IN THE TENANCY TRIBUNAL)
AT CANBERRA IN THE) TT 308 of 1996
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN:
Barry Marshall, Anne Marshall and
Peter Thompson
Applicants
AND:
Commonwealth Funds Management
Limited and
P.T. Limited
Respondents

Reasons for Decision of President M. A. Somes
Dated the 10th day of December 1997

The applicants were the lessees of premises described as Shop 132 at the premises owned by the respondents and known as the Belconnen Shoppingtown (the shopping centre). A lease had been entered into between the applicants and the respondents on the 1st of August 1991 for a period ending on the 31st of July 1996.

A Notice of Dispute dated the 18th of July 1996 was filed in the Registry of the Tribunal by the applicants and Interim Orders were made by President Burns on the 23rd of July 1996. These Orders were discharged on the 1st of August 1996. The dispute between the parties came on for hearing on the 7th of October 1997 and concluded on the 8th of October when I reserved my decision.

The real issue in dispute between the parties was the claim by the applicants that the conduct of the respondents was harsh and oppressive within the terms of the provisions of the Tenancy Tribunal Act 1994 (the Act) and that as a result of the conduct

of the respondents the applicants had suffered loss and were entitled to an award by way of compensation or damages.

There was no substantial dispute between the parties as to some of the facts of the dispute, but there was dispute as to the contents of a number of discussions which took place between the parties.

In order to understand the basis of the allegation that the respondents conduct was harsh and oppressive it is necessary, in my opinion, to look in some detail at the history of dealings between the applicants and the respondents and also a third party, Cardeaux.

As already mentioned the lease existing between the applicants and the respondents was to expire on the 31st of July 1996. The Code of Practice under the Tenancy Tribunal Act 1994 provides in Clause 94 as follows:

> "A tenant is entitled, by written notice, within 12 months prior to the expiry of a lease, to request from the owner a statement of intention as to renewal of the lease by the owner."

The applicants did not make any such request.

No action was taken by the applicants at all in relation to the question of the renewal of the expiring lease although the evidence of Mr. Marshall and Mr. Thompson suggests that some consideration was being given to the expiry of the lease for some months prior to July 1996.

The first step taken in relation to the possible renewal of the lease was taken by the respondents who, through Mr. Holmes a Court, spoke with Mr. Marshall on the 29th of May 1996. At this meeting, some of the details of which are in dispute, Mr. Holmes a Court indicated that the respondents would be prepared to renew the lease for a slightly increased rental of $112,000.00 per annum. It is clear from the evidence of Mr. Holmes a Court and supported, at least in part, by Mr. Marshall that this proposal was not acceptable to the applicants. A letter dated the 29th of May 1996 (Exh. 1) was

forwarded to the applicants by the respondents setting out formally the terms of the proposal made by Mr. Holmes a Court to Mr. Marshall that same day.

On the 28th of May 1996 an offer had been sent by the respondents to Cardeaux which is in much the same terms as the offer made to the applicants in the letter of the 29th of May 1996. The offer to Cardeaux of the 28th of May 1996 is to be found in Exhibit C.

The significance of Cardeaux is that in about March of 1996 Cardeaux had approached the applicants and some discussions had taken place between the applicants and Cardeaux with a view to Cardeaux purchasing the existing business conducted by the applicants in the shopping centre. During the course of these discussions financial material was provided by the applicants to Cardeaux. The evidence of the applicants is that no agreement was reached between the applicants and Cardeaux in relation to the proposed sale of the business and that contact ceased between Cardeaux and the applicants in either late March or early April 1996.

Exhibit E, which is a copy of a Fax sent by the respondents to Cardeaux dated the 20th of June 1996, refers to a Fax from Cardeaux to the respondents of the 30th of May 1996 regarding the offer to lease Shop 132 of the shopping centre. The Fax of the 30th of May 1996 was not in evidence before me.

No response was received by the respondents from the applicants in relation to either the discussion of the 29th of May 1996 or the letter of the same date. The letter of the 29th of May 1996 (Exh. 1) indicated that the respondents required a reply within 14 days from the date of the letter. This condition, insofar as it is relevant to these proceedings, was not in any way complied with by the applicants. The letter also indicated that the respondents reserved "*the right to withdraw this offer to lease at any time prior to our receipt of the signed declaration*".

On the 5th of June 1996 the applicants caused to be placed on the windows of the premises a substantial sign indicating "closing down sale 10% to 50% off all stock".

See photograph Annexure K to affidavit (Exh. 2) of Mr. Holmes a Court. The evidence indicates that Mr. Holmes a Court immediately raised the presence of the sign with Mr. Marshall and requested that it be removed and be substituted by some other wording. This was not done by the applicants. The conversation between Mr. Holmes a Court and Mr. Marshall of the 29th of May 1996, together with the failure of the applicants to respond to the letter of the 29th of May 1996, and the presence of the closing down sale sign, persuaded Mr. Holmes a Court at that time that there was a serious likelihood that the applicants would not renew the lease.

On the 12th of June 1996 a meeting was held between Mr. Holmes a Court and Mr. Lopez, on behalf of the respondents, and Mr. Marshall and Mr. Thompson of the applicants. At that meeting it was suggested by Mr. Thompson that the applicants would pay a rental of $75,000.00. This was rejected by Mr. Holmes a Court who indicated that a figure of $85,000.00 would be acceptable. The meeting ended on the basis that the $85,000.00 was not acceptable to the applicants, but they would discuss it with their partner, Mrs. Marshall.

Following the meeting of the 12th of June 1996 the respondents wrote a letter to Cardeaux, dated the 20th of June 1996, which set out formally the offer to Cardeaux at the rental of $85,000.00. This letter is now Exhibit E.

The respondents, on the 25th of June 1996, wrote to the applicants setting out the fact that the respondents were prepared to accept a rental of $85,000.00 per annum with all other terms and conditions to be the same as the offer contained in the letter of the 29th of May 1996. This letter represented the offer made by the respondents at the meeting of the 12th of June 1996. The letter of the 29th of June 1996, which is annexure C in the affidavit of Mr. Holmes a Court (Exh. 2), requested notification of the intention of the applicants to renew or vacate the tenancy by Friday the 29th of June 1996. No such notification was ever received.

It is apparent from reading the letter of the 25th of June 1996 to the applicants and the letter of the 20th of June 1996 to Cardeaux that the offers to both prospective tenants were in much the same terms.

On the 28th of June 1996 a conversation took place between Mr. Holmes a Court and Mr. Marshall which I will return to in due course, but which became critical in the chronology of events.

On the 2nd of July 1996 a letter was sent by the respondents to Cardeaux formally setting out again the terms of the proposal and also containing documentation required under the provision of the Code. This letter is Exhibit 3.

On the 3rd of July 1996 a letter was sent from the respondents to the applicants confirming the advice given that the applicants intended to vacate the premises. This letter was sent under the hand of Mr. Ray Jewry, the National Leasing Manager of the respondents.

On the 7th of July 1996 a letter was sent by the applicants to Mr. and Mrs. Cowburn, a copy of which is annexed to the affidavit of Mr. Thompson (Exh. B). This letter, as I understand it, contains a proposal from the applicants to Mr. and Mrs. Cowburn to sell the business subject to the transfer of the lease and subject to the terms of the lease being to the satisfaction of Mr. and Mrs. Cowburn.

On the 10th of July 1996 a further meeting took place between Mr. Holmes a Court, Mr. Thompson and Mr. and Mrs. Cowburn. At this meeting Mr. Holmes a Court advised that he was at that time negotiating with another prospective tenant. The purpose of the meeting of the 10th of July 1996 was to enable Mr. Thompson, on behalf of the applicants, to introduce Mr. and Mrs. Cowburn to the respondents as a prospective tenant of the shop occupied by the applicants.

On the 11th of July 1996 a letter was written by Mr. Thompson to the respondents which is now annexure E of Exhibit 2. This letter was directed to the National Leasing Manager and not to Mr. Holmes a Court. I will return to this letter subsequently.

On the 11th of July 1996 at approximately 2:10 p.m. Mr. Holmes a Court received confirmation of the acceptance by Cardeaux of the proposal to lease the premises then occupied by the applicants.

At about 4:30 p.m. the same day Mr. Holmes a Court advised Mr. Cowburn of that situation. Mr. Holmes a Court's evidence is that Mr. Cowburn apparently accepted that situation without complaint.

At about 5:00 p.m. on the same day Mr. Thompson rang Mr. Holmes a Court who advised him of the situation concerning Cardeaux.

On the 12th of July 1996 a letter was written by Mr. Thompson to the respondents concerning the leasing to Cardeaux.

On the 16th of July 1996 two letters were sent, apparently crossing, by the respondents to the applicants confirming the Cardeaux situation and indicating that the applicants were required to vacate the premises on or before the 31st of July 1996.

On the 18th of July 1996 a Notice of Dispute was completed and filed on or about that date in the Registry of the Tribunal.

On the 19th of July 1996 the respondents formally sought approval from one of the owners of the shopping centre for the lease to Cardeaux.

On the 23rd of July 1996 Interim Orders were made by President Burns in response to the Notice of Dispute.

On the 31st of July 1996 the owner from whom permission had been sought concerning the Cardeaux lease indicated their approval.

On the 1st of August 1996 the Interim Orders of the 23rd of July 1996 were discharged.

The effect of the negotiations between the applicants and the respondents was that the applicants left the premises following the granting of the lease to Cardeaux. The applicants allege that the conduct of the respondents was harsh and oppressive within the meaning of section 6(1)(b) of the Tenancy Tribunal Act 1994.

In the Notice of Dispute dated the 18th of July 1996, a date prior to the actual end of the lease, but after the applicants had been advised of the agreement between the respondents and Cardeaux, the applicants stated as follows:

> "PART 6
>
> SUMMARY
>
> We are the current tenants of shop 132 Westfield Belconnen. Our current lease is due to expire on 31 July 1996. We believe the new lease offered to us by Westfield is valued above market rent and some other clauses in the lease are in violation of the code. We notified the landlord that a Market Rent Review was required under Clause 53 Retail and Commercial Tennancy (sic) Code together with further negotiations on the other clauses. Westfield have taken this as a total rejection of their offer and have offered, and apparently, accepted another party (Cardeaux Pty Ltd) to take over our premises. We believe we have the right to obtain a Market Rent Review under the provisions of the Code. Also we believe Westfield may be in breach of the Code by negotiating and transferring our lease, this conduct being harsh and oppressive in removing the goodwill of our business.
>
> NOTE: To add insult to injury Cardeaux negotiated with us earlier in the year with a view to purchasing our business. They obtained all our trading figures and a detailed profile of our business. They decided not to go ahead with the purchase because the rent was too high. Now it appears they are going to get

the lease knowing exactly how the location is trading without any goodwill payment."

The Notice of Dispute then proceeds to set out a short history of the circumstances from the point of view of the applicants.

This Notice of Dispute was generally the basis upon which the proceedings before me were conducted. Mr. Pilkinton in his submissions indicated that the dispute was whether the respondents had engaged in harsh and oppressive conduct and, in effect, whether as a result of that harsh and oppressive conduct the applicants had lost the possible benefits which may have flowed to the applicants from the sale of their business.

Before proceeding to consider the question as to whether the conduct of the respondents was harsh and oppressive under the meaning of the Act it is necessary to look briefly at the other complaint raised in the Notice of Dispute, namely, the question of market rent review under Clause 53 of the Code. It was ultimately agreed by Mr. Pilkinton that this clause did not apply in relation to this particular tenancy situation. This concession on the part of Mr. Pilkinton was quite correct. I do not intend to go into detail as to why the concession is correct but it is clear on the reading of the Code that at no time was Clause 53 of the Code triggered as required by the Code. In particular, no resort was made by the applicants to Clause 94 of the Code which is one of the triggering mechanisms for Clause 53. The evidence suggests that the applicants had only recently become aware of the possible application of Clause 53 but it would appear in the circumstances of their becoming aware of this that they did not proceed in accordance with the Code.

The only issue, therefore, for consideration in this dispute is whether the conduct of the respondents was harsh and oppressive under the terms of the Act.

Harsh and oppressive is a term not defined in the Act but I am content to accept the definition of it provided by President Burns initially in his decision of *Cabrera -v-*

Leda Commercial Properties Pty Ltd (TT 122 of 1996) and also *Kyrgios and Burns Phillip Trustee* (TT 04 of 1995).

> President Burns in Kyrgios and Burns Phillip Trustee (supra.) says:
> "Conduct will therefore usually be described as "harsh and oppressive" if it is significantly unfair or severe on a party to a lease, resulting in an unjust burden to that party, and in circumstances in which such conduct goes beyond what is required to protect the legitimate interests of the party whose conduct is complained of. In applying this test the Tribunal will apply the standards of ordinary commercial practice, as well as considering issues relevant to each particular case. This test, whilst clearly incorporating objective elements for consideration such as usual commercial practice, is to be applied subjectively in the sense referred to in the quoted passage from *McDonald v Mcdonald* (1964) 81 W.N.(Pt.2) (NSW), i.e. that the conduct must be showed to be harsh and oppressive to the particular applicant."

It is therefore necessary to look at the facts of this dispute in light of that definition of harsh and oppressive.

Mr. Pilkinton in his submissions submitted that the conduct of the respondents in relation to it's dealings with Cardeaux was of itself harsh and oppressive. This submission, as I understand it, was based upon an argument that Cardeaux had, by reason of it's knowledge of the financial affairs of the applicants, an advantage when it came to deal with the respondents. There is no evidence before me that the respondents were aware as to any advantage which Cardeaux may have had as a result of this contact with the applicants other than the fact that Mr. Holmes a Court was told by a representative of Cardeaux that some contact had occurred. There is nothing in the evidence to suggest that Mr. Holmes a Court approached Cardeaux as a result of Cardeaux having approached the applicants. Indeed the evidence of Mr. Holmes a Court, which is not contradicted on this point, is that he contacted Cardeaux of his own volition and it is also clear on the evidence that at all times any offer made to Cardeaux was in much the same terms as any offer made to the applicants. It would seem to me

that any advantage that existed in relation to any of the three parties to these discussions existed with Cardeaux and this could not in any way, in my opinion, be regarded as harsh and oppressive conduct by the respondents.

The applicants, it seemed, made much of the situation concerning Cardeaux, including it in their Notice of Dispute, but in my opinion there is no substance in their complaint against the respondents in relation to the dealings between the applicants and the respondents and the parties and Cardeaux.

The final issue between the parties concerned the process of negotiation. It is clear on the evidence that the applicants themselves took no action at all prior to May 1996 to initiate discussions with the respondents as to whether the respondents would be prepared to offer to the applicants a new lease in relation to the premises.

The initiative in relation to any possible new lease was taken by Mr. Holmes a Court initially in his discussions with Mr. Marshall of the of the 29th of May 1996 and in the letter of that same date.

Mr. Holmes a Court in his evidence indicates that during the discussion of the 29th of May 1996 between himself and Mr. Marshall, Mr. Marshall said words to the following effect:

> "We are not in a position to have an increase. We are losing money. If you want to increase the rent then we will have to close the business."

Mr. Marshall in his evidence (T 13) indicated in relation to the conversation of the 29th of May 1996:

> "In general terms, I think I said it was too high and we'd have to consider our options or words to that effect, your Worship. I'm not sure what I said exactly."

The situation at the end of this discussion was that Mr. Holmes a Court, on behalf of the respondents, had made an offer to the applicants through Mr. Marshall to renew the lease for a rental slightly in excess of that rent which had been paid by the applicants on a yearly basis over the term of the lease. Mr. Marshall's evidence clearly indicates

that in his view he indicated to Mr. Holmes a Court that the rent was too high. I am prepared in the circumstances to accept Mr. Holmes a Court's memory of the conversation to the effect:

"If you want to increase the rent then we'll have to close the business."

Mr. Holmes a Court in his evidence indicates that he made notes, generally speaking, of conversations such as the one he had with Mr. Marshall and it is certainly clear that he responded in writing to confirm the contents of the later conversation he had with Mr. Marshall on the 28th of June 1996. Mr. Marshall was not able to recall the terms of the conversation of the 29th of May 1996 and, indeed, in a number of other situations Mr. Marshall's evidence was, in my view, less than satisfactory. However, it is not essential to form a firm opinion as to the precise conversation which took place on the 29th of May 1996 other than to say that it is clear from both lots of evidence that the applicants, through Mr. Marshall, indicated that an increase to $112,000.00 was unacceptable and that at the very least the applicants would have to consider their position.

The next incident in the course of negotiations was the appearance of the sign in the window. This sign confirmed in the mind of Mr. Holmes a Court the rejection of his proposal of the 29th of May 1996. No other communication was made by any of the applicants in relation to the proposal of the 29th of May 1996 other than the inferential rejection by the shop window sign. Notwithstanding Mr. Holmes a Court's complaints, the sign was not removed by the applicants therefore, once again, confirming their intention that they did not intend to renew the lease.

The next significant stage in the negotiations was the meeting of the 12th of June 1996 at which it is generally agreed that the applicants indicated they would not accept the offer of $85,000.00 per year, but at it's highest would reserve their position and discuss it with their partner, Mrs. Marshall. Some indirect evidence was given which suggested that Mrs. Marshall was not keen to renew the lease. Mrs. Marshall was not called to give any evidence and in those circumstances it seems to me to be open for me to accept that she was indeed not keen to renew the lease.

The next incident in relation to the negotiations was the meeting between Mr. Marshall and Mr. Holmes a Court on the 20th of June 1996. Mr. Holmes a Court's evidence is that Mr. Marshall indicated to him expressly on that date that the applicants would be vacating the tenancy.

Mr. Marshall in his evidence, in particular in his cross-examination by Mr. Refshauge, was unable to give any precise details of the conversation of the 28th of June 1996.

It is significant, however, that shortly after this conversation a letter was forwarded by the respondents to the applicants confirming the advice that they were to vacate the premises. This letter was dated the 3rd of July 1996, just a few days after the meeting of the 28th of June 1996.

Mr. Marshall in his evidence (T15) stated that his recollection was that at the end of the conversation he "just said I would have to talk to my partners about it and if we couldn't come to an agreement we would have to talk further about what we were going to do with the shop." This recollection is, of course, in stark contrast to the memory of Mr. Holmes a Court who recalls being told that they would vacate the tenancy. This dispute between Mr. Marshall and Mr. Holmes a Court is one of the more significant disputes on the evidence. If, as Mr. Holmes a Court says, Mr. Marshall indicated to him on the 28th of June 1996 that the tenants would be vacating, then, of course, there would be no dispute between the parties. If, on the other hand, Mr. Marshall is correct it could be argued the respondents acted precipitately in relation to their dealings with Cardeaux.

I accept the version put forward by Mr. Holmes a Court as it appears on all the evidence to be more consistent with the conduct of the applicants and in particular with the conduct of Mr. Marshall. Mr. Marshall indicated in relation to a number of issues that things that were being done were really part of the negotiation tactic that he was engaged in. Examples of this are the closing down sale sign which was put up in circumstances where Mr. Marshall says there was not strictly speaking an intention to

close down the shop. Secondly his evidence that the respondents were told that the business was losing money when the suggestion seems to be that the business was not losing money and thirdly the failure on the part of the applicants to take any action to protect their position in relation to the renewal of the lease.

I accept that Mr. Marshall, if he did make the comment to Mr. Holmes a Court, did not have the authority of his partners to do so, but I am content that he did indicate to Mr. Holmes a Court, for whatever reason, that the applicants would be vacating the tenancy. There would seem to be no other explanation for the writing of the letter of the 3rd of July 1996 confirming the vacation of the premises by the applicants if this had not been said. Mr. Holmes a Court did not impress me as a person who would, of his own volition, invent such a conversation and confirm it in writing. It is also significant that while the letter confirming the discussions was dated the 3rd of July 1996 no response was made to it until the 11th of July 1996.

The letter of the 11th of July 1996, which is annexure E to the affidavit of Mr. Holmes a Court (Exh. 2), does indicate that the advice referred to in the letter of the 3rd of July 1996 concerning vacating the shop is incorrect. However the balance of the letter seems to me to again reflect upon the attitude expressed throughout the whole of the negotiations by the applicants, namely, that they appear not to have been able to make up their mind as to what it was that they intended to do in relation to this particular shop. The letter is in the following terms:

> "We refer to your letter 3 July 1996 and would like to point out that the advice we will be vacating shop 132 is incorrect. The advice should be taken as we are not happy with your offer of a base rent of $85,000.00 as outlined in your letter of the 25th of June 1996.
>
> In this regard we are considering accepting your offer subject to market rent review as per the Retail and Commercial Tenancy Code of Practice (clause 53). We would also like to further negotiate with you on the 5% annual increase in rent.
>
> Please do not hesitate to contact us regarding this matter."

My reading of this letter again indicates that there was no acceptance, and indeed there was a rejection, of the offer then outstanding from the respondents.

The whole of the activities engaged in by the applicants, particularly Mr. Marshall and Mr. Thompson, during the period from May until the 11th of July 1996 were indicative of persons who were unable to decide whether they had any interest at all in renewing the lease. Indeed, all of their actions would have in my view tended to have indicated to Mr. Holmes a Court, on behalf of the respondents, that there was no genuine interest on the part of the applicants in renewing the lease.

The discussion and the letter of the 29th of May 1996 were ignored, the sign raised on the 5th of June 1996 clearly announced to the whole world that the premises were closing down, and the evidence suggests that this sale continued throughout the whole of the time when negotiations were taking place and led to a substantial reduction in the stock held in the premises by the applicants. The meeting of the 12th of June 1996 indicated that the offer put by Mr. Holmes a Court was not acceptable to the applicants. There were discussions that suggested that Mrs. Marshall, one of the applicants, was not interested in renewing the lease. The discussions of the 28th of June 1996 clearly indicated that Mr. Marshall, with or without authority, was telling Mr. Holmes a Court that the applicants did not intend to renew the lease and, finally, at the meeting of the 10th of July 1996 when the fact that negotiations were taking place between the respondents and another perspective tenant was disclosed no action was taken by the applicants at that time to take up the outstanding offer of $85,000.00.

The applicants took only one positive step in the whole of these negotiations and that was to introduce Mr. and Mrs. Cowburn as a possible new tenant. They did not at any point in time during the discussions put themselves forward as a possible renewer of the lease.

Looking at all of these facts it is impossible in my view to find anything which would in my opinion amount to harsh and oppressive conduct on the part of the respondents. The clear implication of the evidence is that the applicants did not wish

to renew the lease but hoped to be able somehow to sell the business so as to obtain some benefit from their situation. They took no action at all to initiate discussions with the respondents and once discussions were initiated by the respondents they took no step to actively attempt to finalise the negotiations. It appears that for whatever reason they were content to allow the matters to drag along and even when confronted with the actual fact of a genuine prospective alternative tenant took no action to protect their position. In all of the circumstances I am not satisfied that the applicants have made out any grounds to suggest that the respondents conduct was harsh and oppressive and the application is dismissed. I shall hear the parties as to costs.