



COMMENTS

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THE COURTS v THE RESIDENTIAL TENANCIES TRIBUNAL: JUDICIAL REVIEW BY ANY OTHER NAME

1. INTRODUCTION

Litigation during the first decade of the Residential Tenancies Act 1978 (SA) has primarily concerned the 'scope of the Act'.¹ What is a residential tenancy? To which residential tenancies does the Act apply? Judicial consideration of these questions is not surprising. The Residential Tenancies Tribunal, the dispute-resolution body, cannot be unconcerned with the limits of its own jurisdiction,² which is exclusive and based upon the scope of the Act. The various criminal offences provided for in the Act depend for their successful prosecution upon the application of the Act to a particular tenancy. Anyone (presumably a landlord) concerned to avoid the consequences of the Act is likely to challenge its overall application to the tenancy or type of tenancy in question rather than dispute the operation of a particular provision.

The inclusive definition of that scope is found in s5 of the Residential Tenancies Act 1978, namely, that 'residential tenancy agreement' means 'any agreement, whether express or implied, under which any person for valuable consideration grants to any other person a right to occupy,

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1 This terminology is used in Bradbrook, MacCallum and Moore, *Residential Tenancy Law and Practice. Victoria and South Australia* (1983) 70-117, to describe the fact that the Act only applies to certain types of agreement in regard to certain types of residential property.

2 The Tribunal may reserve any question of law for the decision of the Supreme Court: see s28. Thus, the Tribunal may inquire into the scope of the Act or its own jurisdiction. The Tribunal has exclusive jurisdiction over 'residential tenancy agreements': see s21(1). The Tribunal has no jurisdiction in regard to a monetary claim over \$2500: see s21(2). A right of appeal lies to the Local Court, except in regard to a monetary claim less than \$1000: see s29(1) and (2).

whether exclusively or otherwise, any residential premises or part of residential premises for the purpose of residence'. Section 7(1) provides that the Act applies to 'any residential tenancy agreement entered into, renewed, assigned or otherwise transferred after the commencement of this Act'. Sections 6, 7, 7a and 8 contain various special purpose exceptions to s7(1) and these effectively operate as exceptions to the scope of the inclusive definition. The exceptions relate either to the type of premises let or the nature of the particular tenancy. It is not the purpose of this comment to review the scope of the Act generally.³ Its concern is with the litigation. In the four cases that review the scope of the Act to date, the Act was held not to apply to the tenancy or type of tenancy in question. Thus the decisions curtailed the jurisdiction of the Tribunal: either the width of the inclusive definition was narrowed or the width of the exceptions stressed.

Normally judicial uniformity is to be welcomed, but this litigation is worth a second look as it concerns those sections of the community which do not have the power to purchase their own homes. The author adopts the values implicit in the Residential Tenancies Act 1978 itself. It is good to provide a balanced measure of regulation of relationships in the private rental sector⁴ that have, in the past, been the subject of abuse by both landlords and tenants. It is good to support that regulation with an inexpensive, efficient and swift method of petty dispute-resolution.⁵ There is no need to recite the Act's provisions to state that the Act is a charter for both landlord and tenant. Past exercises in consumer control in the private rental area (eg the Excessive Rents Act 1966 (SA)) have not proved a success where the resolution of disputes has been left to the Local Court. Experience elsewhere suggests that if there is to be no special system of dispute-resolution then it is necessary to define rights to overtly protect one party, usually the tenant, against the landlord.⁶ These values are, therefore, relatively objective.

2. THE CASES

The appropriate starting point of the inquiry is the technical or internal reasoning of the cases themselves, looking at the intent and policy of the Residential Tenancies Act 1978. If the reasoning is sound, no objection may be taken.

3 For a thorough review of the scope of the Act, see Bradbrook, MacCallum and Moore, *supra* n 1, ch 4.

4 The Act does not apply to any residential tenancy agreement entered into by the Housing Trust of South Australia: see s6(2). Otherwise, the Act binds the Crown: see s6(1). The Act will apply if, say, the Highways Department lets a government house to an employee.

5 See Bradbrook, MacCallum and Moore, *supra* n 1, at 1-16 for a legislative history of the Act; at 41-69 for an analysis of why legislative intervention in the residential rental market was necessary; at 679-714 for an analysis of the dispute-resolution processes and remedies. Overall, residential letting is governed by some twelve statutes, state and federal: See eg, Landlord and Tenant 1936 (SA), Housing Improvement Act 1940 (SA), Sex Discrimination Act 1975 (SA). The Act essentially governs excessive rents and rent increases, the provision of a limited security of tenure, bonds, the day-to-day obligations of both landlords and tenants.

6 Note, for example, the UK experience. Under that system, which only applies to leases, a lease once established provides the tenant with life-long security of tenure, including security for the spouse. The landlord has few rights except to receive rent which, in turn, is fixed by a system of registration of rents. If the landlord wishes to recover the property, the landlord must effectively relocate the tenant. There is no special system of dispute-resolution because the rights accorded to the tenant are absolute. If threatened, the tenant has good reason to go to court as the stakes are high: see the Rent Act 1977 (UK).

(a) *Re Belajev*⁷

This was a case stated. The question asked was whether a periodic residential tenancy, the first period of which occurred before the Residential Tenancies Act 1978 came into force but continuing after that time, fell within the scope of s7(1). By definition, the Act did not apply to residential tenancies commencing before the Act came into force and neither 'assigned' nor 'renewed' since that time. Mohr J did not approach the question from a policy standpoint. Rather he approached it from a technical standpoint governed by the nature of the periodic tenancy.⁸ If the tenancy was continuous, no matter how many periods had occurred after the Act was in force, the tenancy had commenced before that time. If the tenancy was a set of separate periods, the Act would apply from the first period after the Act came into force. Mohr J held that the periodic tenancy was, of its 'true' nature, a continuous tenancy. Mohr J cited various cases which, in his Honour's opinion, established that true nature.⁹ With respect, these cases were either concerned with the termination of periodic tenancies as opposed to tenancies at will or the length of time to be specified in notices of termination. Naturally, they referred to concepts of continuity as they were concerned with the on-going right to renew a periodic tenancy in the absence of a proper prior notice. They did not discuss the nature of a periodic tenancy at all, except for one passage in *Fink v McIntosh*. This passage actually referred to a periodic tenancy as 'a tenancy for a series of definite periodic terms of one week [or whatever length] each conferring an estate upon the tenant'.¹⁰

It is true that, at common law, looking at a periodic tenancy retrospectively, it is viewed as one continuum.¹¹ All the periods are joined together. It is, however, more fundamentally true at common law that, looking at a periodic tenancy prospectively, it is a series of separate periods each one commencing upon the expiry of the last. Otherwise, the periodic tenancy would offend certain basic rules relating to certainty of duration. It is the series of separate periods that makes the tenancy periodic. The case stated, therefore, should have concerned which of the 'true' natures - retrospective or prospective - was the more appropriate to the application of the Residential Tenancies Act 1978. This was a policy question within the limits of statutory interpretation. If Mohr J felt that the Act

7 (1979) 22 SASR 1.

8 *Ibid* 3, 4.

9 *Queen's Club Gardens Estates v Bignell* [1924] 1 KB 117 at 134, citing *Gandy v Jubber* (1865) 9 B&S 15 at 18; *Dockrill v Cavanagh* (1945) 45 SR(NSW) 78 at 82; *Fink v McIntosh* [1946] VR 290 at 292.

10 [1946] VR 290 at 292.

11 See Megarry and Wade, *The Law of Real Property* (5th edn 1984) at 648-649. See also the passage cited by Mohr J supra n 7 at 3 from *Gandy v Jubber* (1865) B&S 15 at 18 which reads in regard to a tenancy from year to year: 'Such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest arising from the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation *from times past*, make an entire lease of so many years, and that after the commencement of each new year it becomes an entire lease certain *for the years past* and also for the year so entered on...'

should not apply to a tenancy commencing before the Act came into force without the specific approval of Parliament, Mohr J did not say so. Moreover, by virtue of s7(1), the Act was made to apply to tenancies 'assigned' after the Act came into force whenever they had commenced. A landlord could, therefore, be subjected, with Parliament's blessing, to the regime of the Act by the unilateral actions of the tenant, actions which the landlord could not unreasonably have prevented. The Act was well-advertised before its commencement and, in the absence of a notice of termination by the landlord, could well have been regarded as 'renewed' with the consent of both parties in relation to the first period after the Act came into force. Prospectively, the parties intended their relations to continue. Mohr J's analysis was, at best, one-sided as to the nature of the periodic tenancy upon a partial selection of authorities. By s7a(1), the Act was amended to overcome the result in *Re Belayev*.¹²

(b) MacDonald v Reich¹³

The case concerned a criminal prosecution for offences allegedly committed by the landlord under certain provisions of the Residential Tenancies Act 1978.¹⁴ As the landlord's defence was that the Act did not apply to the tenancy, the case turned upon the scope of the Act. The facts, lying behind the issue of prosecution, are important. The landlord had for some time run a motel, the building being erected (in common sense) as a motel. It consisted of nine units. Due to a downturn in business, the landlord advertised certain units, four at most, for permanent let. One of the units was let to T at (only) \$50 a week. 'Key money' of \$50 was paid. T received a rent book, provided linen, installed a telephone and cleaned the unit occupied. No services normally provided by a motel owner accrued to T. After an altercation led to a complaint by T, the prosecution was mounted.

The agreement between the landlord and T manifestly fell within the inclusive definition. It did not matter that T was only in occupation of part of the premises.¹⁵ Section 5 twice defines premises to include 'part of the premises'. Section 7(3) excepted from the Act: '(a) any part of a hotel or motel'. This was the landlord's defence - T was in part of a motel. In a careful judgment, Bollen J found T was in occupation of part of a motel and the prosecution failed. Apart from the fact that, on the burden of proof, the Crown had not made out its case, Bollen J's main reasoning¹⁶ was that, even taking everything about T's occupancy into account, T was in residence in 'part of' a building that constituted a motel. The building was built as a motel, was predominantly run as a motel and had been originally run as a motel. His Honour concluded that

12 Inserted by Residential Tenancies Amendment Act 1981, s6.

13 (1984) 36 SASR 295.

14 The charges related to a breach of regs 8 and 9 of the Residential Tenancies Regulations (failure to serve a Form 5 and 6 at the commencement of the residential tenancy) and s32(2)(b) of the Act (failure to lodge the security bond with the Tribunal within 7 days of receipt).

15 *Supra* n 13 at 298.

16 *Ibid* 299-301.

this reasoning was the only way to give full force to the words 'any part of...a motel'. If s7(3)(a) was confined, upon construction, to the building or that part of it that was *exclusively* let as a motel, the words 'any part of' would be unnecessary. Obviously, motel guests would be in part of the motel. If Parliament had intended to exclude, from the scope of the Act, only hotel or motel guests then s7(3)(a) would have been drafted to read: '(a) a hotel or motel'. By using the words 'any part of' Parliament intended more. It wished to exclude all those in residence in a hotel or motel building whether they were normal guests or not.

Given the literal width of s7(3)(a), these arguments were meritorious. The Crown's argument was equally meritorious.¹⁷ The Crown's argument was that T was in part of the premises that did not constitute part of the motel. T was in a separate unit that was no longer part of the motel as T was receiving no services. T was in T's home. The landlord was treating T differently to other guests. On this analysis, it is not then open to ask if it is 'any part of...a motel'. It has already been decided that it is not. It is a separate area where long-term residence is taking place. It is the other part of the building which falls under s7(3)(a). It follows from this that the words 'any part of' do have little meaning. Motel guests are excluded from the Act as they are in (part of) a motel. The words signify, at most, that a motel guest is unlikely to be in residence of the whole of the motel or that motel guests occupy part of a motel as opposed to some other part of the building. They could also be read to cover motel employees.

This decision depends upon the starting point. Once Bollen J decided that he had to concentrate upon the whole physical structure (the motel as built of bricks and mortar) or its majority use (taking the building as a whole), the Crown's argument becomes difficult to accept. Whatever the *prima facie* reading of s7(3)(a), however, nothing in the sub-section specifically requires concentration upon the physical structure or its majority use. The phrase is as much capable of meaning 'any part of a hotel or motel' business, giving recognition to the variety of uses actually occurring in the whole building, as it is of meaning 'any part of a hotel or motel' building, built or predominantly used as a hotel or motel. A more conceptual approach to the question of what is a motel or in what part of the building motel use was occurring could have been taken. Certainly, the intention of the builder cannot be very relevant as buildings are converted to new uses all the time. Moreover, what would have been the position if six, instead of four, units had been converted to permanent let? Following Bollen J's own arguments, the building would now be, by majority use, an apartment block. In which case, would the motel guests in the remaining units get the protection of the Residential Tenancies Act 1978? Neither the landlord nor T regarded T as being in a motel. T was in permanent residence and legislation designed to concern 'the purpose of residence' cannot depend for its application on what else is going on in the building. It is for this reason that the Act applies to

¹⁷ Ibid 301. Bollen J clearly appreciated the strength of the Crown's argument but sought to overcome it by strenuous repetition of the alternative argument.

'part of the premises' under s5. More should surely have been made of the 'purpose of residence' than factors going to the construction and initial use of the building or to, on a confined and localised basis, what else was occurring in the building.

While no doubt the criminal aspects of the case played their part, the decision does involve certain technical rigidities which serve to broaden s7(3)(a) beyond what was manifestly intended. The object of s7(3)(a), and that of the other exceptions in s7(3), for example, educational institutions, hospitals, premises used as a club, is to make it clear that certain types of tenant - students, patients, guests - do not gain the protection of the Residential Tenancies Act 1978. No more, particularly, should they.¹⁸ The exceptions cannot be read to exclude from regulation landlord and tenants who bona fide enter into long-term relationships involving the payment of 'key money' and the installation of telephones. Conversely, the proponents of the Act did not help themselves. To draft s7(3)(a) in the form 'any part of...a motel' and to draft s7(3)(c) 'any premises used for the purposes of a club' is, in criminal matters, to invite the courts to draw the sorts of distinctions between whole structures and part uses that were clearly drawn in *MacDonald v Reicht*.

(c) **Shell Co v Kenpark**¹⁹

This was a case stated. The question asked was whether an agreement, otherwise falling within the inclusive definition, was excluded from the scope of the Residential Tenancies Act 1978 because the tenant was a corporation. Quite why the Residential Tenancies Tribunal itself should risk asking such a question is hard to imagine.²⁰ Moreover, as the inclusive definition states that a residential tenancy agreement means 'any agreement...under which any person...grants to *any other person* a right to occupy...' it may be blithely wondered what the difficulty is here. The corporation as tenant is not included in the list of specific exceptions under ss6-7. The provisions of the Act apply equally well to the corporate, as to the human, tenant. The context does not, therefore, require the normal definition of 'person' in s4 of the Acts Interpretation Act 1915 (SA) to exclude 'body corporate'.²¹ The answer to the question is: No. Millhouse J held that the answer to the question was: Yes.

Millhouse J started his inquiry by posing the question asked in the form: is a limited company capable of residing on the premises? By thus reinterpreting the question, the damage was probably done because attention was directed away from rights and agreements to the recognition of facts. Millhouse J did not directly decide the case on this simple ground of incapacity to reside. His Honour appeared

18 The exceptions are mirrored in an expanded form in the Residential Tenancies Act 1980 (Vic): see Smith, 'Extending the Scope of the Residential Tenancies Act 1980 to Include Residential Licensees' (1982) 14 MULR 1.

19 Unreported, Supreme Court of SA (No 420, 29 March 1985) Millhouse J. Sub nom *Shell Co of Australia v Kenpark Pty Ltd*.

20 The Tribunal had had a number of cases concerning company tenants and sought clarification of a series of issues.

21 Millhouse J did not directly discuss s4 or whether a contrary intention appeared.

to reason as follows: (i) the object of the Residential Tenancies Act 1978 is to give a quick and simple remedy to consumers; (ii) consumers are tenants who fulfil the purpose of residence having a right of occupancy or a right to occupy; (iii) the right of occupancy has to be exercised by the same person who is granted the right to occupy; (iv) therefore the Act applies to consumers/tenants in occupation;²² (v) a corporation cannot be in occupation and, thus, the Act does not apply to an agreement under which a corporation is a tenant. This reasoning and its consequences rests partly in policy, partly in statutory interpretation.

In terms of policy, Millhouse J appears to contemplate that corporations should take their chance in the market place under the general law of contract and seek their remedies through the courts. This assumes that all corporations are of the size of *Shell Co* whereas, in fact, there is no reason to suppose that a small business is any more capable of doing without some measure of protection than a human tenant. If Parliament had intended agreements with corporate tenants to be excepted from the Residential Tenancies Act 1978, so obvious a potential exception would have been included on the list of exceptions in ss6 and 7.²³ Further, unless the agreement constitutes a more personal right of residence, the tenancy has a future. Millhouse J's policy consideration overlooks this. Suppose the corporation were to assign its tenancy to a human tenant.²⁴ One outcome could be that the Act would apply as the bar erected by the corporate status of the tenant would be removed. In this circumstance, would the landlord know or remember to comply with its provisions, for example, by serving the forms required by the Act in the light of the assignment or lodging the bond with the Residential Tenancies Tribunal? If not, the landlord, formerly

22 Millhouse J clearly draws sustenance from the word 'occupancy'. However, this word was juxtaposed to the words 'right of' in s5, the definition section. The 'right of occupancy' merely equates to the 'right to occupy'.

23 See eg *Land Agents, Brokers and Valuers Act 1973 (SA)* which excludes corporations from the right to cool-off a purchase of a property under s88: see s88(4). A company is expressly excluded from the definition of a consumer in certain legislation. See *Consumer Transactions Act 1972 (SA)*, s5. A consumer is defined for the purposes of that Act 'as a person (other than a body corporate)'. The fact that a company is not expressly excluded in the Act might be a reason for assuming that it can be a 'tenant' rather than the reverse. Moreover, in *Mobitel (International) Pty Ltd v Dun and Bradstreet (Australia) Pty Ltd* (1977) 76 LSJS 62, the Full Court of the Supreme Court of South Australia expressly held that a company could be a person entitled to the benefit of the Fair Credit Reports Act 1974 contrasting the fact that the Fair Credit Reports Act, unlike the Consumer Transactions Act, did not expressly exclude a company from the definition of consumer. Millhouse J in *Shell* could have applied a similar technique. The Full Court in *Mobitel* was also untroubled by the fact that, under s5(12)(b) of the Fair Credit Reports Act, a company had to be domiciled or have residence in South Australia. The company in question had residence in South Australia. *Mobitel* does not receive mention in the judgment of Millhouse J in *Shell*. A company can also be an occupier for the purposes of occupiers liability: see *Wheat v E Lacon and Co* [1966] AC 552.

24 For the right to assign or sublet a residential tenancy, see s52(1)(a). A residential tenancy agreement may contain a clause providing that the right to assign or sub-let is subject to the consent of the landlord but the landlord may not unreasonably withhold the consent. Where no clause is included, the tenant may assign or sub-let at will.

excepted from the Act by Millhouse J, commits a criminal offence.²⁵ Another possibility is that the bar against the application of the Act would remain because the tenant was originally a corporation. In this circumstance, a human tenant, a 'consumer' to echo the words of Millhouse J, would not receive the protection of the Act by virtue of a consideration which does not apply to the new tenant. Further, when a landlord and corporate tenant negotiate a tenancy, both parties are manifestly aware that a human sub-tenant (or licensee) of the corporation, usually an employee, will occupy. This person, a 'consumer', is in direct contemplation yet, whatever rights the human sub-tenant may have against the corporate sub-landlord, the sub-tenant is vulnerable. Suppose the corporation could only negotiate a weekly tenancy. Upon one week's notice at common law, ie outside the provisions of the Act, the head-tenancy will be terminated and the rights of occupation of the human sub-tenant fall with it.²⁶

In terms of the law, the key to Millhouse J's reasoning is the proposition that the 'right to occupy', which Millhouse J acknowledged to be a central feature of the inclusive definition, is 'the right for that person [the person granted the right] to occupy for the purpose of that same person's residence'. The inclusive definition is not satisfied merely because a right to occupation of a residential premises is given for the purpose of residence. The right to occupy is limited by the factor that the right must be given so that the donee of the right may actually occupy. This interpolates a factor not apparent on the face of the inclusive definition. Unless this factor is satisfied, however, the Residential Tenancies Act 1978 does not, according to Millhouse J, apply to the tenancy. It is not precisely clear how extensive Millhouse J intended this limitation to be. The narrower limitation would be that the factor links up with the reformulation of the question asked: the right to occupy must be given to someone actually capable of residing (of physical occupation). Basically, only corporations cannot do this so the effect of the limitation is to place agreements with corporate tenants directly into the list of tenancies excepted from the Act. This is a place they do not occupy by virtue of the Act passed. The broader limitation would treat the interpolation at its face value: the right to occupy must be given to someone who is actually to exercise it. This limitation extends beyond corporations for it contemplates that the Act will cease to apply to a human tenant who sub-lets and ceases to exercise the purpose of residence. This limitation contradicts the provisions of the Act which directly contemplate sub-letting within the overall application of the Act.²⁷ If it is correct, the rights of the sub-tenant became vulnerable as the head tenancy is no longer protected by the provisions of the Act. If Millhouse J only meant that the right to occupy falls outside the inclusive definition if the right is given to someone who is not to exercise

25 See supra n 14. The Act does not provide for the point as its proponents, naturally, did not foresee it. The landlord would also now bear the liability for rates and taxes: s51. Formerly, this could have been imposed on the tenant at common law. See also n 24: would this be a reason for the landlord to refuse to consent to an assignment?

26 Person with superior title to the landlord becoming entitled to possession: see s61(1)(c).

27 See supra n 24.

it initially, it cannot be assumed (equating to the narrower limitation) that only a corporation does not exercise it initially. A human tenant may lease intending to sub-let immediately and never to exercise the purpose of residence. Is the application of the Act and, thus, the landlord's liability to criminal proceedings to depend upon what the landlord intimates from the tenant's proposal to take a tenancy?

With respect, this limitation was not thought through either in terms of policy or its application to tenants generally. Millhouse J gives no real reason for the limitation. Its interpolation fragments the strategic application of the Act which prima facie applies to all those who take a right to occupy residential premises for whoever's occupation. It is *the right to occupy* that is important upon the face of the inclusive definition and this is as capable of being held by a corporation as any other tenant.²⁸

(d) **Chapman v Roach**²⁹

This case concerned another of the exceptions. The defendant was the sub-landlord (head-lessee) of a four-bedroom house. The sub-landlord occupied one bedroom. There was no separate sitting room. The sub-landlord let the other three bedrooms at \$33 a week to individuals, essentially strangers to the sub-landlord. The departure of one individual gave way to the arrival of another. The individuals each had a separate key to their bedrooms to which, seemingly, the sub-landlord could not gain access, or, at least, not without permission. Each individual had a key to the front door. The individuals provided their own food, and, evidently, their own linen. The sub-landlord retained financial control of the telephone, organised a roster for the kitchen and supervised domestic arrangements, rubbish-removal and the curtilage of the house. A dispute developed between the sub-landlord and one individual, the plaintiff. The plaintiff was given one week's notice to quit. The Residential Tenancies Tribunal held the notice was invalid under the provisions of the Residential Tenancies Act 1978. The sub-landlord appealed to the Local Court arguing that, although the inclusive definition was satisfied, the Act did not apply to the agreement between the plaintiff and sub-landlord. Under the exception contained in s7(2)(d), the plaintiff was 'a boarder or a lodger'. The validity of the notice to quit turned on this issue. Roder J held that the plaintiff was a lodger. The plaintiff was not a boarder as no meals were provided.

In a brief judgment, Roder J cited certain 19th and early 20th

28 The decision of Millhouse J had one further remarkable consequence. A specific question was asked: what should the Tribunal do with security bonds paid by corporate tenants if the Act did not apply? Millhouse J held that they could not be returned as the Tribunal only had powers to act within the scope of the Act and returning the bonds, even ex gratia, would fall outside the Tribunal's powers. The bonds became a windfall gain to the Tribunal. This is remarkable if only for a failure to return the bonds under fiduciary principles. If the Tribunal did not have power to return the bonds, they also did not have power to keep them.

29 Unreported, District Court of Adelaide (No 424, 13 August 1986) Roder J. Roder J makes reference to a divergence of facts before the Tribunal and before the court. The only apparent difference was in regard to the plaintiff's entitlement to a linen service. In the event, the plaintiff did provide his own linen. The freehold owner took no part in proceedings.

century decisions which indicated that whether an occupant was a lodger or a tenant (in the present case, a sub-tenant) depended upon whether the landlord resided on the premises exercising dominion over the whole.³⁰ Was the landlord the 'master'?³¹ If so, the occupant was merely a lodger. Roder J held that, upon this test, there was no doubt that the plaintiff was a lodger. The decision indicates that Roder J understood that the meaning of the phrase 'a boarder or a lodger' was to be determined by its meaning at common law. While the facts are ultimately for the judge, legally the decision may be questioned on various grounds.

The latest case cited by Roder J was *Downie v Taylor*, decided in 1954. This was decided before rent control legislation became widespread in the UK and Commonwealth. Since 1954, there have been a myriad of High Court and House of Lords decisions dealing with the distinction between common law lessees (tenants) and lodgers or (the landlord not being in residence) lessees and licensees generally.³² While the residence and the exercise of dominion by the landlord remain relevant factors at common law, the recent decisions show that other factors, of equal or greater weight, must be considered. In brief, these factors include:

- (i) whether the occupant has exclusive occupation to part of the premises or not. If exclusive occupation is granted, despite residence of the landlord, the occupant would tend, although the factor is not absolutely conclusive, to be a common law lessee. A common law lessee, by virtue of a property right, cannot be a lodger. If exclusive occupation is lacking, however, the occupant cannot be more than a mere licensee.
- (ii) the label attached by the parties to their agreement, (although well established not to be conclusive) or, more broadly, whether the parties intended the occupant to have a mere personal and unassignable privilege;

30 *Toms v Luckett* (1847) 136 ER 781; *Bradley v Bayliss* (1881) 8 QBD 195; *Anckettill v Bayliss* (2882) 10 QBD 577; *Torrissi v Oliver* [1951] VLR 380; *Noblet v Manley* [1952] SASR 155; *Downie v Taylor* [1954] VR 603.

31 See *Toms v Luckett* supra n 30 at 787 for the main passage cited by Roder J. *Toms* actually concerned a landlord who did not reside in the premises let. The case was scarcely relevant in social terms.

32 See eg, *Radiach v Smith* (1959) 101 CLR 209; *Isaac v Hotel de Paris Ltd* [1960] 1 All ER 348 (PC); *Goldsworthy Mining Ltd v Commissioner of Taxation* (1973) 128 CLR 199; *Street v Mountford* [1985] 2 All ER (HL). See also *Lewis v Bell* [1985] 1 NSWLR 731; *Eastleigh Borough Council v Walsh* [1985] 1 WLR 525. See Bradbrook, MacCallum and Moore, supra n 1 at 72-89 for a full discussion of the topic and the further references cited there. Exclusive possession is the critical factor. If it exists, the occupant will be a lessee in the vast majority of cases. For cases on the importance of 'labels' attached to agreements, see *Street v Mountford* at 298-299. For cases on physical separateness of the powers, see *Hoare v O'Neill* [1961] NSWLR 387; *Stephenson v Morgan* (1964) 80 WB(NSW) 1719. For cases on family or amicable relationships, see *Finbow v Air Ministry* (1963) 2 All ER 647. For cases on the supply of services, particularly relevant to the status of lodgers, see *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 All ER 352; *Appah v Parnclyffe Investments* [1964] 1 WLR 1064; *Luganda v Service Hotels Ltd* [1969] 2 Ch 609; *Marchant v Charters* [1977] 1 WLR 1181; *Street v Mountford* at 299.

- (iii) the degree of separateness of the contracting parties, including both physical separateness and the extent of their personal relationship; and
- (iv) the provision of services, such as cleaning, bed-making, linen service and the restrictions upon the occupant.

At common law, whether or not a person is a licensee/lodger or a lessee is a question of the understanding of the parties, objectively assessed, upon the balancing of a wide range of factors going way beyond the existence and extent of the dominion of a resident landlord. As a residence of the landlord implies dominion and dominion without residence is reduced, these factors tend to merge into the one criterion of residence. At common law, a stranger (or even a relative) occupying a room and having the right to bar all, including the resident owner of the house, from that room may well be a lessee even though the owner controls ingress and egress, does the occupant's laundry and regulates use of the kitchen and bathroom. The less the extent of the control and services, the more the likelihood that the occupant will be a lessee. If the occupation is, upon the intention or agreement of the parties, personal and unassignable, this will be important. This matter may not, however, be discussed separately from inferences to be drawn from other facts. Roder J's failure to consider the exclusivity of the sub-tenants' possession, its assignability in the absence of specific agreement, the fact that the parties were living at arm's length and the lack of services of any kind constitute, with respect, signal omissions. The sub-tenant in *Chapman v Roach* was little different to the lessee of a separate flat who shares certain facilities and walk-ways with a landlord resident in the same building. The sub-tenant might easily have been regarded as having exclusive possession of his room.

Moreover, the issue of an occupant's status is not simply one of common law factors. The issue in *Chapman v Roach* was whether the plaintiff was a 'tenant' or a 'lodger' for the purposes of the Residential Tenancies Act 1978. Roder J made no reference to the statutory context of these words and, thus, erected a statutory vacuum. Although neither is defined individually in s5, boarder and lodger appear together in s7(2)(d). The exception appears in the context of other exceptions in s7(2) and (3), being special purpose exceptions relating, inter alia, to holiday occupation, the temporary residence of a purchaser under a contract for the sale of land, and residents in educational institutions, nursing homes, clubs and the like. According to s5, the inclusive definition itself makes allowance for a residential tenancy agreement' to include a 'right to occupy, whether exclusive or otherwise'. In other words, the Act may apply to a tenancy where the occupant is merely a licensee. Thus, a 'lodger' could well be regarded as someone who is something like a boarder, whose residence is taken up for a particular reason even if only a desire to be partially looked after and who is more special than a mere licensee. Otherwise, the occupant is a 'tenant'.

Certainly, too much cannot be made of the statutory context. Arguably, if the landlord is in residence, the exception in s7(2)(d) relating to boarders and lodgers may have intended to remove from the scope of the Residential Tenancies Act 1978 all agreements under which the 'tenant' is a licensee as opposed to a lessee. Again, if

the landlord is in residence and the tenant lacks exclusive possession or has been granted a more personal right, the prospect for arguing that the occupant is not a lodger will be small.³³ Conversely, the use of the phrase 'a boarder or a lodger' as opposed to any direct reference in s7(2)(d) to the landlord's residence could imply that the issue of a licensee's status is not to be judged on the residence of the landlord alone but depends upon the circumstances of the case. If so, the lodger being a person who lives somewhat as a 'member of the [landlord's] family' and the 'tenant' or 'sub-tenant' being a person who lives more at arm's length, only the facts of the instant case can decide the issue. Again, the reference in the inclusive definition to a 'right to occupy' as opposed to a grant of a property right suggests that something is protected and assignable under the Act in the absence of clear facts to the contrary. As Roder J did not discuss these questions, the matter remains open. If a licensee of a resident landlord is not automatically a lodger, then *Chapman v Roach* (assuming the occupant plaintiff to be a licensee) may have been precisely the case in which the distinction between a 'tenant' and a 'lodger' was to be applied. In the absence of clear facts to the contrary, the *prima facie* definition of all occupants as 'tenants' was to be preferred.

On the facts and in relation to the application of the single criterion of residence and dominion of the landlord, Roder J's finding that the occupant was, beyond doubt, a lodger makes absolute what was at best marginal. The decision extends the width of the exception in s7(2)(d) beyond what is acceptable. Such was not the necessary intendment of Parliament nor the necessary outcome of facts involving a 'masterful' resident landlord. The decision puts under threat of exclusion from the Residential Tenancies Act 1978 all group-letting situations where one tenant holds the lease from the landlord. Even if others had arranged with that tenant for joint occupation in advance, their relationship with the sub-landlord may fall outside the scope of the Act. Similarly, as the concept of 'part of the premises' receives no mention in *Chapman v Roach*, the status of those who occupy a landlord's 'granny flat' may be questionable. Perhaps Roder J was influenced by the fact that some 'wear and tear' had developed between the parties in the instant case. If so, this was precisely the situation with which the Act was originally designed to deal. For the Act to operate at all efficiently, its application to particular tenancies must be conceptually, not rule, oriented.

3. WIDER JUSTIFICATIONS

Of the four cases, each one and, thus, the judicial trend itself could have been decided the other way. Given the value system implicit in the Residential Tenancies Act 1978, it should have been the other way. Taking the various cases together, a compendious definition of a 'residential

³³ See Bradbrook, MacCallum and Moore, *supra* n 1 at 88. In the context of a landlord being in residence, the authors argue that there is no room for an intermediate category between a lessee (a person having exclusive possession) and a lodger. This comment suggests below that there could be some room for an intermediate category. If the landlord is in residence the categories would be: (1) common law lessee; (2) licensee ('tenant'); (3) lodger.

tenancy agreement' now reads: 'Subject to certain exceptions of broad application, any agreement under which one person, who is not in residence, grants for valuable consideration to any other person, who is not a body corporate, and perhaps, as long as that person remains in occupation, a right to occupy...'. Such a definition puts under threat the strategic unity of the legislative scheme and fragments the jurisdiction of the Tribunal in a way that was never intended by the introduction of certain special purpose exceptions. Henceforth, the Tribunal will have to spend more time on jurisdictional concerns to the detriment of efficient decision-making. Yet without proper justification from the standpoint of statutory interpretation as in *Shell Co v Kenpark* or the use of common law property concepts as in *Re Belayev* and *Chapman v Roach*, why should this be? It leaves the courts open to the charge that, for reasons best known to themselves, the courts do not wish a piece of socially beneficial legislation to work and are engaged in a naked exercise against the Act and its Tribunal. What therefore is the value system of the courts? Are there any wider justifications for the decisions?

(a) The protection of property rights

The suggestion that the courts seek to limit the application of rent control legislation on the grounds that it infringes the property rights of owners and landlords is an 'old chestnut'. In England, in regard to the distinction between leases and licenses, the courts developed the 'intention' test, rather than relying purely on the exclusivity of possession, precisely to give themselves some flexibility in dealing with such legislation. In that country rent control legislation regulated leases but not licences. By promoting attention to other factors than possession, certain tenancies could be withdrawn from the scope of the legislation where this was appropriate in the light of the agreement made.³⁴

There is no real evidence in the four cases to suggest such an approach is being adopted by the South Australian courts. In one sense, there cannot be. While imposing on landlords various duties and the threat of criminal sanctions in the search of a basic framework of security for tenants, the Act also imposes duties on tenants and makes provision for previous difficulties faced by landlords in regard to damage to their premises by impecunious tenants.³⁵ Moreover, far from showing a pro-tenant bias, the statistics show that it is the landlords who have taken advantage of the ready access to the Tribunal.³⁶ Thus, the two cases stated only benefitted the landlord in so far as landlords would prefer, in itself a highly dubious conclusion, to remain outside the provisions of the Act rather than to accept the advantages that the Act offers. While *Macdonald v Reich* was decided on factors pertinent to some degree to a criminal trial, it

34 See supra n 6.

35 See supra n 5. For payments to landlords for damage caused by tenants, see s86(a) and (b).

36 See Commissioner for Consumer Affairs, *Annual Report 1986*. For the year ending 30 June 1986, 6222 applications were received by the Tribunal. Eighty per cent were from landlords. Out of 988 hearings relating to security bonds, the bond was fully paid out to the landlord in 581 cases, partly paid out in 256 cases. Out of 341 hearings relating to termination pursuant to service of a termination notice by the landlord (see Part V of the Act), termination and possession was ordered in 254 cases. In 38 of these cases, the landlord recovered possession prematurely on the grounds of undue hardship. The Tribunal currently hears some 2100 applications per annum, including 120 country hearings.

is only *Chapman v Roach* of the four cases which shows a marked tendency to prefer the rights of a resident landlord over a balanced application of the policy of the Residential Tenancies Act 1978. Unfortunately, the tenant was unrepresented in that case and it is impossible to argue from the single instance.

If the courts are favouring property rights, it comes in the form that the courts are 'thinking' property rights. It is interesting to note that two of the four cases turned not on the policies of the Act or the interpretation of various words within the context of the Act as a whole but on the application of property concepts. *Re Belayev* and *Chapman v Roach* both turned upon factors that their respective judges understood about the nature of leases or leases as opposed to licences. In thinking property rights, it is perhaps no surprise that their Honours both adopted conclusions which enabled the agreements in question to be withdrawn from the scope of the Act. But why are the judiciary thinking property rights when the whole policy of the Act through its inclusive definition (eg the non-distinction between leases and licences, the use of concepts like the 'purpose of residence') is to break down traditional property concepts and the barriers that they create? In so far as the Act does not unduly favour tenants over landlords, it may be that the concepts provide a veneer for a more subtle purpose.

(b) The protection of the courts jurisdiction

By s21(1) of the Residential Tenancies Act 1978, the Tribunal has exclusive jurisdiction over matters falling within the scope of the Act. The more subtle purpose would suggest that the courts are reacting to the exclusion of their own jurisdiction. In this regard, *Goold v Clemente*,³⁷ an unreported decision of Roder J, though not directly concerned with the scope of the Act, helps to complete the picture. Basically, the Residential Tenancies Tribunal had evicted certain tenants on the ground that they had breached their lease, principally by causing a disturbance in the apartment block in which they occupied a flat. On appeal, Roder J resubmitted the matter to the Tribunal for a hearing *de novo*. This was on the grounds of certain improprieties in the Tribunal decision including inter alia:³⁸ (i) lack of reference in the Tribunal decision to the tenants' counter-claim; (ii) the use, as evidence, of certain letters received by the landlord from other tenants in the block of flats in question, none of the letter writers giving evidence before the Tribunal; (iii) the use of the Tribunal hearing of a report from an investigating officer relating to a previous incident between the landlord and the tenants; (iv) the possible overuse, as evidence, of the demeanour or misbehaviour of the tenants at previous hearings of the Tribunal itself; and (v) the lack of reasons in the Tribunal decision for dismissing certain sworn evidence of the tenants. In short, given the natural conflict between the sworn evidence of the landlord and tenants, Roder J felt that the finding of the Tribunal that the tenants had breached their tenancy was inadequately supported by the use of certain unsworn letters and the behaviour of the tenants. The tenants' bad behaviour at the Tribunal hearing was not a reason for supposing that they behaved badly at home.

37 Unreported. District Court (No 2255 18 July 1986) Roder J.

38 Overall, Roder J takes issue with some 15 points on which the Tribunal failed. To meet all these points, the Tribunal's order would have to have been some 20-30 pages long. The major fault finding exercise comes from a perspective outside the normal parameters within which the Tribunal has consistently operated.

Many a lawyer might feel inclined to agree with His Honour. However, s24(5) of the Residential Tenancies Act 1978 reads: 'In any proceedings the Tribunal shall not be bound by the rules of evidence but may inform itself upon any matter relating to the proceedings as it thinks fit'. In other words, while the Tribunal must act fairly and impartially, the only limitation upon its use of evidence is that it must relate to the proceedings. Specifically, the source of the evidence is irrelevant. As Roder J himself pointed out, the Act imposes a 'duty on the Tribunal to determine matters before it with a considerable degree of promptitude [so that] proceedings are likely to be dealt with with a considerable degree of lesser formality than that found...in the Courts'. The parties before the hearing are not generally represented and are unskilled in presenting evidence. The Tribunal must investigate. There is no full discovery of documents and many witnesses will not be contactable or otherwise be unwilling to attend at certain times.³⁹ In the light of these factors, it may be wondered how the Tribunal erred. As the evidence of the landlord and tenant conflicted, previous instances of aggression by the tenants and letters, however unspecific, about the rental situation did relate to the proceedings and allowed appropriate conclusions. As Roder J again recognised, hearings before the Tribunal would not be an 'easy task' and would be 'emotionally charged'. At the previous hearings where the tenants behaved badly, the tenants actually won. The further conclusion, therefore, that the Tribunal had taken 'a fussy or over-formalised regard for its own dignity' was somewhat speculative. Overall, the Tribunal, in trying circumstances, seemed to have carried out its function to the letter.

Thus, Roder J was expecting more from the Tribunal than that specified in the statute. To His Honour, the Tribunal had failed to act sufficiently like a court. Hence, Roder J thought that the Tribunal should only have decided the case 'on evidentiary material known to all parties during the course of proceedings' and should have analysed that evidence in judgment, corroborated only by the parties' respective demeanours. The tenants should have had an opportunity to question the letter-writers and 'inappropriate' similar fact evidence should have been disregarded. Whatever changes to the Tribunal's decision-making processes *Goold v Clemente* presages, the decision says a good deal about the attitudes of the courts. Linked to the decisions on the scope of the Act, either the courts will deny the Tribunal jurisdiction over various tenancies or, if the Tribunal has that jurisdiction, it will lose that jurisdiction upon appeal unless the jurisdiction is exercised in a particular way.⁴⁰ One may see the thinking repeated in *Chapman v Roach*: if a landlord has let persons reside in his or her home, the landlord is not to be deprived of dominion without access to a court. It is clear in *Shell Co v Kenpark*: companies are not consumers and must protect their rights in court. The cover is provided by the use

³⁹ For the procedures applicable to a Tribunal hearing, see ss24 and 25.

⁴⁰ See also the Judges of the Supreme Court of South Australia, *Report to the Attorney-General* (1985). The Report argues (at 3-5) that Parliament should make less use of tribunals and advises the use of special divisions of the established court system with improvements in decision-making techniques and costs. This would be acceptable in terms of the ideal of preserving access to the courts. How would the court operate though in processing and hearing 2100 applications a year (see n 36) unless it operated exactly like the Tribunal. In residential tenancy matters, the speed at which the matter gets to court is essential. In the meantime, the Report explains much about the judicial attitude to the Tribunal.

of property concepts and, if necessary, caricatures of statutory interpretation. The justification for such an approach lies in legal history. The jurisdiction of the courts should not be ousted without the clearest intention of Parliament. Parliament must make adjustments by way of amending legislation. The courts' resistance to the jurisdiction of the Tribunal lies in their traditional stand against 'privative clauses' and the control of statutory bodies under administrative law.

The scheme engendered by the Residential Tenancies Act 1978, however, does not represent a confrontation between or regulation of the individual by the State. The scheme represents paternalistic intervention in the relationship of two individuals, a body of substantive law designed to solve a long-standing problem surrounding their relationship. Hence, the intendment of the broad inclusive definition and the special purpose nature of the exceptions: the scheme should apply to all residential landlords and tenants unless particular circumstances show that ultimately no relationship of residential landlord and tenant exists (eg guests in a motel, vendor and purchaser, holiday letting). Accepting the value system interest in that scheme, the conclusion must be that the fragmentation of the scope of the Act merely leaves certain groups of individuals (including the landlords in these groups) without access to that body of law and its efficacious dispute-resolution mechanism, the Tribunal. On these grounds, the decisions in all four cases concerning the scope of the Act remain suspect. *Re Belayev* and *MacDonald v Reich* withheld from the Act a class of tenancy and a particular tenancy that embodied the genuine long-term landlord and tenant relationship. *Shell Co v Kenpark* removed from its scope an individual tenant, not per se capable of residence, but who manifestly negotiates with another individual tenant's long-term residence in mind. The decision in *Chapman v Roach* would only be justified if the court had asked: was the landlord operating a bona fide lodging house? By concentrating upon the residence and dominion of the landlord, it assumed the very thing that it had to prove, namely, that the occupant was not resident in his or her own home. Beyond these cases, the decision in *Goold v Clemente* remains more potentially damaging than any limitation upon the peripheries of the jurisdiction of the Tribunal. That decision is only justified if it leads to an improvement in the decision-making processes of the Tribunal. In so far as it foreshadows the adoption of more rigid and time-consuming processes as the Tribunal adjusts to avoid continuous evidentiary and procedural appeals, it can only hamper the ability of the Tribunal to carry out its duty with 'considerable promptitude'.

4. CONCLUSION

This comment has attempted to analyse certain cases which display a judicial trend. That judicial trend displays an attempt to confine the operation of the Residential Tenancies Act 1978 as a mechanism for regulating the relationship of landlord and tenant of residential property and the resolution of petty, if sensitive, disputes between the parties. Confronted with the establishment of a non-judicial process for the resolution of such disputes, the cases have sought to limit the jurisdiction of that process to make it operate more as a judicial process. The 'new administrative law' is under attack from the old. The result of that attack is to return certain tenancy agreements to the leasehold regime operative at common law and to presage certain changes in the operation of the Tribunal. Its validity depends in part upon the value inherent in the courts'

maintaining an assertion of their own jurisdiction and in part upon the quality of the service, legal and administrative, that the courts themselves can offer in the area of landlord and tenant disputes. This comment cannot conduct a full rehearsal of the social, economic and policy directions of the Act, the depths of the problem that the Act was designed to resolve or the quality of the dispute-resolution processes offered by the Tribunal. Objectively speaking, whatever its perceived defects, the Act has lifted the relations of landlord and tenant of residential property out of its previous mire of tactical abuse of bonds, self-help, frustrated rights, questionable rental standards and general insecurity. Certainly, the Act embodies a balanced statement of the rights to be accorded to the property interests of the landlord against the fact that the tenant occupies the premises as a home. The Tribunal processes some 6000-7000 applications a year, a number with which anything other than an informed system cannot hope to deal. If a balanced system of rights is to be maintained, the informal adjudication process must be maintained. The alternative is to draft rights entirely on one side (presumably the tenant's) so that disputes, except where security of tenure for life makes something worth litigating about, do not occur.⁴¹ The point is that, within the framework of the Act, there is every opportunity for the courts to become central to the adjudication process. Perhaps the next time that the Supreme Court receives a case stated, it will consider the underlying values of the Act and its strategic unity more carefully.⁴² Under s29(1) and (2) of the Act, a right of appeal exists to the Local Court. Perhaps on future occasions that the Local Court receives a matter on appeal, it will attempt to resolve it upon the facts and according to the substantive provisions of the Act.⁴³ From *Chapman v Roach* and *Goold v Clemente*, the impression is gained that the Local Court finds too hard the task with which the tribunal is confronted every day.

41 See supra n 6 and text.

42 See the case stated, *Noy v Public Trustee* and *Re Noy* (unreported, Supreme Court of SA No 419 24 March 1985 and 31 October 1985). The matter was technical: had s90 of the Act repealed s56(3) of the Housing Improvement Act 1940 (SA).

43 For an excellent illustration of how the Local Court can decide a residential tenancy matter according to the facts and the law, see *Burke v Bohines Pty Ltd* (unreported, Local Court, No 3256, 29 October 1985, Burns J).