Tenancy Agreement in relation to premises at Gungahlin. HHA regarded Mr New's right to remain as an occupant as ended but had agreed to his occupation continuing for two weeks from the signing of the tenancy agreement, in order to assist him in his move from one home to another. HHA regarded the Residential Tenancy Agreement in relation to the Gungahlin premises as still in force, because the method by which Mr New purported to terminate it was not in accordance with the agreement. Nevertheless Mr Cable had indicated that HHA was willing to enter into a new Occupancy Agreement with Mr New in relation to premises at Ainslie Village but Mr Cable informed the Residential Tenancies Tribunal that Mr New consistently refused to sign a new agreement.
20. During the course of the hearing there was some discussion between the Tribunal and the parties about the conduct of Ms Leonie Bassett, a staff member of HHA and the content of the occupancy agreement. These arose from a previous matter: Mr Cable informed the Tribunal that Ms Bassett was no longer employed by HHA. Mr Cable assured the Tribunal that the occupancy agreement had been redrafted following comments from the Tribunal and after HHA had sought legal advice. These matters were only indirectly related to the key issues before the Tribunal in this matter. Ms Bassett signed the Residential Tenancy Agreement between Mr New and HHA in relation to the Gungahlin premises: Mr New complains that she refused him an opportunity to read the agreement before signing. The Tribunal has no other evidence that would support Mr New's allegation of 'unconscionable' conduct by HHA.

Termination of the occupancy agreement in relation to Unit 4B Ainslie Village.

21. An occupancy agreement is defined in section 71C of the Residential tenancies Act 1997. The Residential Tenancies Tribunal is to have regard to the occupancy principles in determining an occupancy dispute.
22. The occupancy agreement between the parties was terminated on 16 November 2007 by implication from the conduct of the parties:
 - a. the parties entered into a Residential Tenancy Agreement in relation to the Gungahlin premises. This commenced on 16 November 2007. On the evidence before it the Tribunal concludes that both parties intended that the occupancy agreement would end upon the commencement of the Residential Tenancy Agreement: Mr New was no longer liable to pay rent for the premises at Ainslie Village and ceased doing so.
 - b. HHA had given Mr New permission to use the premises at Ainslie Village for two weeks from 16 November 2007. This was not disputed by Mr New. This arrangement might be characterised as a licence, which would terminate upon Mr New's vacation of the premises or two weeks from 16 November 2007.
 - c. HHA has consistently refused tendered payment of 'rent' by Mr New.
23. It does not follow in law that, upon the termination by Mr New of the Residential Tenancy agreement entered into between the parties in relation to premises at Gungahlin, the previous agreement could revive. This could only be the case if the parties agree. It was manifest on the evidence before the tribunal that HHA did not agree to Mr New remaining in occupation at Ainslie Village for any purpose other than to assist in his move, and did not ever intend that he should be able to chose to revive the old agreement.. It was not the intention or understanding of either party that the termination of the first agreement was conditional in any way.

Termination of the Residential Tenancy Agreement in relation to the Gungahlin premises

24. The evidence before the Tribunal establishes that on or about 27 November 2007 Mr New returned the keys to the Gungahlin property to HHA. on 28 November he wrote to HHA confirming that he had returned the keys. In his application to the Tribunal Mr New asserts that this conduct was sufficient to terminate the tenancy under Clause 84 of the standard residential tenancy terms. Ex post facto written confirmation of the return of keys is not sufficient to comply with the notice requirements of the terms. However, taking into account all the evidence and the decision during the course of the hearing by HHA to waive their claim in relation to unpaid rent due to them under the tenancy agreement, the parties agreed and the Tribunal concluded that the Residential Tenancy Agreement between the parties was at an end.

Resolution of matter.

25. The Tribunal had no evidence regarding Mr New's claim for abatement of rent at Ainslie Village from 27 November; this was not pressed and in view of the Tribunal's conclusion that the Occupancy Agreement had terminated on 16 November, superfluous.
26. The Tribunal had no evidence regarding neither the conduct of HHA nor the basis for the monetary amount pursuant to Mr New's claim for damages arising from harassment of him by HHA.
27. The remaining issue before the Tribunal was the continued occupation of Unit 4B Ainslie Village by Mr New. The conclusions of the Tribunal meant that his continued occupancy of the Unit was unlawful.
28. HHA had no application for termination before the Tribunal. Section 102(f) in relation to the procedural powers of the Tribunal provides that the Tribunal may, apart from exercising its specific powers take any other action it considers that is consistent with the Act. Taking into account the tenor of the Act, the duty to assist parties, the desire for finality, sections 102(f) and 104(l) the Tribunal adopted the view that it was preferable to conclude the matter.
29. HHA gave evidence that they were prepared to enter into a new occupancy agreement in relation to Ainslie Village with Mr New, but that he had consistently refused to agree to this. HHA tendered a copy of a letter sent to Mr New by HHA and dated 19 March 2008. That letter stated, inter alia that the Board [of HHA] had determined that Mr New could remain at Ainslie village if he completed the necessary paperwork to terminate the tenancy agreement in relation to Gungahlin premises and signed a new occupancy agreement in relation to Unit 4B.

30. Mr New indicated towards the end of the hearing that he was not unwilling to sign a new occupancy agreement, but he wanted a chance to read and consider it. It is the Tribunal's understanding that HHA had reworded their standard occupancy agreement. Mr Cable undertook to provide Mr New with a copy of the agreement. There was no copy of the reworded agreement available to the Tribunal.
31. Throughout the hearing Mr New had been unco-operative and difficult. It was evident to the Tribunal that he was under a great deal of stress, that some of this arose from the internal politics of Ainslie Village and the approach to him of the management of HHA. In a very long hearing Mr New kept changing tack and wanted to spend time on matters not directly linked to the issues before the Tribunal. Nevertheless the Tribunal allowed him some latitude in presenting his arguments.
32. The Tribunal formed the opinion that it was more likely than not that Mr New would sign a new occupancy agreement and that therefore his continued occupation of the Ainslie Village premises would be governed by that new agreement. The Tribunal explained to Mr New that if he chose not to sign such an agreement then he would have to vacate the premises. Although the Residential Tenancies Tribunal expressed the hope that the signing of a new agreement would end this dispute, the Tribunal, taking into account the relationship between the parties was of the opinion that it was necessary to make orders which would achieve finality in this matter. Should the parties be at an impasse in seven days HHA should be given leave to bring an application for the issue of a warrant.
33. The Residential Tenancies Tribunal made the following orders:
 1. That the occupancy agreement for Unit 4B Ainslie Village was rescinded on 16th November 2007.
 2. That the Residential Tenancy Agreement with respect to 6/68 Anthony Rolfe Avenue, Gungahlin was terminated by repudiation by the tenant on 27th November 2007.
 3. That the tenant was to vacate the premises [at 4B Ainslie Village] within 7 days of the date of this order.
 4. The respondent has leave to apply for a warrant of eviction if default in Order 3.

JANN LENNARD

MEMBER

Residential Tenancies Tribunal

5 JUNE 2008