CITATION:	*Holdeth Investments Pty Ltd v Ivinson & Halliday* [2009] NTMC 016
PARTIES:	HOLDETH INVESTMENTS PTY LTD v LORRAINE IVINSON & RAYMOND HALLIDAY
TITLE OF COURT:	Local Court
JURISDICTION:	Tenancy Appeal
FILE NO(s):	20828912
DELIVERED ON:	5 May 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	19 March 2009
JUDGMENT OF:	Dr John Allan Lowndes, SM

CATCHWORDS:

TENANCY APPEAL FROM DECISION OF COMMISSIONER – INCREASE IN RENT – CONTRACTUAL FREEDOM TO INCREASE RENT – CONTRACTING OUT OF THE PROVISIONS OF THE *RESIDENTIAL TENANCIES ACT* – MATTER OF STATUTORY INTERPRETATION

RESIDENTIAL TENANCIES ACT ss 3, 19, 20, 41, 82, 83 & 150

INTERPRETATION ACT s 62A, 62B

Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404 followed
Mills and Meeking (1990) 169 CLR 214 followed
Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (unreported 14/8/1996) applied
Sargood Bros v Commonwealth (1910) 11 CLR 258 applied
Plaintiff S157/2000 *v Cth of Australia* (2003) 211 CLR 476 applied
Hart and Freeburn v Norton [2000] ACTRTT9 followed
Pearce and Geddes Statutory Interpretation in Australia 6th edition
Gillies Concise Contract Law (1988)

REPRESENTATION:

Counsel:

Appellant:	Mr Perry SC
Respondent:	Mr Lee

Solicitors:

Appellant:	Cridlands MB town agents for Carter Newell
Respondent:	William Forster Chambers

Judgment category classification:	A
Judgment ID number:	[2009] NTMC 016
Number of paragraphs:	178

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20828912

[2009] NTMC 016

BETWEEN:

HOLDETH INVESTMENTS PTY LTD
Appellant

AND:

LORRAINE IVINSON
&
RAYMOND HALLIDAY
Defendants

REASONS FOR DECISION

(Delivered 5 May 2009)

Dr John Allan Lowndes SM:

THE NATURE OF THE PROCEEDINGS

1. This is an appeal against a decision made by the Delegate of the Commissioner of Tenancies on 11 August 2008. The Delegate dismissed an application brought by the landlord (the present appellant), seeking termination of a tenancy and possession of certain premises on the ground that the Notice to Remedy Unpaid Rent failed to comply with the provisions of the *Residential Tenancies Act*.

2. Essentially, the Delegate found that the amount shown in the Notice was incorrect because the first rental increase of $10.00 and any subsequent increases contravened s 41 of the Act. More specifically, the original tenancy agreement did not specify that the landlord could increase the rent nor did it describe any amount that might apply to increase the rent, or alternatively a method of calculation of any such increase.

3. The notice was therefore found to be in breach of s 96A(2)(c) of the Act and accordingly invalid and not effective to ground an order for termination and possession under s 100A.[1]

THE NATURE AND SCOPE OF THE APPEAL

4. Section 150 (1) of the Act provides that a landlord or a tenant may appeal to the Local Court against an order, determination or decision of the Commissioner in relation to the landlord or tenant. Subsection (2) states that an appeal is an appeal de novo, but the court may rehear evidence taken before the Commissioner or take further evidence. According to subsection (4), on an appeal the court may do one or more of the following:

    (a) confirm, vary or quash the order, determination or decision of the Commissioner;

    (b) make an order that should have been made in the first instance by the Commissioner;

    (c) make incidental and ancillary orders.

5. There was a concern expressed by Mr Bradley SM, who initially heard the matter, that s 150 of the Act may not empower the court to hear and determine the present appeal, as any decision made by the court would not affect the rights of the parties. The tenancy had come to an end, and there was no question of the tenancy being terminated and possession of the premises being given to the landlord. Although there was the matter of the tenant's claim for recovery of rent paid, the Commissioner had not yet determined that claim and, therefore, it did not fall within the purview of the appeal.

6. However, neither party appeared to share the magistrate's concern, and were content for me to hear and determine the appeal.

[1] The decision of the Delegate was included in the Agreed Bundle of Documents relied upon for the purposes of the appeal: see tab 2.

7. Although I think Mr Bradley raised a legitimate concern, I consider that the court is able to hear and determine the present appeal.

8. Section 150 of the Act creates a right of appeal against any order, determination or decision of the Commissioner. By necessary implication, the Local Court has the power to hear and determine any appeal in relation to an order, determination or decision of the Commissioner with respect to a landlord or tenant. On a plain reading of the section, the fact that the outcome of an appeal may not affect directly or indirectly the rights of the parties seems to be immaterial.

9. In any event, the outcome of this appeal will, in a very real sense, affect the rights of the parties. The outcome of the present appeal will inevitably impact upon the respondents' claim for compensation. If the court were to confirm the Commissioner's decision, then that would leave the door open for the Commissioner to make a determination in favour of the respondents with respect to their claim for compensation. If the court were to quash the decision of the Commissioner, that would effectively determine the right of the respondents to claim compensation, as their claim is contingent upon the validity of the Commissioner's decision.

10. It should be noted that the court is empowered to make incidental or ancillary orders. If the court were to dismiss the appeal, I believe that it would be open to the court to make an order for compensation by way of incidental or ancillary relief. My understanding is that the parties have concurred with that approach.

11. As the appeal is an appeal de novo. the application that was considered by the Commissioner is heard afresh and a decision is given on the evidence presented to the court.[2]

[2] *Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203.

12. The facts and circumstances agreed and relied upon by the parties for the purposes of the appeal are as follows.

13. On 5 March 2004 the respondents entered into a written tenancy agreement with Allied Australasian Pty Ltd as agent for Showpoint Pty Ltd in respect of a property situated at 10/20 Gothenburg Crescent, Stuart Park (the property) at a weekly rental of $180.00 per week for the period 11 March 2004 to 15 January 2005.

14. On 18 October 2004 the respondents executed a Memorandum of Variation of Residential Tenancy Agreement (MOV) in respect of the property. That MOV provided that the tenancy would continue until 20 February 2006 and that the rent in respect of the property would increase to $190.00 per week, effective from 16 January 2005.

15. On 20 March 2006 the respondents executed a MOV in respect of the property, which provided that the tenancy would continue until 30 June 2006, with the weekly rent remaining at $190.00.

16. On 6 August 2006 the respondents executed a MOV in respect of the property, pursuant to which the tenancy was to continue until 30 January 2007 at a continuing weekly rent of $190.00.

17. On 10 September 2007 a MOV and a notice to tenants, in the form prescribed by the *Residential Tenancies Act*, of an increase in rent ($250.00 per week) and/or security deposit was sent by the letting agent to the respondents. Although the respondents did not execute and return the MOV, they remained in occupation of the property and paid rent at the rate of $250.00 per week.

18. On 15 February 2008 the letting agent issued a notice to remedy unpaid rent to the respondents, seeking payment of arrears of rent in the amount of $705.71 on the basis that the respondents were obliged to pay rent in the

amount of $250.00 per week. On 5 March 2008 the respondents complied with the demand for unpaid rent made in the notice to remedy.

19. On 7 March 2008 the letting agent issued another notice to remedy unpaid rent, seeking payment of arrears in the sum of $935.71. The demand was again made on the basis that the rent payable by the tenants was $250.00 per week.

20. On 9 May 2008 the letting agent issued a notice to tenants of rent and/or security deposit increase. The notice, which was issued in the form prescribed by the *Residential Tenancies Act*, provided that the rent in respect of the property was to increase to $285.00 per week, with the new rental becoming payable from 12 June 2008.

21. Notwithstanding that notice, the respondents remained in occupation of the property after 12 June 2008 and continued to pay weekly rent in the amount of $250.00.

22. After 30 June 2008 (the date of expiry of the tenancy agreement prescribed in the MOV of 10 September 2007, which was not signed by the respondents) the respondents remained in occupation of the property pursuant to a periodic tenancy.

23. On 27 May 2008 the letting agent issued a notice to remedy unpaid rent to the respondents. That notice sought payment of rent arrears in the sum of $551.71 on the basis that the rent payable was $250.00 per week.

24. On 6 June 2008 the letting agent filed an application with the Commissioner seeking orders for termination of the tenancy and possession of the property and an order for compensation.

25. On 18 June 2008 the letting agent issued a notice to remedy unpaid rent to the respondents, seeking arrears of rent in the amount of $590.71 on the basis that the rent payable was in the amount of $285.00 per week.

26. On 20 June 2008 the letting agent withdrew the application for termination, possession and compensation dated 6 June 2008.

27. On 1 July 2008 the letting agent filed a further application to the Commissioner of Tenancies seeking orders for termination, possession and compensation. That application was heard by the Delegate on 29 July 2008. The Delegate's decision in relation to that application was given on 11 August 2008.

28. On 25 November 2008 the respondents' application for compensation was heard before a delegate of the Commissioner of Tenancies. Judgment in respect of that application was reserved.

THE SUBMISSIONS

29. Very detailed submissions were made by both parties, comprising the following:

- Submissions on behalf of the appellant received on 27 January 2009;
- Respondents' response to the appellant's submissions received on 3 February 2009;
- Appellant's submissions in response dated 6 February 2009;
- Further submissions on behalf of the appellant dated 26 February 2009;
- Respondents' further submissions dated 5 March 2009;
- Submissions in reply on behalf of the appellant dated 16 March 2009;
- Outline of Argument of the respondents;
- Appellant's further submissions with respect to s 19 of the *Residential Tenancies Act* dated 6 April 2009;
- Respondents' further submissions dated 6 April 2009; and

- Appellant's further submissions dated 27 April 2009.

30. In addition, the court heard oral submissions at the hearing of the appeal on 19 March 2009.

31. I propose to set out in some detail the submissions made by each party.

The Appellant's Submissions

32. The appellant submitted that the Delegate's conclusion that the Memorandum in each case was void because the original tenancy agreement did not contain a clause permitting the landlord to increase the rent, or any mechanism related thereto, ignores "the simple fact that there is no suggestion that any grounds exist whereby the Memorandum of Variation might be set aside or declared invalid, and totally ignores the simple fact that both landlord and tenant proceeded upon the validity of the agreements for a significant period, that is, the tenants paid the rent and the landlord accepted it".

33. The appellant argued that the Delegate failed to advert to the fact that the initial Memorandum of Variation "did not effect an increase in rent, either at the instance of the landlord or otherwise, during the term of the initial tenancy agreement, but simply a new rental applicable on and from the expiry of the initial tenancy agreement for the period commencing from the expiry of the initial tenancy agreement and concluding on 20 February 2006".

34. According to the appellant, the title of the document is irrelevant – what is important is its substantive terms and their effect. The Memorandum of Variation "brought into being a new tenancy agreement commencing on 16 January 2005 upon the same terms and conditions as the initial tenancy agreement save that the rental was set, by mutual agreement, at $190.00 per week and the term would be from 16 January 2005 to 20 February 2006".

35. The appellant submitted that as "the successive Memoranda of Variation were effective in setting the rent for the period referred to in each of those successive agreements which had been executed by the tenants", the appeal should be allowed.

36. The appellant submitted that applying a purposive approach to statutory interpretation, "the agreement of the parties with respect to the rent for each nominated period", which was adhered to by the parties, was not precluded by the operation of s 41 of the Act. Section 41 is directed at preventing "unilateral attempts by landlords to increase rent" and not mutual agreements between parties as to rent.

37. It was submitted that whether the Memorandum of Variation represented an extension of an existing tenancy agreement or amounted to a new agreement on the same terms (except for rent) as the original tenancy agreement may be immaterial - "in either circumstance s 41 can have no application to what occurred here".

38. The appellant pointed out that there was no challenge to the validity of any of the agreements entered into by the parties on grounds other than that arising out of s 41. It also pointed out that there is no assertion that the rental agreed on each occasion was anything other than entirely fair and appropriate. The appellant submitted that "where the rent is in all the circumstance appropriate, and where a tenant does not assert that the agreement in question was in any sense vitiated by, for example, misrepresentation or duress, this Tribunal ought to give effect to what are obvious otherwise valid and binding agreements".

39. The appellant went on to submit that the conclusion reached by the Delegate is "entirely inconsistent with the objectives of the Act as set out in s 3". The purpose of s 41 of the Act is to "regulate the situation where the landlord unilaterally increases the rent, the tenant does not agree to the increase, but is nevertheless liable to be evicted, if the increase is validly effected".

40. The appellant submitted that the suggestion made by the Delegate that the agreement of the parties might somehow constitute a breach of s 20 of the Act was without foundation. The prohibition on "contracting out" does not apply in the present case. The appellant submitted that "the purpose of that prohibition is to preclude a circumstance arising where a landlord, acting unilaterally, may increase the rent without reference to the machinery required under s 41". The appellant went on to say "where, as here, the position is that the parties have agreed as to what the rent shall be, and where there is no challenge to the validity of that agreement, s 41 has no role at all".

41. The appellant made the following submissions with respect to s 19 of the Act and the agreements said to arise out of the unsigned MOV:

- Section 19 of the Act does not require that an agreement be in writing: it is "sufficient if an agreement exists and if it does then, by virtue of s 19(4) and Schedule 2, the agreement will be held to contain particular terms";

- With respect to the unsigned MOV the agreement in question was partly written and formed partly by conduct. The MOV constituted the written part, while the relevant conduct was represented by payment of the rent stipulated in the MOV, the landlord's acceptance of that rent and the grant of exclusive possession by virtue of the payment of that rent;[3]

- The agreement in question contained the terms set out in Schedule 2;

- None of those terms affect the fundamental proposition that s 41 of the Act does not apply to that agreement;

[3] The appellant submitted that although the Memorandum of Variation dated 10 September 2007 was not signed by either of the appellants, its agent or the respondents, "each party adopted or acted entirely consistently with the relevant terms of the document in that the respondents remained in possession and paid rent of $250.00 per week on and from 18 October 2007". In other words, there was "an effective agreement between the parties, entirely consistent with the terms of the 10 September 2007 MOV." The appellant submitted that there was no apparent impediment under the Act for such an arrangement to be enforceable as between the parties.

- It is apparent that "each new tenancy agreement is established by the fact of payment of rent rather than an existing tenancy being continued by virtue of that step having occurred";

- Where rent is not paid (as was the case with the last proposed increase to $285.00 per week) "no agreement can be found to exist, but that is irrelevant as no claim is being made by the landlord for arrears of rent";

- Far from the provisions of s 19(4), Regulation 10 and Schedule 2 having any consequence adverse to the appellant's case, "they highlight the simple reality which is that new agreements for lease were entered into by reason of a combination of an unsigned MOV together with the relevant conduct set out above".

42. In answer to the respondents' final submissions received on 6 April 2009, the appellant submitted that ss 82 and 83 have no application to the successive MOVs, whether signed or unsigned, or whether they constituted an agreement based largely upon conduct.

43. According to the appellant "the respondents' position must mean that the MOVs were effective for the purposes of s 83(a) insofar as the term of the tenancy is concerned". Furthermore, the appellant submitted that "if, as must necessarily be the case from the respondents' perspective, the MOVs were effective in one respect pursuant to s 83 then the only, and indeed necessarily logical, conclusion is that the MOVs can be equally effective as to the rent to be paid under the new tenancy and for the extended or new term".

44. The appellant adopted the respondents' concession that the MOVs were effective to extend the term or to establish a new fixed term. The appellant submitted that "once that position is accepted, then the termination provisions in s 83 of the Act are irrelevant".

45. It was submitted by the appellant that the rental increases in each instance were to apply after the conclusion of the then existing term. Consequently, the new agreement in each instance was said to comply with the provisions

of s 19(1)(d) and 19(1)(e) in that the new agreement contained the necessary terms, particularly by reason of the operation of s 19(4).

The Respondents' Submissions

46. The respondents submitted that the purpose of the Act is to regulate the relationship of landlord and tenant under residential tenancy agreements. The objectives of the Act are outlined in s 3. Primary of those is the objective of fairly balancing the rights and duties of landlords and tenants.

47. The respondents argued that the agreement to which s 41 of the Act applies is the residential tenancy agreement entered into by the parties on 5 March 2004. As that agreement did not contain a clause permitting the landlord to increase the rent or describing any amount that might apply to an increase in rent, or alternatively, a method of calculation of any such increase, the agreement did not comply with s 41. Accordingly, the landlord was prevented from increasing the rent as he purported to do by way of the subsequent memoranda.

48. The respondents say that a "Memorandum of Variation" is not a tenancy agreement for the purposes of the *Residential Tenancies Act*. The Memorandum of Variation did not meet the definition of "tenancy agreement" in s 4 of the Act, that is, it did not "grant" a right to occupy premises. It merely extended the term of the original tenancy agreement.

49. However, the respondents submitted that even if the various memoranda were to be considered agreements, or treated as new agreements as proposed by the appellant, those agreements failed to comply with s 41.

50. According to the respondents "if the various memoranda constitute 'agreements or arrangements' that in effect circumvent the requirements and negate the operation of s 41 ('restrict the operation of this Act'), then the appellant/landlord is potentially in breach of s 20(4) of the Act and could therefore be liable to prosecution".

51. Whilst the respondents acknowledged that the Memorandum of Variation dated 18 October 2004 did not purport to increase the rental from $180.00 per week to $190.00 per week until 16 January 2005 – that is, it did not increase the rent payable for the initial term under the original tenancy agreement – they submitted that as the term of the original tenancy agreement was extended by the Memorandum of Variation to 20 February 2006, "technically, the increase in rent occurred during the currency of the tenancy agreement, and in relation to a future period which (because of the extension) would also be within the currency of the tenancy agreement".

52. In countering an argument that the various memoranda offered valid consideration by extending the term of the initial residential tenancy agreement, the respondents submitted as follows:

> The difficulty with that argument is that the operation of the memoranda is not purely a matter for determination by reference to common law contractual principles. Parliament has deemed the regulation and conduct of residential tenancy agreements be subject to statute. MOVs 1, 2, 3 and 4 do not satisfy the requirements of section 41(1), section 20(1) and 20(3) of the *Residential Tenancies Act* to effect a rent increase.

53. The respondents went on to say that whilst memoranda "can clearly extend the term of an existing occupancy without breaching the Act, memoranda that breach s 20 of the *Residential Tenancies Act* to the extent that they purport to exclude, modify or restrict the operation of the Act are void to the extent of the inconsistency". It was asserted that although MOVs 1, 2, 3 and 4 had the lawful effect of extending the term of occupancy they breached s 20 of the Act in respect of the issue of increasing the rent. Furthermore, the memoranda breached the primary objective of the Act, which is to fairly balance the rights and duties of landlords and tenants.

54. With respect to the appellant's contention that MOV1 created a new tenancy agreement, the respondents submitted that it "did not and could not create a new tenancy agreement either as a matter of fact or law". In advancing that argument, the respondents relied upon the provisions of ss 82 and 83 of the

Act, which respectively deal with the termination of residential tenancy agreements and periodic tenancies.[4] The respondents also relied upon a consideration of competing analyses of the Act, the memoranda and the conduct of the parties.[5]

55. The respondents also made submissions in relation to the effect of s 19 on the creation of new tenancy agreements by way of the signed and unsigned memoranda.[6]

THE PROPER CONSTRUCTION OF S 41(1) RESIDENTIAL TENANCIES ACT

56. The determination of the present appeal turns upon the proper construction of s 41(1) of the *Residential Tenancies Act*, which deals with increases in rent.

57. The entirety of s 41 is set out as follows:

> (1) A landlord may increase the rent payable under a tenancy agreement only if
>
> (a) the right to increase the rent; and
>
> (b) the amount of the increase in rent or the method of calculation of the increase in rent,
>
> is specified in the agreement.
>
> (2) A proposal to increase the rent payable under a tenancy agreement is of no effect unless at least 30 days written notice is given to the tenant of –
>
> (a) the amount of the increase; and
>
> (b) the date from which the increase is to take effect.
>
> (3) The date fixed for an increase in rent in relation to a tenancy must not be earlier than 6 months after –

[4] See [8] - [40] of the respondents' submissions received on 6 April 2009.
[5] See n 4.
[6] See [5] – [7], [15], [19], [20], [22], [37] and [39] of the respondents' submissions received on 6 April 2009.

(a) the day on which the tenancy agreement commences; or

(b) if there has been a previous increase of rent under this section in relation to one or more of the same tenants and the same premises – the last increase.

(4) If the rent payable under a tenancy agreement is increased under this section, the terms of the agreement are varied accordingly.

(5) Subsections (2), (3) and (4) do not apply in relation to –

(a) a provision of a tenancy agreement in relation to a tenancy under which the rent payable changes automatically at stated intervals on a basis set out in the agreement or by a determination under the *Housing Act* by the Minister administering that Act; or

(b) an increase in the amount of rent payable by a tenant because of the cancellation or adjustment of a rent rebate.

58. Section 4 of the Act defines a "tenancy agreement" as "an agreement under which a person grants to another person for valuable consideration a right (which may be, but need not be, an exclusive right) to occupy premises for the purpose of residency".

59. "Rent" is also defined in s 4 as "an amount payable under a tenancy agreement for the occupancy of premises for a period of the tenancy".

60. "Tenancy" is defined in the same section as meaning "the right to occupy the premises under a tenancy agreement".

61. Pursuant to s 4 "landlord" means "the person who grants the right of occupancy under a tenancy agreement or a successor in title to the tenanted premises whose title is subject to the tenant's interest".

62. Section 20 of the Act is also relevant to the proper construction of s 41(1) of the Act. Section 20, which is in effect a "contracting out" provision, provides that an agreement or arrangement that is inconsistent with the Act or the Regulations or purports to exclude, modify or restrict the operation of

the Act or the Regulations, is void to the extent of the inconsistency. The section goes on to prohibit a landlord from entering into a agreement or arrangement to exclude, modify or restrict the operation of the Act (directly or indirectly) or that purports to exclude, modify or restrict the operation of the Act (directly or indirectly).

63. To put the issue in context, the first crucial document in a series of documents was the MOV executed by the parties on 18 October 2004. That document extended the tenancy for a further 12 months at a higher rental, effective from the end of the original term.

64. That written agreement was in accordance with s 19 of the Act, which establishes various requirements for tenancy agreements reduced to writing. The executed tenancy agreement provided for a further term of 12 months at a weekly rent of $190.00, subject to the same terms and conditions as set in the initial fixed term tenancy agreement.

65. The respondents argued that the MOV did not comply with s 41(1) of the Act for the reason that the original tenancy agreement did not contain a clause permitting the landlord to increase the rent payable in respect of the leased premises, nor did it specify the amount of, or the method of calculating, any such increase.

66. The effect of the respondents' argument is that s 41(1) not only applies to an initial tenancy agreement between landlord and tenant, but also to any subsequent agreement varying the terms and conditions of the original agreement. It is immaterial that the higher rent did not become payable until after the end of the original term.

67. The respondents argued that not only was the rent increase invalid by reason of the non-compliance with s 41, but the MOV contravened the "contracting out" provisions of s 20 of the Act.

68. At common law rent increases are not permitted during the term of a fixed term tenancy unless the tenancy agreement itself so provides or the parties agree to the increase.[7] The question is whether the *Residential Tenancies Act* – in particular s 41(1) of the Act – was intended to supplant the common law by precluding a landlord and tenant from mutually agreeing to increase rent during the term of a tenancy or during any extension of the original term.

69. It is a fundamental principle of statutory interpretation that a court should begin by looking at the words of the statutory provision under consideration.

70. As was made clear in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423, approved in *Bropho v Western Australia* (1990) 171 CLR 1 at 20,[8] a purposive approach and not a literal approach is the method of statutory interpretation that now prevails:

> A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.

71. The dominance of the purposive approach to statutory interpretation is established by the provisions of s 62A of the *Interpretation Act* (NT):

> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

72. Section 62A requires "the purpose or object to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear." [9] The effect of s 62A is as follows:

> When purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one

[7] See *Hart & Freeburn v Norton* [2000] ACTRTT 9.
[8] See also *Palgo Holdings Pty Ltd v Gowans* [2005] 21 CLR 249 at 264 per Kirby J.
[9] See Pearce and Geddes, *Statutory Interpretation in Australia* 6th ed at [2.8] where the authors makes these observations in relation to s 15AA of the *Acts Interpretation Act* 1901 (Cth) which is in almost identical terms to s 62A of the *Interpretation Act*.

> interpretation does not promote the purpose or object of the Act and another interpretation does so, the latter interpretation must be adopted.[10]

73. In *Mills and Meeking* (1990) 169 CLR 214 at 235, Dawson J explained the effect of s 35(a) of the *Interpretation of Legislation Act* 1984 (Vic), which is in similar terms to s 62A of the *Interpretation Act* (NT):

> The literal rule of construction … must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the *Interpretation of Legislation Act* must, I think, mean that the purposes stated in Part 5 of the *Road Safety Act* are to be taken into account in construing the provisions of that Part, not only where those provisions are on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the traditional rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v Commonwealth* (1904) 1 CLR 668; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 513. The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it, and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes, and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in light of its purposes.

74. As pointed out by Pearce and Geddes, provisions like s 62A of the *Interpretation Act* (NT) do not "permit the courts to ignore the actual words of a statute", and in some cases courts are bound to give effect to the clear language of a statute.[11]

75. As is apparent from s 62A of the *Interpretation Act*, the underlying purpose or object of a statute or a statutory provision may be expressly stated in the

[10] See Pearce and Geddes, n 9 at [2.8] where these observations are made in relation to s 15 AA of the Commonwealth Act.
[11] Pearce and Geddes n 9 at [2.9]. See, in particular, *Byrnes v R* (1999) 199 CLR 1.

legislation, that is, by way of a statement of purpose or object. Failing that, the purpose or object of an Act or a statutory provision is to be deduced from a reading of the rest of the Act.[12] As observed by McHugh J in *Saraswati v R* (1991) 172 CLR 1 at 21; 100 ALR 193 at 207:

> In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the "ordinary meaning" to be applied.[13]

76. Commenting on the effect of s 15AA of the *Acts Interpretation Act* 1901 (Cth) and equivalent provisions such as s 62A of the *Interpretation Act* (NT), Pearce and Geddes state:

> Generally speaking, it is only when the legislative drafter has fallen short of his or ideal that the dominance of the purposive approach as dictated by these provisions assumes significance. If the drafter has achieved what he or she set out to do, applications of the literal and purposive approaches will ordinarily produce the same result.[14]

77. Given that the underlying purpose or object of a statute or statutory provision may be expressly stated in legislation, s 3 of the *Residential Tenancies Act* needs to be noted:

> The objectives of this Act are –
>
> (a) to fairly balance the rights and duties of tenants and landlords;
>
> (b) to improve the understanding of landlords, tenants and agents of their rights and obligations in relation to residential tenancies;
>
> (c) to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements and this Act;

[12] Pearce and Geddes, n 9 at [2.11].
[13] Cited in Pearce and Geddes, n 9 at [2.14].
[14] Pearce and Geddes, n 9 at [2.14]. See also the following observation by the authors at [2.19]:
"… in many instances applying the literal approach on the one hand and s 15AA or an equivalent on the other will produce the same result."

(d) to ensure that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure; and

(e) to facilitate landlords receiving a fair rent for providing safe and habitable accommodation to tenants.

78. Although it is permissible to use s 3 of the Act as an aid to the construction of words or phrases used in an Act, there are some qualifications on the use that may be made of it. [15]

79. In *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (unreported, 90640127, 14 August 1996) the NSW Court of Appeal held that "whilst regard may be had to an objects clause to resolve uncertainty, the objects clause does not control clear statutory language … ".[16]

80. Pearce and Geddes remind us that an objects clause alone will not represent the object of the legislation - "intention is to be gleaned from the whole of the Act and regard must also be had to other sections: *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579."[17]

81. As observed by Brennan CJ and McHugh J in *IW v City Of Perth* (1997) 191 CLR 1 at 12; 146 ALR 696 at 702 general statements in legislation need to be approached and understood by reference to other provisions in the legislation. Put another way, "a purpose or objects clause must be interpreted in its context".[18]

82. It must also be kept in mind that "where an interpretation has been adopted that does not fit readily with the clause, it has to be explained and that in itself seems a worthwhile exercise in directing consideration of the purpose of the legislation".[19]

[15] Pearce and Geddes, n 9 at [4.42].
[16] Cited in Pearce and Geddes, n 9 at [4.42].
[17] Pearce and Geddes, n 9 at [4.42].
[18] Pearce and Geddes, n 9 at [2.10].
[19] Pearce and Geddes, n 9 at [4.42].

83. In seeking to discover the underlying purpose or object of an Act or a statutory provision, it is permissible to have regard to the long title of the Act. The long title is intended to describe in a general way the purpose or object of the Act.[20]

84. The long title of the *Residential Tenancies Act* is "An Act to regulate the relationship of landlord and tenant under residential tenancy agreements and for related purposes".

85. It is not the case that the long title of the *Residential Tenancies Act* may only be referred to if there is some ambiguity in the language of the statutory provision being considered. There is a line of authority that seems to "indicate recognition that the title is part of the Act and, accordingly, is to be taken into account in considering the context in which other provisions appear … as an Act is to be read as a whole, the title can give colour to the meaning of other provisions."[21]

86. Whether it is permissible to have regard to the short title of an Act as an aid to interpretation is less clear. English authority appears to prohibit its use as an interpretational aid: see *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 128-9; *Re Boaler* [1915] 1 KB 21 at 27. However, Pearce and Geddes proffer the opinion that there seems to be no good reason to prevent recourse to the short title of a statute – "for what it may be worth".[22]

87. Section 62B(1) of the *Interpretation Act* (NT) permits the use of extrinsic material in interpreting a provision of an Act:

---

[20] Pearce and Geddes, n 9 at [1.31]. See also *Pitt, Son & Badgery Ltd v Sydney Municipal Council* (1908) 24 WN (NSW) 203 at 204, cited by Pearce and Geddes, n 9 at [4.39].
[21] Pearce and Geddes, n 9 at [4.39. See also *Clunies –Ross v Commonwealth* (1984) 155 CLR 193 at 199; 55 ALR 609 at 610; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 530; 70 ALR 225 at 237; *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471 at 477; 112 ALR 1 at 5; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 563; 112 ALR 87 at 89.
[22] Pearce and Geddes, n 9 at [4.40].

> (1) In interpreting a provision of an Act, if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision, the material may be considered –
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when –
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

88. Section 62B(2) permits extrinsic material such as second reading speeches to be considered in interpreting a provision of an Act.

89. As indicated earlier, the starting point is the literal or grammatical meaning of s 41(1) of the Act. In considering the meaning of the provision, it is important to bear in mind that the meaning of the words is not to be derived by considering the words in isolation and construing them as if they existed in a vacuum: the meaning of the words depends upon the context in which they appear and the Act read as a whole.

90. In my opinion, the language used in s 41, read in the context of the rest of the Act, is clear.

91. Section 41(1) prevents a landlord from unilaterally increasing the rent payable under a tenancy agreement unless a right to increase the rent and the amount of the increase in rent or the method of calculating the rent increase is specified in the agreement. That is the underlying purpose or object of s 41. No other construction is open.

92. Section 41(1) does not represent a major departure from the common law. It affirms the need for the tenancy agreement to make provision for an increase

in rent. It arguably goes further than the common law by requiring the agreement to specify the increase in rent or the machinery for calculating a rent increase. A clear point of departure from the common law are the requirements set out in ss 41(2) and (3).

93. Section 41(1) does not prevent a landlord and a tenant from mutually agreeing to the rent being increased during the term of a tenancy agreement, or during any extension of the original term, in circumstances where the original agreement neither provides for an increase in rent nor specifies the amount of the increase in rent or the machinery for quantifying any such increase.

94. In my opinion, the language used in s 41(1) has been carefully chosen by the draftsman so as to leave open the option of increasing rent by mutual agreement. Section 41(1) is addressed to a "landlord", and there is no reference at all to a "tenant". The provision is directed to one party, and not to two. It only affects one party, namely the landlord; and it does not purport to have the bilateral effect contended for by the respondents. If the section were intended to preclude an increase by mutual agreement, then the draftsman had at his or her disposal the extensive grammatical facilities of the English language and its vast vocabulary to readily and clearly give effect to that intention. If the legislature had intended that result, then the draftsman could have simply achieved that statutory objective by providing that notwithstanding mutual agreement between the parties, the rent shall not be increased unless the original tenancy agreement reserved a right to increase the rent. In my opinion, the draftsman has, by the language used in s 41, achieved what he or she set out to do.

95. The conclusion that s 41(1) permits a landlord and tenant to increase rent by mutual agreement sits comfortably with the rest of the Act, and in particular, the provisions of s 20. The purpose of s 20 is to outlaw agreements and arrangements that are inconsistent with other provisions of the Act or that

exclude, modify or restrict the operation of such provisions directly or indirectly or purport to exclude, modify or restrict their operation directly or indirectly. A mutual agreement to increase rent during the currency of a tenancy agreement is sanctioned by s 41 and therefore such an agreement does not offend the provisions of s 20 of the Act.

96. In support of that conclusion, it is useful to consider the type of agreements or arrangements that would contravene s 41 and may amount to a "contracting out".

97. An agreement that provided that the provisions of s 41 were not to apply would obviously contravene s 41 of the Act.

98. An agreement that provided for an increase in rent without specifying the amount of increase or the method of calculating any such increase would also contravene s 41 of the Act.

99. Similarly, an agreement that purported to relieve the landlord of the obligations imposed by subsections (2) and (3) would not be in conformity with s 41.

100. The difficulty with the first of the above agreements is that it exposes the tenant to the risk of the landlord increasing the rent at will by any amount and at any time. The difficulty with the other two agreements is that the tenant faces uncertainty as to the amount of any increase in rent and the time at which such increase will become due and payable. One of the purposes or objects of s 41 is to introduce certainty into the landlord/tenant relationship and to protect the tenant in that regard.

101. A mutual agreement between landlord and tenant to increase rent during the term of a tenancy agreement (which makes no provisions for a rent increase) poses no such difficulties, and does not run counter to the purpose or object of s 41. Should a tenant agree to an increase to rent – and that is entirely a matter for the tenant - he or she is aware of the rent that will be charged

under that agreement, and has certainty as to the amount of rent that must be paid and the date from which it will become due and payable.

102. One can readily conceive of circumstances under which a tenant would be prepared to agree to an increase in rent during the term of a tenancy agreement. For example, premises may have been offered by a landlord to a tenant at a relatively modest rent due to the limited income of the tenant. The financial position of the tenant having improved, the tenant is prepared, in the spirit of fairness, to pay a higher rent during the balance of the term of the tenancy agreement. This scenario might arise where the parties have familial ties. By way of further example, a tenancy agreement may have only related to unfurnished premises, and the tenant has requested the premises to be furnished, and in consideration of that being done, is prepared to pay a higher rent.

103. If the respondents' construction of s 41(1) is correct, then a landlord and tenant are prevented from entering either of the agreements referred to in the preceding paragraph. It is hard to imagine that the legislature ever intended to outlaw such fair, reasonable and "at arm's length" agreements or arrangements.

104. Again if the respondents' construction is right, then in the examples given above, the parties could only achieve their objective by terminating the tenancy agreement and entering into a new negotiated agreement. It is highly improbable that the legislature intended the parties to go through such a charade in order to give effect to their contractual intentions with respect to what could only be described as a fair and equitable arrangement.

105. In my opinion, neither s 41(1) nor s 20 of the Act – or indeed any other provision of the Act – were intended to supplant the common law right of parties to increase rent by mutual agreement during the currency of a tenancy agreement.

106. Pearce and Geddes point out that while it is accepted by the courts that legislation can override the common law, courts require that it be clearly shown that the legislature intended to do so: hence the adoption of the two closely related presumptions against alteration of common law doctrines and invasion of common law rights.[23] As stated by the learned authors:

> Both presumptions represent the same philosophy: that it is the responsibility of the courts to protect the individual from the excesses of the state. It is assumed that this protection is best afforded by the principles of the common law.[24]

107. In *FCT v Citibank Ltd* (1989) 20 FCR 404 at 433; 85 ALR 588 at 614-15, French J adverted to the interrelationship between those two presumptions and the will of the legislature:

> The nature of this society, and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms. But where the natural meaning of the words is clear, the will of Parliament must be respected.[25]

108. In referring to the presumption against alteration of common law doctrines, O'Connor J in *Potter v Minehan* (1908) 7 CLR 277 at 304 approved of the following passage from the 4th edition of *Maxwell on Statutes* (p 21):

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[26]

109. The weight accorded to the presumption against alteration of common law doctrines was recognised in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6: 93 ALR 469 at 477 where the

---

[23] Pearce and Geddes, n 9 at [5.23].
[24] Pearce and Geddes, n 9 at [5.23].
[25] Cited in Pearce and Geddes, n 9 at [5.23].
[26] Cited in Pearce and Geddes, n 9 at [5.24]. See also the following cases cited by Pearce and Geddes at [5.24]: *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18; 93 ALR 207 at 215; *Coco v R* (1994) 179 CLR 427 at 437; 120 ALR 415 at 419; *Thompson v ACT* (1994) 54 FCR 513 at 526; 127 ALR 317 at 329

High Court observed that "where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred".

110. With respect to the related presumption against the invasion of common law rights, O'Connor J made the following statement in *Sargood Bros v Commonwealth* (1910) 11 CLR 258 at 279:

> It is a well recognised rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction. [27]

111. In *Plaintiff S157/2000 v Commonwealth of Australia* (2003) 211 CLR 476 at 492; 195 ALR 24 at 34 Gleeson CJ:

> … courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment … for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual".

112. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (203) 214 CLR 269 at 284; 198 ALR 100 at 109 McHugh J noted that although legislatures regularly enact laws that infringe the common law rights of individuals, the presumption against non-interference with common law rights is strong "when the right is a fundamental right of our legal system".

113. One such fundamental right is the principle or right of freedom of contract, which was eloquently expressed by Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:

> … if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

[27] This case is cited in Pearce and Geddes, n 9 at [5.29].

> Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

114. Gillies explains the role that the principle of freedom of contract has played in the law of contract:

> The common law of contract was settled in its modern form by the English judges. For some considerable period up until, say, the late nineteenth or early twentieth centuries, the courts were affected by the notion of philosophy of laissez-faire, or the non-interference by the law or by government in economic affairs and the workings of the market. In the context of contract law, this attitude found expression in the notion that a person's freedom to enter into whatever contract he or she chose should be unhindered, subject to obvious and limited exceptions such as contracts offensive to policy because offensive to morality, or contracts for the commission of crime.[28]

115. Although, as noted by Gillies, "in the last hundred odd years, the courts and legislatures have become more interventionist in protecting the rights of contracting parties and thereby encroaching upon the notion of freedom of contract",[29] the principle of freedom of contract remains a fundamental right of our legal system, which can only be taken away by the legislature through the enactment of legislation which is clear and unambiguous.

116. Having regard to the above principles of statutory interpretation, I do not consider that the purpose or object of s 41 was to impose what might be described as a paternalistic or interventionist regime, prohibiting the parties from increasing rent during the currency of a tenancy agreement by mutual agreement. There is nothing in s 41 or any other provision of the Act that supplants the common law right of parties to mutually agree to an increase in rent during the currency of a tenancy agreement.

117. The construction of s 41(1) contended for by the respondents cannot be sustained. The object or purpose of that section can be readily deduced from the text of s 41, taking into account its context; and there is nothing in the Act that displaces that clear object or purpose.

---

[28] Gillies *Concise Contract Law* (1988 Federation Press), pp 4-5.
[29] Gillies, n 28, p 5.

118. The long title of the *Residential Tenancies Act* in no way limits the effect of the clear and unambiguous language used in s 41. The ordinary meaning conveyed by the text of the provision taking into account its context in the Act is entirely consistent with the general purpose of the Act as expressed in the long title to the Act. Section 41 is a specific example of the way in which residential tenancy agreements are regulated under the Act. There is nothing in the long title of the Act that would indicate that the object or purpose of s 41(1) is other than that deduced from the grammatical and literal meaning of the provision read in the context of the rest of the Act. There is nothing in the long title that would suggest that s 41(1) is susceptible to an alternative interpretation and that that interpretation should be preferred as promoting the object or purpose of the section.

119. The short title of the Act in no way affects the conclusion that I have reached as to the meaning and effect of s 41(1) and its underlying object or purpose.

120. Section 3 of the Act does not point to s 41(1) being open to an alternative interpretation, and its object or purpose being other than I have determined.

121. As mentioned earlier, it is important to bear in mind that general statements in a statute need to be approached and understood by reference to other provisions in the legislation – in this case, s 41(1) of the Act.

122. The construction that I have imposed on s 41(1) is entirely consistent with the objectives of s 3 of the Act. Furthermore, none of the objectives enumerated in s 3 have the effect of subverting, modifying, restricting or otherwise controlling the clear statutory language used in s 41(1). In my opinion, the interpretation that I have given to the section fits readily with the objects clause, whereas the construction advanced by the respondents is not capable of being justified by reference to the objectives set out in s 3 of the Act.

123. In my view, s 41(1) is neither ambiguous or obscure. Therefore, it is not permissible to have recourse to the second reading speech to determine the meaning of the section on the basis that the provision is ambiguous or obscure. However, it is permissible to have regard to that extrinsic material in order to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.

124. The second reading speech makes no reference to s 41, and is therefore of little, if no, assistance. However, there is nothing in the second reading speech that contradicts or rebuts the ordinary meaning of the words used in s 41(1) and its apparent object or purpose.

125. If s 41(1) permits a landlord and tenant to mutually agree to an increase in rent during the currency of a tenancy agreement, as I have found, then ipso facto there is nothing preventing a landlord and tenant from entering into an agreement of the type comprised in the 2004 MOV. The effect of that MOV was to vary the existing tenancy agreement by providing for the payment of a higher rent, not during the current term, but after the expiry of the agreement, and during a further term from 16 January 2005 to 20 February 2006. Accordingly, the rental increase effectuated by the MOV was valid.

126. However, there is an independent basis for concluding that the 2004 MOV did not contravene the provisions of s 41(1).

127. Even if the legislature intended to deny a landlord and tenant the contractual freedom to increase rent during the currency of a tenancy agreement (which is not accepted), I do not consider that the object or purpose of s 41(1) was to further restrict the contractual freedom of parties by precluding a landlord and tenant from entering into an agreement of the type comprised by the MOV. The reasons for that are as follows.

128. If prior to the expiry of a fixed term tenancy the landlord were to advise the tenant of his or her intention to increase the rent at the beginning of a new fixed term tenancy, neither s 41(1) nor any other provision of the Act would impose a restriction on the amount of rent that can be charged. Of course, it would be a matter for the tenant to decide whether or not to enter the new tenancy agreement at the higher rent.

129. In a similar vein, s 41 does not apply in the case of a periodic tenancy agreement, whether created ab initio or brought into existence at the end of a fixed term tenancy agreement. Common sense and logic compel that conclusion: each rental period must be considered to constitute a separate tenancy agreement, thereby permitting a landlord to increase the rent at the expiry of each rental period.

130. In my opinion there is no substantive difference between a landlord and a tenant agreeing to extend the term of a current lease at an increased rent (commencing at the expiry of the original term) and a landlord and tenant entering into a new fixed term tenancy agreement (at an increased rent) after the expiry of the original agreement. Any attempt to distinguish the two arrangements would be highly artificial and result in a triumph of "form" over "substance", which simply cannot be justified on public policy grounds or any other basis.

131. Although the 2004 MOV purported to vary the original tenancy agreement, it, in substance, created a new fixed term tenancy.[30] It did not alter, or purport to alter, the position or rights of the parties during the currency of the original fixed term tenancy with respect to the payment of rent or, indeed, any other matter. Rather, the MOV granted the tenant a right to occupy the subject premises up until 20 February 2006 - a right not

[30] It is of some significance that the original tenancy agreement made no provision for the parties to vary the terms and conditions of the lease.

conferred by the original fixed term tenancy. At the expiration of the original tenancy agreement the tenant could only continue to occupy the premises under a periodic tenancy, with the consent of the landlord. At the end of the original agreement the tenant had at best limited security of tenure in the form of a periodic tenancy. In consideration of being given greater security of tenure, the tenant agreed to pay a higher rent during the period commencing 16 January 2005 and ending 20 February 2006. Moreover, the further agreement between the parties relieved the tenants of the prospect of facing periodic increases in rent under a periodic tenancy.

132. I reject the arguments put forward by the respondents concerning the effect of the 2004 MOV. First, the MOV met the definition of a tenancy agreement. It granted a right to occupy the premises for valuable consideration. Secondly, I do not accept the argument that as the original tenancy agreement was extended by the MOV to 20 February 2006, "technically, the increase in rent occurred during the currency of the tenancy agreement, and in relation to a future period which (because of the extension) would also be within the currency of the tenancy agreement". That construction ignores the substantive and prospective effect of the MOV and the simple fact that the MOV did not alter the rights of the parties during the currency of the original tenancy agreement.

133. For the foregoing reasons the rental increase effectuated by the 2004 MOV was valid.

134. It is noted that the Delegate did not consider any document later than the MOV 2004 because he was of the opinion that, whatever the final rent per week might have been, "any subsequent signed memoranda of rent increases or notices to increase the rent that were the cause of the rent increasing during the tenancy and subsequent to the original tenancy agreement", were as defective as the 2004 MOV, and therefore invalid.

135. Unlike the approach taken by the Commissioner, I now go on to consider the effect of the parties' subsequent contractual dealings.

136. The next contractual dealing between the parties was the "Memorandum of Variation of Residential Tenancy Agreement" executed by both parties on 20 March 2006. Pursuant to that MOV, the tenancy was to continue up until 30 June 2006, with the rent remaining at $190.00 per week. The MOV conformed to the requirements of s 19 of the Act.

137. It is noted that the 2006 MOV was executed one month after the term created by the 2004 MOV had expired. By 20 February 2006 the previous MOV had run its course, and the tenancy created thereby had come to an end. Therefore, there was a periodic tenancy during the period 20 February to 20 March 2006, either as a result of the provisions of the 2004 MOV (which incorporated the terms and conditions of the original tenancy agreement) or by reason of s 83 of the Act.[31]

138. Although the 2006 MOV purported to be a variation of the original tenancy agreement, it must, in my opinion, be considered to represent a completely separate tenancy agreement entered into by the parties following a periodic tenancy. Both the original tenancy agreement and the 2004 MOV had expired. There was no subsisting agreement capable of being varied. By signing the 2006 MOV, the parties intended to create a contractual relationship, which had the effect of converting a hitherto periodic tenancy into a short term tenancy agreement.

139. In my opinion, the 2006 MOV did not contravene the provisions of s 41(1) of the Act because it represented a new fixed term tenancy, in respect of which the Act imposed no restriction on the amount of rent that could be charged. But even if that analysis is incorrect – and the 2006 MOV ought to

[31] That is there was a periodic tenancy which incorporated the terms of the 2004 MOV.

be treated, somewhat artificially, as a variation of the initial tenancy agreement – the MOV still effected a valid rent increase because s 41(1) does not take away the fundamental right of a landlord and tenant by mutual agreement to increase the rent payable under a tenancy agreement.

140. On 6 August 2006 the parties executed a further "Memorandum of Variation of Residential Tenancy Agreement" whereby it was agreed that the tenancy would continue up until 30 January 2007, without any increase in rent.[32]

141. Again, it is significant that the MOV was executed by the parties after the term created by the earlier MOV had expired. There was a lacuna between the two MOVs, during which period another periodic tenancy was created. The MOV executed on 6 August 2006 converted a periodic tenancy into another short term tenancy agreement, without any increase in rent. For the various reasons given earlier, that MOV did not contravene the provisions of s 41(1) of the Act

142. As set out in the agreed facts, on 10 September 2007 a Memorandum of Variation of the Residential Tenancy Agreement, together with a notice to tenants, in the form prescribed by the Act, of an increase in rent and/or security deposit was sent by the managing agents to the respondents. As also previously stated, the respondents did not sign and return that MOV. The agreed facts also disclose that the respondents remained in occupation of the subject premises and paid rent in the amount of $250.00 per week.

143. It is clear that at the time the 2007 MOV was sent to the respondents, the term created by the earlier 2006 MOV had expired and that agreement was at an end. It is also clear that a periodic tenancy came into existence after 30 January 2007.

[32] This MOV also satisfied the requirements of s 19 of the Act in relation to written agreements.

144. The question that arises is what was the nature of the legal relationship between the parties following the delivery of the 2007 MOV and the accompanying notice to the respondents.

145. In order to determine the relationship between the parties at that time, it is necessary to have regard to the provisions of s 19 of the *Residential Tenancies Act*. It is clear from the provisions of s 19 that if a landlord enters into a written tenancy agreement, the agreement must contain or specify the matters set out in s 19(1) and must be signed by all parties to the agreement. However, there is nothing to prevent a landlord and tenant from entering into an oral tenancy agreement or a tenancy agreement, which is partly written and partly oral; or, as in the present case, an agreement which is partly written and formed partly by conduct. Any one of those arrangements are permitted by s 19(4) which provides:

> If a tenancy agreement is not in accordance with subsection (1) or is not signed by all parties to the agreement, a tenancy agreement, if any, prescribed for the purposes of this section is to be taken to be the agreement between the parties for the purposes of this Act.

146. Regulation 10 of the *Residential Tenancies Regulations* provides as follows:

> For the purposes of section 19(4) of the Act, the tenancy agreement set out in Schedule 2 is prescribed.

147. Clause 1 of the prescribed agreement requires the parties to comply with the provisions of the Act.

148. Clause 2, which deals with the period of tenancy and payment of rent provides:

> (1) Subject to the Act, the tenancy to which this agreement relates is –
>
> (a) if the landlord and the tenant agree to a tenancy for a fixed term – a tenancy for the term agreed to; or
>
> (b) if the landlord and tenant intended that the tenancy be other than for a fixed term – a periodic tenancy.

(2) The tenant must pay, before each rental payment period in respect of the premises to which this agreement relates, the amount of rent, if any, agreed at the beginning of the tenancy between the landlord and the tenant to be payable in respect of the rental payment period.

(3) The tenant must pay the rent, if any, in the manner, and at the place agreed between the landlord and tenant.

149. The prescribed agreement then goes on to specify various covenants between the landlord and the tenant.

150. In my opinion, a fixed tenancy agreement came into existence following the delivery of the 2007 MOV to the respondents. That agreement was partly written – the written part being the MOV – and formed partly by conduct. As submitted by the appellant, the relevant conduct was the payment by the respondents of the rent specified in the MOV, the acceptance of that payment by the appellant and the grant of exclusive possession by reason of the payment of that rent.

151. By reason of the operation of s 19(4) of the Act, that agreement included the terms and conditions contained in the prescribed residential tenancy agreement. In particular, the term of the tenancy was for a fixed period up until and including 30 June 2008 at a rent of $250.00 per week, effective as from 18 October 2007.

152. That tenancy agreement – constituted as it was by the unsigned 2007 MOV and the accompanying conduct as referred to above – displaced the subsisting periodic tenancy that had come into existence after 30 January 2007.

153. It bears noting that during the currency of that periodic tenancy, the appellant could have increased the rent at the end of each rental period, as each period would be considered to represent a separate agreement. The appellant could have at any time increased the rent to $250.00 per week or more, without contravening s 41 of the Act.

154. It should also be noted that although neither s 19(4) of the Act nor Schedule 2 create an agreement, they establish some of the terms of any agreement found to exist. In the present case, the tenancy agreement which came in existence contained the terms and conditions set out in Schedule 2. Those terms and conditions were not identical to the terms and conditions set out in the original tenancy agreement. That serves to highlight the separateness of the agreement which came into existence as a result of the unsigned MOV and the conduct of the parties.

155. In my opinion, there can be no question that the tenancy agreement, which came into existence by virtue of the unsigned 2007 MOV and the parties' conduct, represented a separate agreement. The appellant was entitled to increase the rent, without running foul of s 41. It is also my view that it was not strictly necessary for the appellant to give the respondents a notice in the form prescribed by the Act of an increase in the rent; though that notice served the purpose of communicating to the respondents the appellant's intention to charge a higher rent in consideration of the respondents being granted exclusive possession of the subject premises for a fixed period up until and including 30 June 2008.

156. The rent increase effectuated by the above tenancy agreement did not contravene the provisions of s 41 of the Act.

157. However, if I have erred in my analysis of the contractual relationship between the parties following the delivery of the MOV in September 2007, then there was, in the alternative, a continuing periodic tenancy, which had commenced after 30 January 2007. During that periodic tenancy, any increase in rent would not have contravened s 41(1) of the Act.

158. The agreed facts disclose that on 9 May 2008 the managing agent issued a notice to tenants of rent and/or security deposit increase. That notice stated that the rent would increase to $285.00 per week, effective as from 12 June 2008.

159. In my opinion, the purported increase in rent was not valid. The appellant attempted unilaterally to increase the rent during the currency of a tenancy agreement which had a fixed term which was not due to expire until 30 June 2008. The subsisting tenancy agreement did not provide for an increase in rent in accordance with s 41(1) of the Act. An increase in rent could only be effectuated by mutual agreement, which did not occur in the present case.[33]

160. It is noted that the Notice to Remedy Unpaid Rent given on 27 May 2008 specified that the current rent payable was $250.00 per week, and not $285.00 per week. Therefore the amount of weekly rent specified in the notice was not only correct, but validly charged by the landlord and payable by the tenants.

161. The conclusion that I have reached is that the rental increases effectuated by the executed MOVs and the unsigned 2007 MOV and accompanying conduct did not contravene s 41(1) of the Act. Therefore, there was no basis for the Delegate dismissing the appellant's application for termination of the tenancy and possession of the premises on the ground that the increases in rent were contrary to the provisions of ss 41(1) and 20 of the Act.

162. In coming to that conclusion, I have considered the quite extensive submissions made by the respondents in relation to the application of ss 19, 82 and 83 to the circumstances of this case.

163. In my opinion, the respondents' submissions in relation to those aspects obscured the essential issue in this case – namely, whether the increases in rent effected by the first MOV and subsequent MOVs and the unsigned 2007 MOV and accompanying conduct effected were in accordance with the Act and therefore valid.

164. The respondents relied heavily upon the provisions of s 82 of the Act by way of refuting the appellant's contention that the MOVs and the 2007

[33] That is conceded by the appellant in its submissions.

unsigned MOV (coupled with the conduct of the parties) gave rise to separate or new tenancy agreements.

165. Section 82 provides that a tenancy is only terminated under one of the circumstances specified therein. Those circumstances include termination of the tenancy by the landlord or tenant or by a court or the Commissioner.

166. In my opinion, there is nothing in s 82 of the Act that would persuade me to alter my analysis of the contractual dealings between the parties.

167. Section 82 merely sets out the circumstances whereby a residential tenancy may be terminated before it has run its natural and legal course. The section has nothing to say about the termination of a tenancy by the effluxion of time. A fixed term tenancy begins on a certain date and ends on a certain date.

168. The original tenancy agreement was due to expire on 15 January 2005: that was its termination date. The effect of the 2004 MOV was to grant the tenants a right to occupy the premises for a fixed period that went beyond the date of termination of the original tenancy agreement. That grant was for valuable consideration, namely payment of a weekly rent of $190.00.

169. As stated earlier, the 2004 MOV created a new fixed term tenancy, which was intended to regulate the landlord/tenant relationship between the parties after the expiry of the original tenancy agreement (which was due to terminate on 15 January 2005 by the effluxion of time). The fact that there was no termination of the original tenancy agreement in conformity with the provisions of s 82 of the Act is irrelevant.

170. In my opinion, s 83 of the Act is equally irrelevant to the 2004 MOV.

171. That section provides that a fixed term agreement continues to apply to the premises on the same terms on which it applied immediately before the day the term ends, but as a periodic tenancy if the conditions set out in paragraphs (a), (b) and (c) are found to exist. Those conditions are that the tenancy agreement does not provide for the continuance of the tenancy after the day the term ends, a notice of termination has not been given in accordance with the Act and the tenant remains in occupation of the premises after the day the term ends.

172. Section 83 is, in effect, a default provision, which regulates the landlord/tenant relationship in particular circumstances. But s 83 has no application in the circumstances of this case. Rather than leave their future landlord and tenant relationship after the expiry of the term of the original tenancy agreement to be governed by the provisions of s 83, the parties chose to achieve certainty in their relationship by executing the 2004 MOV. That agreement created a new fixed term tenancy at a higher rent, but upon the same terms and conditions as set out in the original tenancy agreement.

173. In my opinion, neither s 82 nor 83 impinges upon the legal effect of the successive signed MOVs or the agreement constituted by the unsigned 2007 MOV and relevant conduct.

174. Between the end of the term created by the 2004 MOV and the 2006 MOV there was a periodic tenancy as aforesaid. The 2004 MOV had terminated by the effluxion of time. The tenancy became a periodic tenancy, either as a consequence of the provisions of the 2004 MOV or by reason of the operation of s 83 of the Act. That periodic tenancy was short lived as it was soon replaced by a fixed term tenancy agreement which was executed on 20 March 2006.

175. A similar situation arose in relation to the second 2006 MOV. Between the 30 June 2006 (the date of expiry of the earlier 2006 MOV) and 6 August 2006 (the date on which the second 2006 MOV was executed), there was

another periodic tenancy. Again that periodic tenancy came into existence as a result of the provisions of the earlier MOV or by virtue of s 83 of the Act. As before, that periodic tenancy was superseded by the fixed tenancy agreement that came into existence on 6 August 2006.

176. A similar situation also arose in relation to the 2007 unsigned MOV. That MOV, coupled with the conduct of the parties, created a fixed term tenancy that replaced the subsisting periodic tenancy that had come into existence at the end of the fixed term created by the second 2006 MOV.[34] In the alternative, there was a continuing periodic tenancy following the delivery of the 2007 unsigned MOV.[35]

177. Finally, during the course of my deliberations, I considered an alternative analysis of the 2004 MOV and subsequent signed memoranda. Even if those memoranda were found to be deficient as written agreements, and not in conformity with the requirements of s 19 of the Act (which I do not consider to be the case), separate fixed term tenancy agreements would have nonetheless come into existence by reason of the executed memoranda and the accompanying conduct of the parties. Such agreements would not have contravened s 41(1) of the Act. Furthermore, for the reasons given above, the provisions of ss 82 and 83 would not have impinged upon the legal effect of those successive tenancy agreements.

DECISION

178. Having found that the rent increases effectuated by the successive memoranda and the agreement constituted by the unsigned 2007 MOV and accompanying conduct did not contravene s 41(1) nor s 20 of the Act, I invite further submissions from the parties as to the formal orders and any incidental or ancillary orders that I should make in this matter.

[34] As with the proceeding periodic tenancies, this periodic tenancy was created as a consequence of the provisions of the preceding MOV or by reason of s 83 of the Act.
[35] See above, p 36.

Dated this 5th day of May 2009

_____

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE