IN THE TENANCY TRIBUNAL)
OF THE) **TT 390 of 1996**
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN:

CLASSIC GOURMET SAUSAGES PTY LTD
APPLICANT

AND:

LEDA COMMERCIAL PROPERTIES PTY LTD
RESPONDENT

REASONS FOR THE DECISION OF PRESIDENT BURNS
DELIVERED ON 27 FEBRUARY 1998

The applicant, Classic Gourmet Sausages Pty Ltd, is the lessee of premises known as Shop 71B at Tuggeranong Hyperdome in the Australian Capital Territory ("the premises"). The respondent Leda Commercial Properties Pty Ltd is the lessor of those premises.

The premises were leased to Lynian Pty Ltd on 1 May 1993 (the first lease). The term of that lease was expressed to be one year. The lease contained an option for renewal for a further period of four years. That lease also contained a clause prohibiting the lessee from using the premises for any purpose other than the purpose identified in the Reference Schedule to the lease without the prior consent in writing of the lessor. The purpose identified in the Reference Schedule to the first lease was:

> "Sale of prepared meats and an international gourmet sausage outlet/game meat."

The words "game meat" have been added to the permissible use in the Reference Schedule after the remaining words were typed in, and there is some doubt as to whether they are intended to appear after the word "outlet" as I have presented them above, or whether they were intended to appear after the word "international". However, nothing would appear to turn upon this aspect.

By a lease dated 7 December 1994 (the second lease) the applicant became the lessee of the premises. That lease was expressed to be for a term of five years commencing on 1 September 1994. The second lease contains no provision for an option for renewal. The permissible use of the premises in the Reference Schedule to the second lease is:

"Sale of prepared meats and an international/game meat gourmet sausage outlet."

The applicant notified the Tribunal of a dispute with the respondent on 28 August 1996. The Notice of Dispute did not succinctly set out the ambit of the dispute, and simply annexed correspondences between Mr. Ian Turner on behalf of the applicant and the respondent. I note that Mr Turner corresponded with the respondent on the letterhead of Lynian Investments Pty Ltd, a company with which Mr. Turner was also associated, but the correspondence was clearly intended to be from the applicant company, and appears to have been treated as such by the respondent. Indeed for all purposes Mr Turner is Lynian Pty Ltd and Classic Gourmet Sausages Pty Ltd.

As I understand the applicant's position, it says that the respondent has breached the second lease by precluding the applicant from selling certain meat products from the subject premises. In the alternative, the applicant contends that there was never any lease between the applicant and the respondent as the parties were never *consensus ad idem* (ie: the parties had never reached a mutual agreement as to the use to which the premises could be put).

It is generally the applicant's contention that it is entitled to sell general butcher's lines from the subject premises in accordance with the permissible use in the second lease. It alleges it is entitled to damages as a result of the respondent's breach of the second lease by stopping the applicant from selling such lines.

The respondent submits that the applicant is not entitled to sell general butchery lines from the subject premises. The respondent submits that the applicant is entitled to sell sausages and other meat products that have been subjected to value adding processes such as marination, but that it is not entitled to simply sell cuts of meat off the bone.

The dispute therefore centers on the interpretation of the permissible use clause in the second lease, and in particular the meaning of the words "prepared meats" in that clause. The object of interpreting such a clause is, of course, to determine what the parties themselves had agreed in the contract.

The threshold issue in that regard is whether there is any ambiguity in the meaning of the clause. If there is no ambiguity, the Tribunal should not receive evidence of the conversations and dealings between the parties and their representatives prior to the written agreement being executed. If there is ambiguity, the Tribunal may consider such evidence.

The applicant submits that the words "prepared meats" are unambiguous. It refers to the definition of the word "prepare" in the Macquarie Dictionary, third edition 1997: "1. to make ready, or put in due condition, for something, 2. to get ready for eating, as a meal, by due assembling, dressing or cooking."

Additionally the applicant refers to a publication called the "Handbook of Australian Meat" to establish that the words "prepared meat" have an understood meaning in the meat industry as meaning *any* meat which has been separated from the carcass.

On the other hand the respondent referred the Tribunal to the provision of the *Public Health (Meat) Regulations (ACT)* which defines "prepared meat" goods as including "poultry, rabbit, ham, bacon, salt pork, cooked meat, trotters, smoked fish, salt fish and brawn".

Frankly neither approach is convincing. There is no evidence that the respondent was aware of the contents of the "Handbook of Australian Meat" or any trade usage of the term "prepared meat" at the time that the second lease was prepared. Nor does it appear likely that the parties had in mind the provision of the above regulation at that time.

Where the language used in a written agreement admits of more than one meaning, and may rationally do so in respect of the subject matter of the agreement, and where the parties to the agreement are unable to agree which of the available alternative meanings was intended, then *prima facie* there is ambiguity which will require the Tribunal to receive extrinsic evidence to determine what was agreed between the parties. Such is the case in this dispute.

Inevitably when such an issue arises and falls to be determined on extrinsic evidence, such as the testimony of those involved in the negotiation for entering the lease, issues such as the reliability of the witnesses and their credibility become significant. Evidence was called on behalf of both the applicant and the respondent. It is unnecessary to reproduce that evidence in detail in this decision. It is sufficient to note that the evidence, in many respects, was irreconcilable. The Tribunal must therefore determine what is the more likely version of the events and conversations.

Mr Ian Turner, a director of the applicant, swore an affidavit and was cross-examined. Much of Mr Turner's evidence related to events that occurred after the execution of the second lease. Whilst not irrelevant, this material was of limited use in determining what had been agreed between the parties at the time of execution of the second lease. This is particularly so where the evidence relates to conversations with employees of the respondent who were not involved in the negotiations for the second lease. In reality, these employees of the respondent could do little more than place their own interpretation upon the words "prepared meats" as used in the second lease, or rely upon hearsay material as to some other person's beliefs about what had been agreed between the parties in respect of those words.

Mr Turner deposed that he was an experienced butcher who had experience in managing meat distribution businesses. With reference to the first lease he stated:

> "After the sale of the Meat Export Sydney butcheries to Mr and Mrs Harvey ... in 1992, I was approached by Hardy of Leda Commercial Properties to open a new retail meat business. Negotiations took place between myself and Hardy and correspondence occurred between my solicitor and the Owner regarding the Purposes Clause. It was eventually argued that the permissible use would be described as "sale of prepared meats and an international meat/game gourmet sausage outlet". My original request for a self serve retail butchery was denied. I understood at all times from my discussion with Hardy that I would be allowed to sell prepared meats which were, in part, butcher shop lines". (Affidavit sworn 27 May; paragraph 9).

Mr Turner was aware of the necessity to explain why this form of words were used, rather than simply a clause allowing the defendant to conduct a retail butchers shop and why his request to include the term "self serve butchery" had been denied if both parties intended that he be able to sell general butchery lines. Mr Turner deposed:

> "During October and November 1992 I had a number of conversations with Hardy in relation to the sale of gourmet sausages and prepared meat from the shop and the possible difficulties which might arise in relation to the sale of prepared meats or butcher shop lines. The following conversation, or words to the effect, took place between myself and Hardy - I said to Hardy "I understand that that exclusive rights to run the butcher ships had been given to Meat Exports Sydney Pty. Limited" - Hardy replied "the exclusive rights have been sold with those businesses to Harvey and so the word butchery or butcher shop cannot appear in your Lease" - I said to Hardy "we could put in the words "prepared meats" - Hardy said to me "that should be alright" - Hardy further said to me "I dislike Harvey, he is not a very good operator and because of the lack of competition I will never again lease the two butcher shops to the one butcher. I hope you put the little cunt out of business."" (Affidavit sworn 27 May 1997, paragraph II.)

In a letter to Mr Greg Adcock, the then manager of the Tuggeranong Hyperdome, dated 28 August 1996 Mr Turner gave a slightly different version of his negotiations with Mr Hardy leading up to the execution of the first lease. In that letter he stated:

> "Mr Ian Hardy, centre manager at the time asked me to put this sausage shop in the centre. He told me of the great success in Sydney and I would make a fortune in Canberra. I disagreed with him and stated that if the butcher decided to sell flavoured sausages or cheap sausages I could not survive..... Mr Hardythen guaranteed me that I could sell meat, just like the butcher so I could survive.
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> My solicitor asked for a clause SELF SERVE BUTCHERY to be included in my lease. Mr Hardy told me that the word BUTCHERY could not be used as their (sic) was an arrangement in place with the Butcher and that he was the only one who could sell meat. I said that the agreement was with Malcolm Waters and that I was aware of this as I had been with Malcolm for many years and had actually been with Ritchie Vereks and Malcolm when the Hyperdome was just a plan. As I were (sic) an Area Manager for Meat Export Sydney I was aware of all agreements for the Hyperdome. Mr Hardy then told me that the agreement was sold to Ron Harvey when he purchased the shops.
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> What I will do for you MATE, Mr Hardy said is re-word the term BUTCHERY and call it PRE-PARED (sic) MEATS so if the butcher has a go at you, you can have a go at him."

The respondent denies that any such conversation and/or representation occurred. In fact the evidence before the Tribunal was that there was no exclusivity agreement between Ron Harvey and the respondent. No evidence that any such agreement ever existed was produced, nor was Mr

Harvey called by the applicant to testify. Mr Ian Hardy testified on oath that there was never any such agreement. I accept his evidence in the absence of any independent evidence to the contrary. The non-existence of the alleged agreement between the respondent and Ron Harvey is in itself strong evidence that the conversations did not occur in the terms alleged by Mr Turner.

However, even if the conversations did occur in the terms alleged by Mr Turner, they affect the credit of Mr Turner. The only rational interpretation of Mr Turner's evidence was that he believed that Mr Ron Harvey had an exclusive contractual right with the respondent to conduct businesses in the nature of butcheries in the Hyperdome, and yet he was prepared to connive with the respondent's employees to set Mr Harvey's contractual rights at nought. He was, simply put, on his evidence prepared to enter into an agreement with the object of defrauding Mr Ron Harvey. For the purpose of determining the credibility of Mr Turner the question whether such a conversation occurred in the terms alleged by Mr Turner is not material, what is significant is the fact that Mr Turner says he was prepared to enter into such an agreement.

A second factor relevant to the credibility of Mr Turner was his concession in cross-examination that he has previously been convicted of conspiring to defraud an insurance company some years ago. By itself this is not a matter of determining significance. One conviction does not display a continuing history of criminality or dishonesty such as would warrant the Tribunal, on this ground alone, to reject the evidence of Mr Turner. But it is a relevant circumstance which must be weighed with the remainder of the evidence.

Thirdly, there was the issue of funds allegedly misappropriated from the business of Classic Gourmet Sausages. In cross-examination Mr Turner was referred to a meeting that took place in 1994 between himself, his then partner Mr Frank Colosimo and a bank manager in which it was alleged that Mr Turner was shown the balance sheets for Classic Gourmet Sausages and asked to account for a discrepancy of approximately $100,000. Initially Mr Turner told the Tribunal that no such issue was raised at that meeting. When pressed by counsel for the respondent Mr Turner stated that he did not recall being questioned about where sums of $38,000 and $65,000 had gone from the takings. When I put to Mr Turner the proposition that he would hardly fail to recall a meeting at which it was alleged that $100,000 of his company's takings had gone missing Mr Turner ultimately agreed that the issue had been raised at the meeting. After initially denying that he had been asked to resign at that meeting, Mr Turner ultimately conceded that he had agreed to resign at the meeting.

The evidence before the Tribunal was not sufficient to enable me to positively determine that it was Mr Turner who misappropriated any sum from the applicant company. What was of significance was the dishonest manner in which he dealt with the issue in cross-examination.

This was typical of Mr Turner's attitude in general during cross-examination. His evidence was characterised by a lack of frankness, and frequent downright dishonesty.

I am satisfied that Mr Turner's evidence is, by itself, not reliable. The Tribunal must therefore examine the other evidence to see if it supports the testimony of Mr Turner in material aspects.

In support of Mr Turner's evidence, evidence was called from Grahame Vincent Whitty, a butcher of 32 years experience. Mr Whitty deposed that he was a director of Classic Gourmet Sausages

Pty Limited for the period 11 March 1994 to 29 November 1994. Mr Whitty deposed to the fact that he had been a witness to a number of conversations between Mr Turner and employees of the respondent which, if accepted, corroborated Mr Turner's proposition that the respondent had agreed to allow the applicant to sell general butchery lines. Mr Whitty swore his affidavit on the 17 September 1997. This was some three years after the conversations to which he deposed. It was only approximately one week after swearing his affidavit that Mr Whitty was cross-examined on his affidavit before the Tribunal. During that cross-examination it became abundantly clear that Mr Whitty had no clear recollection of the conversations to which he had deposed. It is inherently unlikely that having remembered those conversations for three years, Mr Whitty had forgotten them in the subsequent seven days. The inevitable inference is that Mr Whitty at the time of swearing his affidavit did not have a truly independent recollection of the conversations to which he deposed. The reasons why Mr Whitty would swear such an affidavit are not hard to find. Firstly he is a friend of Mr Turner. Secondly he works for Mr Turner. Mr Whitty's evidence, in my opinion, cannot be used to materially support the evidence given by Mr Turner.

The respondent also relied upon evidence given by Mr Allen Bedford, a solicitor. Mr Bedford testified that he had been representing Mr and Mrs Harvey who were conducting the business of a butchers at Tuggeranong Hyperdome. He had received complaints from his client in respect of certain actions of the applicant in selling meat products from its premises, and took up those complaints with the respondent. He subsequently had a telephone conversation with Mr Peter Day, an employee of the respondent. Mr Bedford stated that in his call to Mr Day he asked Mr Day to tell him what Mr Turner's lease purpose clause was. He stated that Mr Day read him the clause, and he recollected that it referred to "prepared meats". Mr Bedford stated that Mr Day said to him: "Prepared meats means that Mr Turner can trade in any general butchery line".

This evidence was supported by evidence given by Mr Marc McEnallay, an accountant who was employed by the respondent as the centre accountant/administration manager at the Tuggeranong Hyperdome between June 1994 and October 1995. He stated that in or about March 1995 he spoke to the then centre Manager Mr Craig Day about the purposes clause contained in the lease granted to Classic Gourmet Sausages Pty Ltd. He deposed that his conversation with Day was in words to the effect of him saying to Day "You know that Turner is retailing meat from his premises. It is in his purposes clause that he can sell prepared meat. I understand from talking with Turner that prepared meat is meat off the hook and cut up". Mr McEnallay stated that Mr Day said to him: "If that is the case, there is nothing we can do about it".

This material is of limited value in determining what the intention of the parties was in 1993/94 when the first and second leases were being negotiated, and when the term "prepared meats" was incorporated into those leases. At its highest it would establish that Mr Day around March to May 1995 believed that the applicant's usage clause entitled him to sell general butcher lines. But Mr Day was not party to the negotiations between the applicant and the respondent leading up to the execution of either the first or second lease. It is not suggested that in framing any such belief Mr Day had reference to any documents or materials that are not before the Tribunal. If he did form such a belief it could only have been based upon the terms of the usage clause itself. All that this establishes is what is already obvious: the clause may admit to the meaning urged by the applicant. It does not, however, support the proposition that the parties were in agreement that the term

"prepared meats" meant general butchery lines at the time of entering into the first and second leases.

There are logically three possibilities about the intentions of the parties when they entered into the second lease in the terms in which they did so.

The first possibility is that both parties intended to use the words "prepared meats" to allow the applicant to sell general butchery lines. This is the applicant's contention. To prove it, the applicant relies on the evidence of Mr Turner, and on the evidence of the others I have referred to. For the reasons I have given Mr Turner is not a reliable witness, nor is Mr Whitty. The evidence of Mr Bedford and Mr McEnallay of occurrences after the execution of the second lease is of little assistance. The respondent, in turn, relies upon the evidence of Mr Ian Hardy that the applicant through Mr Turner, was at all times aware that general butchery lines could not be sold and that "prepared meats" meant processed meat, or meat which had undergone some value adding process.

Bearing in mind the credibility problems of Mr Turner and Mr Whitty I am not persuaded that the representatives of the respondent ever communicated to the applicant an acceptance that the use of the term "prepared meats" in the lease was intended, from the respondents point of view, to allow the applicant to sell general butchery lines.

The second possibility is that the applicant, via Mr Turner, genuinely believed that he would be entitled to sell general butchery lines, although this was not the intention of the respondent i.e. that the parties were never of one mind on this fundamental condition of the lease. If this were the case the Tribunal would have power to avoid the lease, and to make orders designed to restore the parties to their original position prior to entering the lease, at least as far as was now possible.

The evidence that after the execution of the first lease, Mr Turner in the guise of Lynian Pty Ltd stocked the shop for opening with general butchery lines is evidence that supports the proposition that Mr Turner at that time believed that Lynian Pty Ltd was entitled to sell those lines.

For the reasons I have given it is difficult to accept Mr Turner's unsupported evidence as to his state of mind. Another matter strongly suggests that Mr Turner did not believe the applicant was entitled to sell general butchery lines. At the time of entering the second lease the applicant was represented by an experienced solicitor, Mr Archie Tsirimokos of the firm Vandenberg Reid. Mr Tsirimokos had represented Mr Turner's other company Lynian Pty Ltd, in negotiations with the respondent which culminated in the execution of the first lease. If anyone would have been privy to the thoughts of Mr Turner on the vital issue of the usage clause it would have been Mr Tsirimokos. It should also be remembered that by the time the second lease was negotiated Mr Turner had, in the guise of Lynian Pty Ltd, been (on his evidence) denied what he was entitled to by the respondent in the same usage clause in the first lease. It is unbelievable that Mr Turner would not have mentioned this to Mr Tsirimokos and instructed him to at least attempt to negotiate a usage clause in the second lease that gave the applicant what Mr Turner says was what he believed the applicant had purchased in the first lease i.e. the right to sell general butchery lines.

Not only was Mr Tsirimokos not called by the applicant to support what Mr Turner says was his state of mind at the time of negotiating the second lease, but there is no correspondence between Mr

Tsirimokos and the respondent upon this issue, despite the fact that when acting for Lynian Pty Ltd in negotiating the first lease Mr Tsirimokos in a letter dated 25 March 1993 requested, unsuccessfully, that the proposed usage clause for the first lease include the words "self serve butchery". The existence of this correspondence in which Mr Turner in the guise of Lynian Pty Ltd was refused the right to run a "self serve butchery" in respect of the first lease is, of course, in itself strong evidence that the applicant could not have believed that it was entitled to sell general butchery lines under the same usage clause in the second lease.

Mr Turner did not present to the Tribunal as a man who would be likely to forgo a right which was likely to be profitable to him, and for which he had paid. It is inherently unlikely that he would not have complained to his solicitor, or taken action to assert his rights. His explanation that he did not want to antagonise his landlord is unconvincing when one considers the number of times, on his own evidence, he took up the issue of the proposed sale of general butchery lines with successive centre managers. In any event, the obtaining of private legal advice from his solicitor could hardly antagonise the respondent.

I am therefore unconvinced that the applicant held a bona fide belief at the date of entering into the second lease that it was entitled to sell general butchery lines. In so far as it is necessary to make any such finding, I am also satisfied that Mr Turner was never of the belief that he was entitled to sell general butchery lines, either under the first lease as Lynian Pty Ltd or under the second lease as the applicant company.

The third possibility is that argued by the respondent i.e. that both parties intended that the term "prepared meat" refer to meat with some value added process, and not to general butchery lines. This possibility has the support of the respondent's witnesses, many of whom are no longer employed by the respondent, and who were not shaken on their credibility. It also makes explicable the otherwise inexplicable behaviour of Mr Turner that I have referred to above in respect of the second possibility. The third possibility is by far more likely to be the true scenario.

I am therefore satisfied that the parties were in agreement at the time of execution of the second lease that the usage clause entitled the applicant to sell meat which had been subjected to some value added process, but not general butchery lines.

The clause in question is no masterpiece of drafting. There is always an inclination towards allowing the drafter of such a poorly drafted clause to bear the loss, if anyone must do so. However, the provision of the *Tenancy Tribunal Act* 1994 does not provide for punishment of a party to a lease for poor drafting. If the evidence before the Tribunal had been such that the Tribunal could not determine the intentions of the parties when they executed the second lease, the result of the dispute would have been very different. However, that was not the case.

I decline to make the orders sought.