

AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: NEWBERRY V MALLITT [2008] ACTRRTT (17)

RT 332 of 2008

ISSUES:

Notice of date of termination

Bond Application – deductions from bond

Request for payment of water consumption after termination of tenancy

LEGISLATION:

Residential Tenancies Act 1997 (ACT)

Sections: 31; 36.

Prescribed terms: 42; 46

Tribunal: J. Lennard, Member

Date: 26 September 2008

AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL

))
) NO: RT 332 of 2008

RE: Wayne NEWBERRY
(Lessor)

AND: Justin & Michelle MALLITT
(Tenants)

DECISION

Tribunal : J. Lennard, Member

Date : 24 June 2008

Decision

1. That the Lessor Wayne Newberry is substituted as Applicant.
2. That the Office of Rental Bonds is directed to release the **balance of the bond** to the Tenants, Justine Mallitt and Michelle Mallitt forthwith.

.....
J. Lennard
Member
26th September 2008

AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL

))
) NO: RT 332 of 2008

RE: Wayne NEWBERRY
(Lessor)

AND: Justin MALLITT & Michelle
MALLITT
(Tenants)

REASONS FOR DECISION

J Lennard, Member

Re: Premises at 11 Domain Street Palmerston, ACT 2913.

Background facts:

1. The parties entered into a residential tenancy agreement in relation to the premises for a fixed term of 24 months commencing 6 July 2006.
2. The parties agreed to end the tenancy and the tenants gave 3 weeks notice by e mail that the tenancy would end on 24 March 2008. This notice was in response to an request by e mail from the tenants which stated: *...you are free to leave the tenancy early, giving the usual 3 weeks notice*

Issues

3. The tenant claimed the whole of the bond of \$1440.00, but the lessor disputed an amount of \$790.85. The lessor was represented by Ms Fiona Wall of Taylor's Real Estate, Ms Sandra Alonso WRLC.
4. The lessor's claim was for \$590 for water consumption and \$200.85 for loss of rent:
 - a. The lessor had paid water consumption charges for the entire tenancy and only instructed his agent to make a claim against the tenant after the tenancy had terminated. The Residential Tenancies Tribunal takes the view that as 25% of ACT lessors pay the cost of their tenants' water consumption and factor this into the calculation of rent, a tenant who has not been asked to pay this cost during the tenancy is entitled to assume that no demand will be made after the termination of the tenancy. The lessor is estopped from making the demand. In any event the claim for water consumption charges is not an allowable deduction from the bond under section 31 of the Residential Tenancies Act 1997.
 - b. The 24th March 2008 was Easter Monday and the lessor claimed rent until the following day, asserting that the tenancy did not terminate until the keys were returned. Section 36 read with clause 84 provide that the parties may agree in writing to terminate the tenancy, and where the tenant gives notice of an intention to vacate and vacates in accordance with the notice, the tenancy ends on the date the tenant vacates the premises. Thus the lessor has no sustainable claim for loss of rent.

Comment

The Residential Tenancies Tribunal notes that is a common misconception among real estate agents and lessors that a tenancy cannot terminate until the tenant has returned all keys to the premises. When a tenant fails to return keys, the lessor has a claim for compensation for any loss resulting from the breach of the agreement, but cannot argue that the tenancy agreement remains in force merely on the basis of retention of keys by the tenant.

The Residential Tenancies Tribunal also notes that Ms Alonso stated that it was common practice for agents to make claims against the bond for items such as water consumption, even though s31 sets out a limited number of claims that a lessor can make in relation to the bond. The proper action for the lessor is to make an application to the Residential Tenancies Tribunal for compensation for breach of the tenancy agreement. It is not acceptable that the tenant should be held to ransom in relation to the bond: without deciding the issue it would appear to the Residential Tenancies Tribunal that a tenant would be able to make a competent claim for costs in relation to an improper claim upon bond moneys.

JANN LENNARD

MEMBER 25 SEPTEMBER 2008.