IN THE TENANCY TRIBUNAL } No: TT 35 of 1995
AT CANBERRA IN THE }
AUSTRALIAN CAPITAL TERRITORY }

BETWEEN:

RONALD & MONICA HARVEY

APPLICANT

AND:

LEDA COMMERCIAL PROPERTIES PTY LTD

RESPONDENT

Reasons for Decision of Magistrate John Burns
Delivered on the 27th day of August 1996

The applicants Ronald and Monica Harvey by a Notice of Dispute dated 1 December 1995 seek orders from this Tribunal under section 54 of the Tenancy Tribunal Act 1994 ("the Act") in the nature of an award of damages against the respondent Leda Commercial Properties Pty Ltd. The applicants were parties to a lease with the respondent in respect of retail premises situated within the Tuggeranong Hyperdome.

The Registrar of the Tribunal has determined that there is no reasonable likelihood of a mediated agreement being reached in the dispute and pursuant to section 15 of the Act he has referred the dispute to the Tribunal. The respondent has challenged the jurisdiction of the Tribunal to hear the dispute.

The respondents challenge is based upon Clause 17.07 of the Lease between the applicants and the respondent, which provides:

> "Unless application is mandatory by law any statute, proclamation, order, regulation or moratorium present or future shall not apply to this lease so as to abrogate, extinguish, impair, diminish, fetter, delay or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to the lessor."

At the outset it should be noted that the issue raised by this clause is not really a jurisdictional issue. The issue is, succinctly, whether parties to a lease may "contract out" of the provisions of the Act and the Commercial and Retail Leases Code of Practice ("the Code"), and if so whether the present clause effectively does so.

It is convenient to deal with the latter issue first. The Tenancy Tribunal Act and the Code introduce rights and obligations for parties to leases that did not exist prior to the Act and Code coming into existence. It also removes some pre-existing rights, such as the right to bring proceedings in the Magistrates Court. It was not argued on behalf of the applicants that the Act and the Code do not "abrogate, extinguish, impair, diminish etc" the rights, powers and remedies of the respondent. In my opinion no such argument could realistically be made. I am therefore satisfied that clause 17.07, if given the effect urged by the respondent, would remove the lease between the applicant and respondent from the operation of the Act and the Code.

The real question is whether the Tribunal should give effect to the contract. That was the question which Rich J posed in Lieberman v Morris (1944) 69 CLR 69, where a pre-nuptial agreement between prospective spouses that the prospective wife would not make any claim under Testator Family Maintenance legislation on the estate of the husband in the event of the husband's death was pleaded as a bar to a subsequent application by the wife under that legislation. His Honour commenced his answer to that question by observing, at page 84:

> "Prima facie it should, because, as a general rule, a court of justice enforces contracts, and therefore treats as no longer available any legal right which has been satisfied or released by contract"

In my opinion the same principles apply to this Tribunal. The Tribunal should ordinarily seek to uphold and enforce contracts, except where it can clearly be shown that there are good reasons not to. There are of course well known categories of contracts which the law will not enforce. Contracts which are expressly or implicitly prohibited by statute are illegal and are not enforceable at law. Contracts which are contrary to public policy, whilst not illegal, are also unenforceable at law. It was submitted by counsel for the applicant that clause 17.07 is either unenforceable as contrary to public policy, or prohibited by statute.

Counsel for the respondent, in his clear and well reasoned arguments, submitted that the Tribunal should take into account the following factors in reaching a conclusion that there is no reason either in public policy or otherwise not to enforce clause 17.07:

> (a) there is no express prohibition on contracting out contained within the Act or the Code, whereas there are express provisions in other Acts: see s.14 Long Service Leave Act 1976; s.14 Annual Holidays Act 1973; s.90 Landlord and Tenant Act 1949; s.13 Workers Compensation Act 1951;

(b) the legislature has made specific reference to certain provisions as being included in leases (Code, clause 12) and other provisions as being prohibited (Code, clauses 120, 121), but has not made any reference to contracting out clauses;

(c) the parties have made a binding agreement regarding the exercise of their powers and rights that the Tribunal should, prima facie, seek to uphold;

(d) the tenants' rights as they existed as at the date of the lease would not be abrogated, the difference being that their legal position vis a vis the landlord would be frozen as at the date of entering into the lease, with the result that any allegation by the tenant of breach of the lease would be brought before the ordinary courts of the Territory.

In his submission counsel for the Director of Consumer Affairs cited Chitty on Contracts 26th edition, 1989 paragraph 1143:

"Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*) difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes.

In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates.

Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver."

It cannot be doubted that, as a general principle, contractual provisions that are contrary to public policy will not be enforced: see A. & others v Hayden and others (1984) 156 CLR 532.

The extent to which the Courts should imply public policy considerations within statutes to determine the issue of contracting out was considered by Latham CJ in Lieberman v Morris (supra) where his Honour observed:

"(I)t is not for a Court to invent a new head of public policy upon the basis of a speculation or belief that if the legislature had directed its attention to the question whether persons should be allowed to renounce statutory benefits the legislature would have provided that any such renunciation would have been ineffective. It is quite easy for parliament if it wishes to do so, to provide against what is generally called "contracting out". (at page 81) ....

> In the present case there is no such provision contained in the Act, and the Court should not be ready to imply such a provision simply upon the basis that the Act in a general kind of way, as evidenced by its title, its subject matter or the general character of its provisions, indicates an intention to establish a new general principle of public policy. (at page 82)
>
> All general statutes give effect to some public policy and many of them confer benefits or advantages upon individuals in pursuance of the general policy of a statute. In my opinion arguments based upon the general character of the Act ... do not show with reasonable certainty that the legislature intended to prevent possible applicants under the Act from effectively agreeing to abandon their rights". (at page 82)

It is important in determining whether to interpret clause 17.07 of the lease in such a way as to allow contracting out of the provisions of the Code and the Act, to have regard to both of those documents and any other material capable of assisting with interpreting the intention of the legislature as embodied in those documents.

The Act is entitled "An Act to establish a Tenancy Tribunal and other special procedures for resolving disputes about certain types of leases, to provide for a Code of Practice about such leases and for related purposes." Section 5 of the Act provides that the Act " ... applies to a lease for premises, situated in the Territory, of any of the following kinds ...", and then specifies the types of premises to which the Act applies, with particular reference to "retail premises, or premises located in a shopping centre", with certain exclusions therein set out.

Section 8 of the Act, the transitional provisions, as amended, make it clear that in respect of most disputes referred to in section 6 of the Act come within the ambit of the Act if the lease in question was "entered into, varied, renewed or extended under an option, before, on or after" 1 January 1995.

The Act is broadly framed and is obviously intended to apply to all leases that come within the ambit of sections 5 and 8 of the Act. It provides for mediation of disputes and for determination of disputes by the Tribunal. It also provides the machinery for enforcement of the provisions of the Code.

The Code itself is approved by the Minister (section 75 of the Act) and is a disallowable instrument for the purposes of section 10 of the Subordinate Laws Act 1989 (section 76 of the Act). Pursuant to clause 5 of the Code, the Code applies to leases entered into, renewed or extended under an option or varied on or after the commencement of the Code, that date being 1 January 1995. Clause 6 of the Code narrows the operation of Clause 5 in relation to the premises within the ambit of the Code, but again with particular reference to "retail premises, or premises located in a shopping centre".

Clause 10 requires parties to a lease in their dealings with each other to conduct themselves in accordance with the Code. Clause 11 provides that where there is an inconsistency between the Code and the provisions of a lease or an agreement to lease, the Code is to prevail.

The Code contains provisions, inter alia,:

- prohibiting parties to a lease from engaging in conduct that is unconscionable, coercive or harsh and oppressive (clause 13);
- regulating the conduct of parties during the negotiation of leases, and providing certain remedies for breach of the Codes provisions (Part 3, Division 2);
- regulating lease costs (Part 3, Division 2);
- regulating the terms of a lease, specifically in relation to the minimum term (Part 3, Division 4);
- regulating the setting of rents, and their review (Part 3, Division 6);
- regulating assignment and sub-leasing (Part 3, Division 9); and
- regulating termination and renewal of leases (Part 3, Division 10).

In addition the Code contains provisions specifically regulating the conduct of parties to leases of premises in "shopping centres", the definition of which would include shopping malls such as the Tuggeranong Hyperdome (Part 4).

Counsel for the Director of Consumer Affairs referred the Tribunal to the presentation speech of the then Attorney-General, Mr Connelly, in respect of the Tenancy Tribunal Bill, which subsequently became the Act. In that speech the Attorney-General stated:

> "As members would be aware, this government has been actively attempting to resolve concerns about the imbalance of market power in the area of retail and commercial tenancies.
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> The number of complaints to the Consumer Affairs Bureau concerning business leases, and the conduct which the bureau has identified, support claims about an imbalance in the market, which is open to exploitation, primarily to the disadvantage of tenants.
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> While the government recognises that many commercial and retail landlords and tenants enjoy good business relationships which are not marred by leases which unduly favour either party, the evidence is that there remains a significant number of commercial and retail tenancy arrangements which leave tenants, in particular, very vulnerable.
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> The high percentage of retail outlets situated in large shopping centres, which is a particular characteristic of the A.C.T. retail market, has compounded the problems of territory retail tenants. In other retail markets there is a greater diversity of retail sites, including many more "street front" sites, giving tenants some additional bargaining power and options other than location in one of the large regional shopping centres.

> However, the problem of an imbalance between bargaining powers of commercial and retail landlords and tenants is by no means unique to the A.C.T. It is a problem which other Australian jurisdictions, including most recently New South Wales, have acknowledged and addressed by enacting legislation to prohibit the operation of unfair provisions in retail leases and to provide tenants with remedies and protection from the operation of particularly harsh terms and conditions in such leases.
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> Members would be aware that the government initially sought, rather than to legislate, to work in consultation with representatives of landlord and tenant groups to develop a Code of Practice acceptable to all parties. It was intended that such a Code would be adopted and complied with on a voluntary basis.
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> Unfortunately, in spite of the considerable time and effort expended in attempting to arrive at a voluntary Code with which all the parties could comply, it has not been possible to reach unanimous agreement.
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> For that reason, in April this year, I advised of the governments intention to develop a Code, in consultation with the relevant parties, which would be approved and enforced under legislation."

In Johnson v Moreton (1980) AC 37 the House of Lords considered the question whether parties to an agricultural tenancy could contract out of the provisions of the Agricultural Holdings Act 1948 which guaranteed security of tenure to tenant farmers. In that case both Lord Salmon and Lord Simon of Glaisdale took a purposive approach to the interpretation of the Agricultural Holdings Act. Lord Simon commented:

> "Where it appears that the mischief that Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and render the statutory provisions a dead letter" (at p.69)

A similar purposive approach to the interpretation of the Aboriginal Land Rights (Northern Territory) Act 1976 lead to the determination that contracting out of the procedures required by the Act for approval of mineral exploration and mining was not permitted: see Northern Territory of Australia v Northern Land Council and Others (1992) 81 NTR 1.

In addition in Johnson v Moreton Lord Hailsham referred to the Agricultural Holdings Act as being passed for the protection of "a class of persons who do not negotiate from a position of equal strength", and that "It is precisely (the tenant's) weakness as a negotiating party from which Parliament wishes to protect him". (page 60)

The Attorney-General's presentation speech succinctly presents the object of the Act. The object of the Act is to, at least in large part, resolve concerns arising out of inequality of bargaining power between tenants and landlords, in the particular circumstances of the Australian Capital Territory retail market place. That particular market place is highly idiosyncratic, largely as a result of the lack of diversity of retail sites available, and the concentration of many of the retail tenancies within large shopping centres or malls.

To adopt an interpretation of the Act that would allow contracting out of the provisions of the Act or the Code would, in the circumstances of the A.C.T. retail rental market place, inevitably lead to the provisions of the Act and the Code becoming a dead letter. An interpretation that achieves the legislative intention of the Act is to be preferred over one which results in the Act, and the Code, becoming irrelevant.

In my opinion this conclusion is not based on the Tribunal finding that the Act creates a new head of public policy rendering clause 17.07 unenforceable, it is a matter of statutory interpretation. There is much to be said for the proposition referred to by Lord Simon in Johnson v Moreton (supra) that it would be anomalous to contemplate a situation where an Act that on its face clearly sets outs to regulate agreements between parties could be avoided by a clause within the very class of agreement that it is intended to regulate. This is particularly so where the statutory provisions are enacted to redress inequality between the bargaining parties.

I am therefore satisfied that the Act and Code impliedly prohibit the parties from contracting out of their operation. It is unnecessary to make any orders at this time. Clause 17.07 of the lease in question commences with the phrase "Unless application is mandatory by law...". I am satisfied that both the Code and Act are mandatory, and accordingly clause 17.07 simply does not apply.

The other issues raised by the respondent in its submissions are more conveniently to be dealt with on the hearing of this matter, after the taking of evidence.