

IN THE TENANCY TRIBUNAL
IN CANBERRA IN THE
AUSTRALIAN CAPITAL TERRITORY

)
) TT 508 OF 1997
)

Garden Network Pty Ltd

-v-

The Tsoulis Group

REASONS FOR DECISION OF PRESIDENT M. A. SOMES
DATED THE 26TH DAY OF MARCH 1998

A Notice of Dispute has been filed by Garden Network Pty Ltd (the tenant) indicating that there is a dispute between the tenant and The Tsoulis Group (the landlord) concerning the issue of a fair market rent to apply in relation to a lease between the landlord and the tenant relating to Block 2, Section 72, Calwell. The parties have filed written submissions and have agreed to the matter being considered in chambers and a decision being given based upon the written submissions.

The particular issue between the parties is whether the relationship is one that is covered by the provisions of the Tenancy Tribunal Act 1994 (the Act) and more particularly by the Commercial and Retail Leases Code of Practice (the Code). In order to make a determination as to this issue it is necessary to decide when the lease commenced.

Clause 3 of the Code is in the following terms:

"For the purposes of this Code, a lease is considered to have been entered into when a person enters into possession of the premises as a tenant under the lease or begins to pay rent under the lease (whichever happens first). However, if both parties execute the lease before the tenant enters into possession under the lease or begins to pay rent under the lease, the lease is

considered to have been entered into as soon as both parties have executed the lease.”

The Act defines a lease in section 3 and further indicates in section 5 that a lease as defined relates to retail premises. There appears to be no dispute between the parties that subject to the question of the commencement date of the lease that the Act would otherwise apply.

The basis of the dispute between the parties concerning the question of rental relates to a provision in the existing lease which is conveniently described as a “ratchet clause”. This term is defined in section 3 of the Act as follows:

““ratchet clause”, in relation to a provision in a lease for determining rent variations in such a way that rent might decrease, means a provision in that lease that has the effect of preventing, or giving a person the power to prevent, that decrease.”

As I understand the submissions of the parties there is no dispute that the existing lease contains a clause referred which would, by definition, be a “ratchet clause”. Such clauses are now illegal.

Section 6 of the Act provides a specific ground of dispute relating to a “ratchet clause”. This specific ground is found in 6(1)(e).

Section 8 (2) of the Act indicates that where there is a dispute relating to section 6(1)(e) then the Act applies provided the relevant lease is *“entered into, renewed or extended under an option on or after 1 January 1994; or (b) the dispute relates to a provision of a lease, being a provision varied on or after that date.”*

The tenant has raised an argument suggesting that there had been, in effect, a variation to the lease on or after the 1st of January 1994 or, alternately, that the relevant lease was entered into after the 1st of January 1994.

The submissions provided by the parties indicate that a Deed of Licence and Agreement to Grant a Sublease was entered into between the parties on the 8th of January 1993. This Agreement related to the intended erection of a building at Block 2, Section 72, Calwell. The Deed had annexed to it, as Annexure D, a document entitled Lease which indicates in Item 3 of the Reference Schedule that the commencement date was *“Date next following notification of practical completion”*. The submissions of the landlord indicate that the practical completion of the building

took place in about June or July of 1993. However, the submissions also indicate that the tenants took occupation in about May of 1993.

As indicated in the tenant's submissions, and agreed to in part in the landlord's submissions, some discussions took place between the landlord's agent and the tenant's agent subsequent to the execution of the agreement in January 1993 and involved, in particular, discussions concerning car parks and a service yard. A further document entitled "Lease" was entered into between the parties and bears the date 23.6.94. That document in Item 3 of the Reference Schedule indicates that the commencement date is the 26th of May 1993. This, I assume, represents the actual date upon which the tenants occupied the building in accordance with the Deed of Licence and Agreement to Grant A Sublease dated the 8th of January 1993. The document marked Exhibit B in the submissions of the landlord represents as I understand the submissions of the parties the final concluded agreement in detail. It is clear, however, that this lease document, while dated after the 1st of January 1994, does not purport to commence on any date other than a date prior to the 1st of January 1994.

It is my view that the Code, therefore, does not apply to this lease as it is a lease relating to an occupation of premises which occurred in about May of 1993 and the lease document itself clearly purports to have commenced prior to the 1st of January 1994. Accordingly, the dispute which relates to the provisions of section 6(1)(e) is not one which falls within the jurisdiction of the Tribunal under the Act, nor is it one which is covered by the provisions of the Code.