PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. 70655

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

SILVER STAR PROPERTIES LIMITED,

Appellant

- and -

SHIRLEY DeMERCHANT & IMELDA FAJARDO,

Respondents

David P.S. Farrar, Esq., solicitor for the applicant
Andrew Pavey, Esq., solicitor for the respondents.

1990, November 19, Cacchione, J.C.C.:- This case involves a notice of objection filed against a recommendation of the Halifax and County West Residential Tenancies Board dated July 13, 1990.

The facts as found by the Residential Tenancies Board are that the tenants entered into a year to year lease in the standard form with respect to the premises in question on March 1, 1989. The rent provided for in the lease was $500.00 per month. The lease was automatically renewable at the expiration of the term unless either the landlord or the tenant had provided at least three months notice to terminate prior to the anniversary date of the lease. In the present case no such notice was given and the lease automatically renewed itself as of March 1, 1990. Despite the specific provision with respect to rent payable contained in the lease, the rent was raised from $500.00 per month to $515.00 per month effective May 1, 1989. This was a three percent guideline increase on the base rent which was accepted, albeit apparently

reluctantly by the tenants. On January 30, 1990, one month prior to the expiration of the existing lease term, and its automatic renewal on March 1, 1990, the landlord provided a notice of proposed rent increase pursuant to an application being made to the Rent Review Commission for increase in rent with respect to the premises. The notice provided a proposed effective date of the requested rental increase as of May 1, 1990, a notice period of in fact three months from the issuing of the notice to the effective date of the proposed increase. The landlord did offer to allow the tenants to terminate their renewed lease on three months notice during the term of the lease if they were unhappy with the rental increase obtained in the amount of $580.00 per month. The tenants chose not to exercise this option. The Residential Tenancies Board, after having made these findings of fact, recommended to this court that the rental increase effective May 1, 1990 should be found to be invalid and that therefore a repayment of $195.00 should be made from the landlord to the tenants.

By notice of objection filed on July 16, 1990 and amended on July 23, 1990 the objectors in this matter list the following grounds of objection.

1. That the Residential Tenancies Board erred in its interpretation of s.11 of the Residential Tenancies Act.

2. That the Board erred in its application of s.4 of the Standard Form Lease.

3. That the Board erred in law and exceeded its jurisdiction in interpreting s.3(2) of the Rent Review Act.

4. That the Board erred in determining that the landlord owed the tenants the sum of $195.00.

5. That the Board erred in law in suggesting that a properly worded lease agreed to by the tenants might provide for an increase in rent during the term as approved by the Rent Review Commission.

6. That the Board erred in substituting its opinion for the clear wording of the provisions of the Rent Review Act.

At the hearing of this objection counsel narrowed the grounds of objection to one, namely: Did the Board err in law in interpreting the **Residential Tenancies Act** by concluding that a landlord cannot increase the rent during the term of the lease? Put another way the issue is: Does a landlord in Nova Scotia have the right under either the **Residential Tenancies Act** R.S.N.S. 1989, c.401, or the **Rent Review Act**, R.S.N.S. 1989, c.398, to unilaterally demand an increase in rent from a tenant with 90 days notice at any stage of the tenancy?

The issue is an important one, and indeed this decision will be the first in examining the meaning of s.11 of the **Residential Tenancies Act**, and s.11 of the **Rent Review Act.** In addition, similar provisions in residential tenancies acts across the country have yet to face judicial interpretation [Alberta **Landlord and Tenant Act**, R.S.A. 1980, c.L-6, s.13; B.C. **Residential Tenancy Act**, S.B.C. 1984, c.15, s.18; Manitoba **Landlord and Tenant Act**, R.S.M. 1987, c.L-70, s.112; Newfoundland **Residential Tenancies Act**, S.N. 1989, c.44, s.17; Saskatchewan **Residential Tenancies Act**, R.S.S. 1978, c.R-22, s.39].

One does not have to look far into any treatise on landlord - tenant law to discover that the landlord-tenant relationship is one which has its roots firmly planted in the common law of contract, see Williams & Rhodes, Canadian Law of Landlord and Tenant 6th ed., Carswell,

Toronto, 1988, at p.1-1, and **Hill and Redman's Landlord and Tenant 12th ed.**, Butterworth & Co., London, 1955, at p.3. As such, the contractual doctrines of offer, acceptance and consideration applied to any tenancy agreement entered into by a landlord and tenant in the same manner as it did to other contracts. As Hill and Redman's correctly observed:

> An agreement for a lease is an ordinary contract, and in accordance with the general principles of contract law it will not be binding on the parties until their minds are at one, both upon matters which are cardinal to every agreement for a lease and also upon matters that are part of the particular bargain. Redman, Op.Cit, at p.90.

The "cardinal" matters Hill and Redman refer to are what we consider today as the essential terms of the contract. The essential terms go to the very heart of the certainty of the contract, and as such, any interpretation of those terms must be founded upon the solid foundations of the mutual intent of the parties. As Tucker J. found in **Gilchrist Vending Ltd. v. Sedley Hotel Ltd.** (1967), 66 D.L.R. (2d) 24 (Sask.Q.B.) at p.26, in delivering a judgment as to the effect of a contract of vending machine services that failed to identify the type of shuffleboard that was the object of the contract:

> "...because this very important clause of the agreement is uncertain and is not a meaningless term (in fact it goes to the basis of the plaintiff's claim) I must hold the agreement void for uncertainty and so unenforceable." [Emphasis mine]

In the case of an uncertain non-essential term, Tucker J. properly pointed out, referring to Anson, **Principles of the English Law of Contract**, 22nd ed., Oxford, Clarendon Press, 1964, at p.26, that the courts are at liberty

> ...if the contract contains an indefinite, but subsidiary provision....to stike it out as being without significance, and to give effect to the rest of the contract without the meaningless term." [Emphasis mine]

Nicolene Ltd. v. Simmonds, [1953] 1 Q.B. 543; **Adamastos Shipping Co.Ltd. v. Anglo-Saxon Petroleum Co.Ltd.,** [1959] A.C. 133.

Over the years the essential terms of an agreement for lease have been thus determined as (a) the identification of the parties, the lessor and the lessee, **Warner v. Willington** (1856), 12 Digest 145, 988, (b) identification of the premises to be leased, **Lancaster v. De Trafford** (1862), 30 Digest 418, 794, (c) the commencement and duration of the term, **Fitzmaurice v. Bayley** (1860) 12 Digest 136, 916, and (d) the rent or other consideration to be paid, **Dolling v. Evans** (1867), 36 L.J. Ch.474. The primary focus of our attention is on the certainty of the latter and the effects its uncerainty has on the enforceability of the lease entered into by the tenant and landlord.

Following first principles, the landlord makes an offer to the prospective tenant, the tenant accepts the offer for lease, and consideration in the form of rent is laid out. In leases, for example in a one year lease, rent is established and most often subdivded into twelve monthly instalments. As such the price for the tenancy is clearly set out, the tenant knows how much he or she will have to pay during the life of the lease, and the landlord can plan accordingly, knowing how much he or she will receive for the premises.

As with any non-unilateral contract, the landlord-tenant contract can only be modified with the consent of both parties. At common law, rental increases could only be imposed during the term of the lease by a landlord if two conditions were met: (a) there had to be consent by the tenant, and (b) there had to be consideration given by the landlord, such as the undertaking that improvement would be made to the premises within a year: **Donellan v. Read** (1832), 110E.R. 330,3B & Ad.897, a view that has been adopted in **Jenkins R. Lewis & Son v. Kerman,** [1971] Ch.477, at p.497. As such, the bargaining rights of both parties to the tenancy agreement were preserved in theory in that the consideration for the premises was ultimately a matter demanding the certainty of mutual agreement.

The Introduction of the Residential Tenancies Act in 1970- Codification and Protection of Tenant and Landlord Rights

The legal regime surrounding landlord and tenant law in Nova Scotia was significantly altered with the introduction of the **Residential Tenancies Act** in 1970. Following the lead taken by Ontario in 1968, the Nova Scotia Legislature established the Select Committee on the Law of Landlord and Tenant in 1970. The Select Committee reported, among other things, that the lack of urban rental housing in Nova Scotia had led to a situation where the landlord could pick-and-choose their tenants, demanding rights and rental payments that exploited the vulnerable bargaining position of prospective tenants, The Report of the Select Committee on the Law of Landlord and Tenant,1970.

Based on the recommendations of the Select Committee, the Nova Scotian Legislature quickly proceeded to pass the **Residential Tenancies Act** in 1970. The Act was enacted with three main purposes in mind: firstly, to codify and

protect the rights of the tenant; secondly, to codify the rights of the landlord; and thirdly, to provide a fast, efficent, and cost-effective means for dispute resolution thereunder.

Given this background to the Act, it is fair to conclude that one of the primary public policy objectives of the Legislature was to provide a regime that would afford better protection for the rights of the tenant in a marketplace that unjustly favored the landlord. In short, the Legislature sought to establish a statutory regime that ensured basic rights were able to be exercised by both parties to a residential tenancy.

Rental Increases Mid-lease Under the New Regime

To the extent that the **Residential Tenancies Act** did not alter the common law relationship between the landlord and tenant, the contractual principles governing that relationship at common law remain intact: **Barron v. Bernard,** (1972), 33 D.L.R. (3d) 371 (N.S.Co.Ct.). The question becomes to what extent have the parties to a lease had their contractual rights altered with respect to the negotiation of "rent" and "Alterations in the rent" during the life of the lease?

If we follow the argument of the appellants in this case, they would interpret s.11 of the **Residential Tenancies Act** as permitting landlords to unilaterally demand an increase in rent simply on 90 days notice, regardless of what stage in the tenancy the parties are at. Section 11 provides as follows:

> Duty of notice to increase rent
> 11 (1) When a landlord intends to increase the rent payable in respect of residential premises

> occupied by or in the possession of a tenant, the landlord shall give to the tenant a notice in writing stating the landlord's intention to increase the rent and the proposed amount of the increase at least three months before the landlord receives, demands or negotiates an increase in the rent payable by the tenant.
>
> Frequently of Increase
>
> (2) Notwithstanding any other enactment, no landlord shall increase the rent for residential premises more than once in a twelve-month period, whether or not the twelve-month period includes a period of time before the coming into force of this subsection.

If this was the proper interpretation of s.11, then the following would result: On January 1, 1990 a landlord and tenant sign a one year lease for a residential premises. The rent is agreed to be $6000.00 or $500.00 per month. On February 1, 1990, or any date after January 1, 1990, the landlord could decide to increase the rent to $535.00 per month or $6420.00 per year. and they could demand this increase as of May 1st, 1990. This interpretation would put the tenant in an unreasonable position for the tenant is obligated under s.10(1)(a) of the **Residential Tenancies Act** not to unilaterally terminate the lease until the 12 month period of the tenancy is up, and also in so doing, the tenant is obligated to give the landlord three months notice of his intention to terminate. As a result, the tenant is forced to pay a rent that was not certain, a rent that was not clearly defined with adequate certainty under the lease, for the tenant has no idea how great the increase could be. What if the increase was from $500.00 per/month to $800.00 per/month? The contract price is left too open ended.

The interpretation of s.11 as suggested by the appellants goes against the very grain of the object of the **Residential Tenancies Act** which is to protect the bargaining rights

of both the landlord and the tenant. Moreover, the Act is intended to protect the tenant from being coerced by the landlord into giving up his contractual rights. If a landlord is permitted to hide anticipated increases in rent from the tenant, only to sneak the increases in after the tenant is statutorily locked into the agreement for 12 months, then the result serves to violate the well established bargaining rights of the tenant. The contract has to be certain in its essential terms. Rent is an essential term of the tenancy agreement. To leave the rent alterable on the wish of one party can render the contract void for uncertainty. As such, there can be no other interpretation than to find that any alteration in the rent payable under a lease requires the consent of both parties.

Consequently, s.11(1) of the **Residential Tenancies Act** means that the three month notice requirement is to come three months before the expiration of the lease period. In a one year lease, this means before the end of the ninth month. It is this reading and this reading alone which respects both the intention of the legislature and the bargaining rights still available to the tenant at common law. It is when the Tenancy Agreement is up for renewal that the landlord can assert his proposed rental increase. At that point, if the tenant chooses not to accept the price for the rental premises, then the landlord can refuse to renew the lease, and seek out a tenant that will accept his offer, complete with increased rent.

Section 11(1) uses the words "receives, demands, or negotiates". "Receives" is meant to guarantee that the landlord cannot receive a rental increase before the notice requirement is met. "Demands" clearly recognizes and acknowledges that at the end of the lease, the landlord

is in the position to demand the rental price he wants, it recognizes his bargaining power. The use of the word "negotiates" acknowledges that the tenant and landlord still possess their common law contractual right to renegotiate the contract price during the term of the lease. Consequently, the landlord is obligated to give three months notice to the tenant before he commences negotiations for an increase in rent during the term of the lease.

The Effect of the Rent Review Act

The rent payable during a tenancy is a matter of contract to be negotiated by the parties. This was clearly laid out earlier, and the only constraint on this bargaining power is the **Rent Review Act**. Section 8 of that Act controls increases in rent on residential premises over a prescribed statutory limit, a measure designed to control the spiralling costs of rental accommodations in Nova Scotia. The limitation restricts both the landlord and the tenant from agreeing to increase the rent of the premises under the tenancy agreement over the prescribed statutory percentage increase in the absence of approval of the Rent Review Commission under s.9. Section 3(2) of the **Rent Review Act** explicitly acknowledges the right of the parties to a tenancy agreement to bargain within the s.9 restriction, wherein it provides that a tenancy agreement, negotiated between the parties, providing for no rent increase or a lesser percentage increase in rent than is provided under s.8 prevails over the Act.

Section 11(1) of the **Rent Review Act** provides that every landlord shall give three months notice of a rent increase to the tenant prior to increasing the rent of the tenant. This provision is to be interpreted in the same manner as section 11 of the **Residential Tenancies**

Act, however, its scope is narrower. Section 11(1) of the **Rent Review Act** is solely aimed at requiring the landlord to provide a notice of increased rent to the tenant prior to the end of the lease so that the tenant can be afforded the opportunity to effectively evaluate the offer for lease renewal before they ultimately decide whether or not to accept the offer or to terminate the Residential Agreement at the expiration of its current term. In other words, just as the tenant is required to give three months notice of termination under s.10 of the **Residential Tenancies Act**, the landlord is required to give three months notice of rental increase to the tenant, so that the tenant can make an informed decision about continued leasing of the premises. Once again, it is a legislative scheme designed to protect the integrity of the contractual rights of both parties to the lease.

Section 4 of the Standard Form Lease

The Standard Form Lease, N.S. Reg. 270/87 made pursuant to s.26 of the **Residential Tenancies Act**, prescribes the regulated and mandatory provisions that a lease shall be read as containing. The Standard Form Lease contains the following paragraph under s.4.

> RENT:
> The rent may be increased on three(3) months written notice in accordance with the provisions of the **Rent Review Act** but no more frequently than once in a twelve month period. The landlord may attach a separate Schedule B giving details of proposed or approved rent.

With respect to the provision, the regulation cannot do what the statute failed to provide for. It flows from this tenet of statutory interpretation that s.4 of the Standard Form Lease means no more than that the landlord must furnish notice of rental increase to the tenant three

months prior to the end of the rental period. This interpretation is a natural, given that the regulation made under s.26(1)(c)(iv) of the **Residential Tenancies Act** was made to describe the rent payable under a lease in accordance with s.1 of that Act. In effect the power of the regulation is derived from the Act, s.11, the interpretation of which was delivered above.

Further, it is important that the courts do not extinguish bargains to which parties had every inention of entering. To this end we must follow the old maxim of English law **verba ita sunt intelligenda ut res magis valeat quam pereat, Hillas and Co.Ltd. v. Arcos Ltd.** (1932), 147 L.T. 503(H.L.). In short, in order to preserve the bargain achieved by the parties, and to avoid having to interpret this provision as leaving the entire lease void for uncertainty, we must interpret s.4 as obligating the landlord to furnish notice of any rental increase to the tenant at least three months prior to the end of the rental period.

Conclusion

The modern law of landlord and tenant in Nova Scotia is one of mixed statute and common law. With respect to the negotiation of rent and alterations in rent during the term of the lease, the rights of both the landlord and the tenant remain at common law with one exception - rental increases over the prescribed rate in the **Rent Review Act** need the approval of the Rent Review Commission.

Consequently, I find in favor of the respondents, holding that the three month notice requirements for rental increases under both the **Residential Tenancies Act** and the **Rent Review Act** must come at least three months prior to the expiration or possible renewal of the tenancy.

Further, it is the finding of this court that the landlord cannot unilaterally impose or demand an increase in rent during the term of the lease. The alteration of an essential term to the lease like rent requires the consent of both parties. In this manner, we respect both the intention and wording of the legislature, as well as the common law doctrine of certainty in contracts that still governs the modern Residential Agreement. This is not to say that a properly worded lease, providing for a mid-term rental increase can never be drafted. If the lease at the time of the signing is clear on its face that a rental increase will occur during the term and the tenant agrees to it then the contract will not be void for uncertainty. The notice of objection is dismissed without costs.

Judge of the County Court
of District Number One