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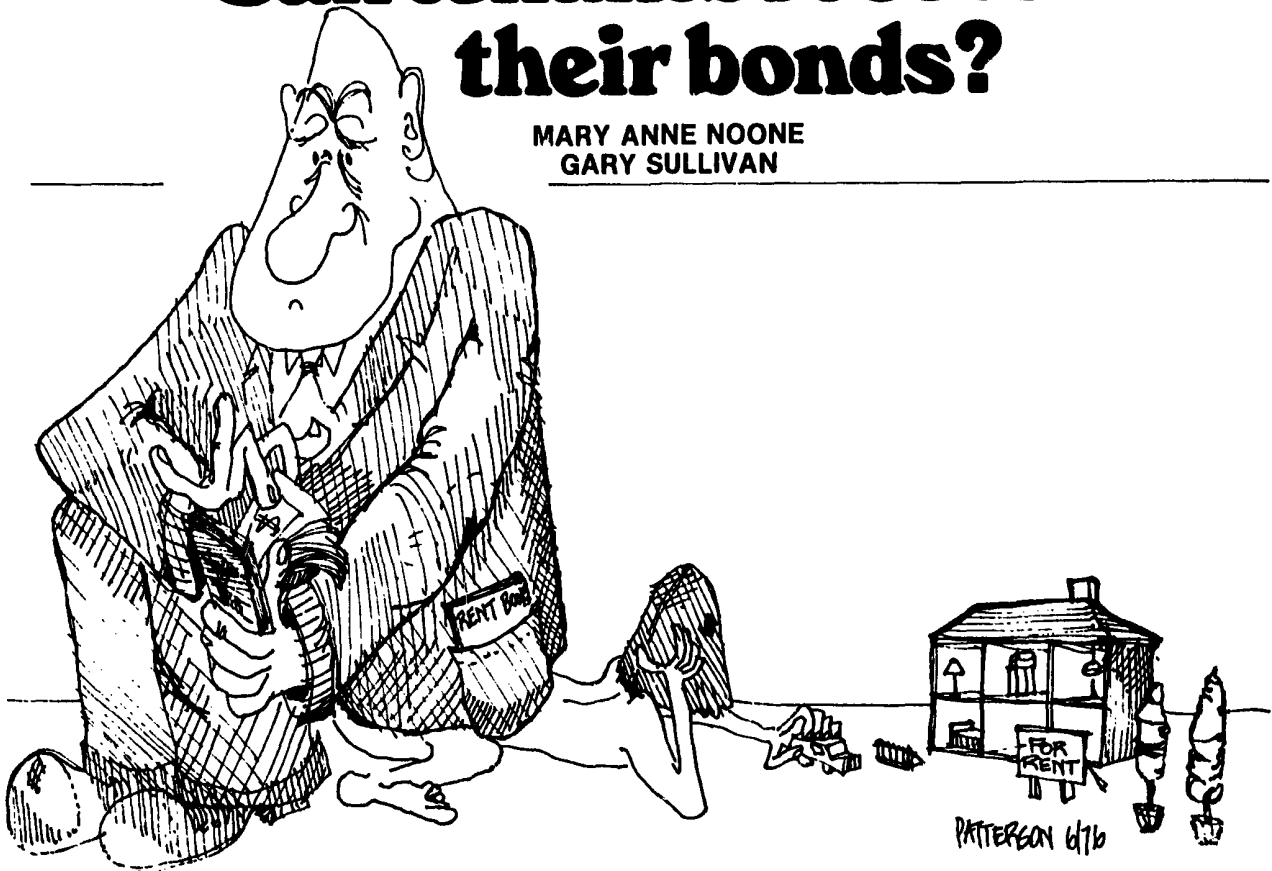
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Can tenants recover their bonds?

MARY ANNE NOONE
GARY SULLIVAN



INTRODUCTION

The right of the tenant to redress before a Magistrates' Court is of little practical value ... it is not economically practical for the tenant to take the matter to court. This fact is, of course, well known to landlords.¹

There is a basic human need of shelter. Tenants are people who rely on others to provide shelter in return for a regular financial payment. But few tenants are tenants by choice: they are confined by their financial resources. The Poverty Enquiry found that tenants are more likely to be poor than the rest of the population². In any dispute the financial circumstances and status of a tenant work against the tenant.

The Victorian Tenants' Union receives enquiries and advises tenants on a variety of matters: evictions, leases, rent rises, maintenance, housing conditions and discrimination; but it is bond disputes which figure most prominently. Evidence compiled by the Western Australian Law Reform Commission supports the proposition that bond disputes are the most common source of disagreement between landlords and tenants³.

Bond disputes arise at the end of a tenancy, when the landlord or agent retains a part or all of the security deposit (bond) and this retention is challenged by the tenant. The legitimate function of bonds is to provide a fund out of which the landlord can be compensated for damage caused by the tenants. However bonds are often used to offset rent arrears and pay for general maintenance of the premises. Bonds are so commonly demanded by landlords at present that the payment of a bond can be considered a pre-

requisite for obtaining rented premises.

PROCEDURE IN BOND DISPUTES

In a bond dispute the Tenants' Union advises tenants firstly to attempt negotiations with the landlord or agent for the return of the bond⁴. If these negotiations break down, a demand in writing for the return of the bond should be sent to the landlord or agent. If no satisfactory reply is received, the possibility of court proceedings is discussed. The advantages and disadvantages of such action are considered and if the tenant decides to proceed, assistance is given in preparing a Default Summons.

The matter is heard in a Magistrates' Court. On receipt of a Default Summons the defendant (landlord/agent) must file a notice of intention to defend with the court within the required time and also notify the tenant, if he/she wishes to present his/her version of the matter in court. If this requirement is not complied with, and the defendant (or his/her representative) does not appear at the court on the hearing day, the tenant may automatically obtain an order for the amount claimed⁵.

For several years now the Tenants' Union has recommended the procedure outlined above to tenants with bond problems. Advisors thought that the success rate of the summonses warranted the continued use of the procedure. In order to discover whether the resort by tenants to courts of law is a viable proposition we attempted to quantify the results of all summonses issued in the seven months January to July 1978.

METHOD

One of the central aims of the Tenants' Union is to

encourage tenants to help themselves. When the tenant resorted to self-help, and did not rely on the Tenants' Union for assistance in preparing the summons, it was impossible for us to include such summonses in our survey. Instead we have confined the study to those summonses of which the Tenants' Union had some record.

From the records of the Tenants' Union we were able to identify 110 cases in which the Union had advised tenants to issue a Default Summons to recover bonds from landlords or agents.

For the majority of cases on our list, files had been opened; we proceeded to examine each of these files. If the information on a file was inconclusive or no file existed, we sought to obtain further information in various ways, either by telephoning the tenant or the court involved or by contacting the advisors or solicitor concerned. When this was not possible or the information available was inadequate, there was no alternative but to eliminate the case.

The final list consisted of thirty-eight names.

Tables on the following page quantify the relevant information we obtained on these thirty-eight cases.

THE RESULTS

- Eighteen of the 38 cases resulted in full recovery of the amount claimed.
- Seven of the nine court hearings resulted in an award to the tenant of the full amount claimed with costs; one case was adjourned to a future date, with \$30 costs awarded against the tenant and in the other case, the tenant was awarded \$155 out of \$200 claimed, plus \$88 costs.
- The highest amount claimed was \$347, the lowest amount was \$26.66.
- In the "less than \$50" category five of the six recovered the full amount and four of these recovered costs;
- Twenty cases resulted in settlements out of court, and 16 of these recovered more than 75% of the amount claimed. Fifteen of the 20 did not recover costs;
- Four cases were abandoned, three because the tenants had difficulty in serving the summonses. In all three cases, the defendants were companies;
- In 24 cases the tenant was suing for the return of the whole bond which had been retained by the landlord/agent. Thirteen of these cases recovered the full amount.

THE COURT CASES - ASSURED SUCCESS?

The results of our survey suggest that if a bond dispute is heard in court, the outcome will be favourable to the tenant. Obviously this result cannot be guaranteed but will depend on the merits of each particular case.

The following is an illustration of a successful court case. The tenant contacted the Tenants' Union when the landlord withheld the bond of \$347. The bond dispute procedure outlined above was followed. A letter of demand was sent to the landlord, who then contacted the Tenants' Union.

The landlord sought to justify the retention of the bond on a number of grounds. He alleged that the tenant had stolen various articles of furniture, namely, the fan over the kitchen stove, a refrigerator, a double bed, and a single bed and mattress. The landlord further alleged that the tenant was in arrears of rent, had left without paying the gas account and had damaged the premises.

Every allegation was denied by the tenant. An offer of \$160.00 in full and final settlement was made by the landlord; the tenant did not accept this offer. A summons was prepared and the case was set down for March 1978. The matter was not defended and the tenant was awarded \$347 plus \$6 costs. A bailiff recovered this sum from the landlord; the landlord also had to pay the bailiff's costs.

OUT- OF- COURT- SETTLEMENTS - ASSURED SUCCESS? OR NO-MAN'S LAND?

The large number of out-of-court settlements suggests that both parties to a dispute will, if possible, avoid a confrontation in court. By making this concession, however, the tenant usually foregoes costs. It is difficult to draw any further concrete conclusions from these settlements (see Table 2). The high proportion of out-of-court settlements might support the proposition that when a tenant issues a summons against a landlord, the tenant is in effect calling the landlord's bluff, but our study did not provide the relevant data to support this proposition and it must remain a hypothesis.

One of the most encouraging cases occurred in this category. The landlord had withheld \$26.66 of a \$150 bond, claiming that the tenant had damaged the premises, and it had consequently been necessary to re-paint two walls. The tenant denied these allegations, and a summons was issued and served. A week before the hearing date, the landlord delivered to the Tenants' Union a cheque for \$41.66 (\$26.66, plus \$15 costs). The case was adjourned *sine die*.

CASES ABANDONED - OPPORTUNITY LOST?

Cases were abandoned by tenants confronted with problems concerning the technicalities of litigation; the reasons for abandonment did not relate to the merits of the case. For example, tenants were dissuaded from continuing with the action when faced with the task of serving the summons on a company (which involved a company search). This general unfamiliarity with legal procedures might also explain the reluctance of many tenants to even consider issuing a summons, in pursuance of their legitimate claims.

Tenants who abandoned their cases conceded victory by default to the landlord, who then retained the bond. Further they also lost at least the cost of the duty stamp on the summons.

COSTS

Bradbrook cast doubt on the economic practicality of tenants taking bond matters to court⁶. A committee of the Law Institute, when examining this area, was also sceptical. It referred to the question of legal costs, and stated that they were "... *excessive in relation to the size of the bond sought to be recovered, thus making recovery somewhat of a pyrrhic victory.*" This statement may be valid when the established legal profession is involved but some further comments must be made on the cases in our study:

- (1) The Tenants' Union encourages tenants to play an active role in the bond dispute procedure, and in this way the costs involved are minimised. A tenant is able, with the advice of the Tenants' Union, to negotiate, send letters of demand, and issue and serve the summons where necessary. The only cost the tenant must pay to issue the summons is the \$6

TABLE 1

Amount Claimed	The Results						TOTAL
	Court Success	Court Failure	Out of Court Settlement	Adjournment	Abandoned	No ^a Information	
\$ 0- 49	1	0	4	0	0	1	6
\$ 50- 99	0	0	2	0	2	1	5
\$100-149	1	0	4	1 ^(b)	0	1	7
\$150-199	1	1 ^(c)	5	0	1	1	9
\$200-249	1	0	2	0	0	0	3
\$250-299	2	0	2	0	0	0	4
\$300-349	2	0	1	0	1	0	4
TOTAL	8	1	20	1	4	4	38

^(a) Cases where the summonses had been issued but we were unable to ascertain the result.

^(b) Tenant's counsel requested leave to amend the summons; leave was granted and the matter was adjourned; \$30.00 costs were awarded against the tenant.

^(c) Struck out because it was a defective summons.

duty stamp. Legal representation is retained only if it is indispensable, for example, when the summons is defended.

(2) Our results indicate that when a matter is actually heard by the court, the tenant generally wins and is awarded costs. The court may make an award of costs which is less than the costs actually incurred, particularly if a solicitor/barrister is involved. However if the process of self-help has been employed, any shortfall will have been minimised. When legal representation has not been necessary, a tenant should recoup all his costs at court.

Those tenants who settle out of court will generally not recover their costs, but as their costs are minimal, most settlements may be considered a financial victory to the tenant.

(3) We should remember that some tenants seek the return of their bond as a matter of principle. They are prepared to take legal action, regardless of the cost, in order to prevent the landlord/agent from retaining what they consider is rightfully theirs.

(4) Another aspect of costs is its role as a deterrent. All potential litigants must evaluate the merits of their cases and consider the possibility of failure and its consequences. A major factor influencing tenants, particularly those on low incomes, is the prospect of having to pay the landlord/agent's legal costs if the action is unsuccessful.

In our study we discovered only one case in which costs were awarded against the tenant. (See Table 1, footnote ^(b)). Accordingly our results suggest that a tenant with a legitimate claim has little to lose by taking the matter to court.

TABLE 2
Out of Court Settlements

	With Costs	Without Costs	TOTAL
Full Recovery	5	5	10
Less than	0	10	10
TOTAL	5	15	20

SUMMARY

In a bond dispute the onus is on the tenant to take the initiative. When a tenant seeks to recover the bond, resort may be made to the courts of law. In this study we have attempted to quantify the results of those Default Summonses issued by tenants, within

a certain period. This has involved researching the records of the Tenants' Union.

We have presented the results in table form and have highlighted some additional points. The main features of the results are:

(1) Cases heard in court generally resulted in a victory for the tenant.

(2) The majority of tenants who settled out of court recovered most of their bond but the settlement usually did not include costs.

(3) Tenants may abandon their actions when confronted with problems concerning the technicalities of litigation.

Although the results indicate that the Default Summons can be used successfully by the tenant to recover his/her bond, this conclusion would ignore the much wider issue: the fairness of the bond system. For a discussion of the merits of the bond system the reader is referred to the Report of the Community Committee on Tenancy Law Reform⁸.

FOOTNOTES

1. Bradbrook, A.J., *Poverty and the Residential Landlord-Tenant Relationship* (AGPS, 1976), p.43.
2. Sackville, R., *Law and Poverty in Australia*, AGPS, Canberra, 1976, p.57.
3. W.A. Law Reform Commission, *Tenancy Bonds Working Paper*, (1974) p.5.
4. Section 38 of the *Victorian Estate Agents Act 1958* (Vic.) prohibits an estate agent from giving the landlord the bond without first having accounted for it.
5. Section 9, *Magistrates (Summary Proceedings) Act 1975* (Vic.).
6. See note 1.
7. *Report of the Landlord and Tenant Committee of the Law Institute of Victoria* (November 1976), pp.15-16.
8. *Reforming Victoria's Tenancy Laws* (VCOSS 1978).