IN THE TENANCY TRIBUNAL } No: TT 2 of 1995
AT CANBERRA IN THE }
AUSTRALIAN CAPITAL TERRITORY }

BETWEEN:

NICK MANOLI OS

APPLICANT

AND:

GAHAHAN PTY LTD

RESPONDENT

Reasons for Decision of Magistrate John Burns
Delivered on the 16th day of August 1996

The applicant, Mr Nick Manolios, has instituted proceedings before the Tribunal alleging a dispute with the respondent Gahahan Pty Ltd.

The respondent is the proprietor of the Tuggeranong Markets. The applicant was a tenant of one of the retail tenancies at the Markets from December 1990 until he sold his business in August 1995. Although the applicant never entered into a written lease agreement with the respondent, he had entered into an agreement to lease and it was conceded by the respondent in a letter dated 14 November 1995 that both parties "proceeded believing the lease was in place and the terms of the unexecuted lease provided the basis of his occupancy".

The respondent initially took part in the proceedings, both by attendance by its representatives at conferences and pre-hearing procedures, and by forwarding to the Tribunal written submissions on the various issues raised by the applicant in his written notice of dispute. However the respondent was not represented at the hearing of the application, which proceeded ex parte. Mr Manolios himself was not legally represented which resulted in difficulty in obtaining a clear indication of the nature of the dispute. However, from the material before the Tribunal I understand Mr Manolios' complaints to be:

1. the markets have been poorly managed by the respondent, which caused the applicant's business to suffer losses;
2. the respondent failed to install heating in the markets, resulting in loss of customers in the winter periods;
3. the markets were not properly cleaned on a regular basis and in particular common areas adjacent to the premises occupied by the applicant were not cleaned;
4. the respondent did not comply with its obligations to ensure that at least 90% of its premises were occupied by tenants other than itself;
5. the applicant was obliged to pay outgoings to cover advertising of the markets, but the respondent did not commission any advertising; and
6. the applicant was obliged to pay $5700 into the trust account of the solicitors for the respondent, Messrs Snedden Hall and Gallop, as security for outgoings claimed by the respondent in circumstances where the applicant has never been provided with audited accounts of outgoings as required under the lease.

I shall consider each of the complaints raised by the applicant to determine whether there is a "dispute" to which the Tenancy Tribunal Act applies, and if so whether the applicant is entitled to any remedy.

1 The allegation of poor management of the markets.

Sub-section 6(1) of the Act provides:

Subject to section 8, this Act applies to the following disputes:

(a) a dispute caused by an alleged breach of a mediated agreement;
(b) a claim by a party to a lease that another party to the lease has engaged in harsh and oppressive conduct towards the first mentioned party (whether that conduct is unconscionable or not);
(c) a dispute about key money, a multiple rent review clause or a ratchet clause, in relation to a lease or to negotiations for the entering into of a lease;
(d) a dispute about key money in relation to a lease or to negotiations for the entering into of a lease;
(e) a dispute about a multiple rent review clause or a ratchet clause in relation to a lease;
(f) a claim by a party to a lease that another party to the lease has breached or is breaching the Code, other than a claim that relates to key money, a multiple rent review clause or a ratchet clause;
(g) a dispute about a lease, being a dispute prescribed by the Code as suitable for resolution under this Act;
(h) any other dispute about a lease or negotiations for the entering into of a lease.

The allegation of poor management of the markets by the applicant clearly does not come within the ambit of paragraphs (a), (c), (d), (e) and (f) of that sub-section. It is also not a dispute "prescribed by the Code as suitable for resolution under this Act" for the purposes of paragraph (g). The applicant's complaint can only possibly come within the ambit of paragraphs (b) or (h) of that sub-section.

Pursuant to sub-section 8(4) of the Act a dispute under paragraph 6(1)(b) of the Act only comes within the ambit of the Act if the conduct which is alleged to be harsh and oppressive occurs on or after the substantive commencement date, being 1 January 1995. The complaints of the applicant regarding the management of the markets were not precisely particularised, but appear to me to relate almost exclusively to the period prior to 1 January 1995.

Pursuant to sub-section 8(5) of the Act, conduct giving rise to a dispute referred to in paragraph 6(1)(h) of the Act comes within the ambit of the Act where that conduct occurs before, on or after 1 January 1995. The complaint of the applicant as to the alleged poor management of the market is then potentially a dispute for the purposes of paragraph 6(1)(h) of the Act.

However the applicants complaint is so lacking in particularity, and specifically in regard to any connection between the alleged poor management of the markets and any loss suffered by the applicant, and the quantum of such loss, that even if the applicants complaint is a dispute within the ambit of the Act the Tribunal in the exercise of its direction pursuant to section 54 of the Act should refuse to order any relief.

2 The respondent failed to install heating in the markets, resulting in loss of customers during the winter periods

The comments I have made in relation to the applicant's first complaint are also applicable to this complaint. For the reasons given this complaint cannot come within the ambit of paragraphs 6(1)(a), (c), (d), (e), (f) and (g) of the Act. It is not alleged that it was a term of any lease agreement that the markets would be heated, and again it appears that the applicants complaint relates primarily to the period prior to 1 January 1995.

For the same reasons as stated in respect of the applicants first complaint the Tribunal should decline to grant relief in respect of this complaint.

3 The Markets were not properly cleaned

For the reasons already given this complaint cannot come within the ambit of paragraphs 6(1)(a),(c),(d),(e),(f) and (g) of the Act.

As I understand the applicants complaint, it is alleged that the respondent had responsibility under the lease for ensuring adequate cleaning of the common areas of the markets. A breach of such an obligation under a lease could come within the ambit of paragraphs 6(1)(b) or (h) of the Act, although in the case of paragraph 6(1)(b) of the Act the Tribunal would be limited to considering conduct that occurred on or after 1 January 1995.

It appears that after the original cleaner's contract with the respondent was terminated, an arrangement was entered into by the respondent with one of the tenants for that person to do the cleaning in exchange for some form of rent reduction. The applicant contends that the result was sub-standard, however there is no evidence

that any lack of proper cleaning services on the part of the respondent lead to any loss on the part of the applicant, nor is there any evidence as to how the Tribunal could quantify any loss. Again, this is a case where even if the Tribunal is satisfied that a dispute exists for the purposes of the Act, the Tribunal in the exercise of its discretion should refuse relief.

4. The applicant paid outgoings for advertising when the respondent did not commission any advertising.

The evidence given by the applicant was lacking in particularity in respect of this complaint, and no evidence was placed before the Tribunal as to the basis of the applicant's complaint Even if the Tribunal can be satisfied that a dispute exists, the Tribunal in the exercise of its discretion should refuse relief.

5. The applicant was obliged to pay $5700 into the respondent's solicitors trust account as security for disputed outgoings.

The applicant testified that under the lease he was entitled to be provided with audited accounts of outgoings. He testified that the respondent failed to provide him with those accounts. In a letter to the Tribunal dated 14 November 1995 Mr E.Notaras on behalf of the respondent company referred to the applicant being provided with "a complete reconciliation of the disputed amounts" in September 1995, and denied that there was any requirement that the figures be audited.

The respondent not having appeared at the hearing of the matter, nor called any witnesses to support its version of the facts, cannot expect that its version will be preferred to the evidence of Mr Manolios, which remained unchallenged at the hearing. I therefore accept that the applicant was required to pay the sum of $5700 into the trust account of the respondent's solicitors in respect of disputed outgoings before the respondent would agree to offer a new lease to the prospective purchaser of the applicant's business, in circumstances where the respondent had failed to comply with its obligations to provide audited accounts to the applicant.

It is immaterial in my view whether or not it is ultimately established that the applicant is indebted to the respondent in the sum held as security. To require that sum to be so deposited in the circumstances of this case amounts to harsh and oppressive conduct, which clearly occurred after 1 January 1995. The applicant is thus entitled to relief.

I order the respondent company, by its proper officer, to complete an authority and direction to Messrs Snedden Hall and Gallop, Barristers and Solicitors, within 7 days of the date of this order, to pay the amount of $5700 held in their trust account to the applicant. I further order that the respondent company take no other steps to deal with that amount, or to direct any other person to deal with that amount.

In the event that the respondent company does not complete such an authority and direction within 7 days of this order, I order that such an authority and direction signed by the Registrar of the Tribunal will be sufficient authority to Messes Snedden Hall and Gallop for the payment out of that sum to the applicant.

It is, of course, possible that it may transpire that the monies referred to are, for whatever reason, no longer held by Messrs Sneddon Hall and Gallop. If that is the case, I order that the respondent pay to the applicant the sum of $5700.