SOME INTRICACIES OF RECENT LANDLORD AND TENANT LEGISLATION IN NEW SOUTH WALES

In 1605 Miguel de Cervantes could not foresee, whilst describing "the terrifying and never-before-imagined adventures of the windmills," that lawyers in 1958 would have similarly fascinating adventures in seeking to interpret the Landlord and Tenant (Amendment) Act, 1958[1] and like Don Quixote, be compelled "to do battle with some . . . giants." It is proposed to examine the difficulties raised by some of the provisions of this Act, and to make submissions where the Legislature has imposed upon us the task of "exploring the elliptical and expounding the unexpressed".[2] The topic will be considered under the following heads:

I. *Exclusion of premises from the major portions of the Act — Section 5A.*
II. *Provisions for proof of availability of alternative accommodation — Section 70A.*
III. *Controlling of decontrolled premises to protect lessees — Section 81A.*
IV. *New ground for notice to quit — Section 62(5)(u).*
V. *Tenants' option to purchase — Section 88A.*

I. *Exclusion of Premises from the Major Portions of the Act — Section 5A.*

The provisions of the Landlord and Tenant (Amendment) Act, 1948-1958 apply to "prescribed premises" as defined in s. 8, subject to some exceptions hereafter mentioned. There are means of excluding prescribed premises from the operation of portions of the Act, provided that ss. 5A, 86, 86A or 87 are complied with. The 1958 amendments of the Act contained substantial additions to s. 5A and enacted s. 86A. Whilst the operation of s. 5A(1), as enacted in 1954, was limited and exclusion under ss. 86 and 87 depended on the exercise of the Rent Controller's discretion, the 1958 amendments considerably extended the scope of excluding premises from the major portions of the Act. The limited scope of s. 5A(1)(a) and (c), which were enacted in 1954, is readily seen, since these paragraphs apply only to dwelling-houses erected after the commencement of the 1954 amending Act or being in the course of erection at that date. Paragraph (b) of s. 5A(1) which was also enacted in 1954 and was slightly amended in 1958 only applied to a dwelling-house being in existence at the commencement of the 1954 amending Act, which was not, in whole or part, the subject of a lease between the 7th December, 1941 and that commencement. Accordingly, the limited operation of these paragraphs prevented the development of a body of case law required to interpret them. In 1958 s. 5A(1) was amended by adding paragraphs (d), (e), (f) and (g)[3] which greatly extend the scope of the Section, making it an object of everyday concern to the practitioner. The new paragraphs have similarities in wording to the already existing paragraphs. It is proposed to examine the whole of the Section in order that the effect of the Section as a means of excluding

[1] Act No. 7, 1958 (N.S.W.). This article is dedicated to my mother, the late Mrs. Elizabeth Lang, whose enthusiasm and devotion has always been an inspiration to me. Appreciation is also expressed for the assistance of Mr. H. D. Barrowman of the N.S.W. Rent Control Office in making several valuable suggestions in regard to this article.

[2] Rich, J. in *James* v. *Cowan* (1929) 43 C.L.R. 386, 422.

[3] Due to the extensive discussion herein of s. 5A of the Landlord and Tenant (Amendment) Act, 1948-1958, the relevant parts of subpara (1) of s. 5A are reprinted as follows:

premises from the portions of the Act specified in s. 5A(1) and (3), may be ascertained. The major problems of interpretation raised by the Section will be considered under the following heads:

"5A (1). The provisions of Parts II, III, IV and V of this Act do not apply in respect of:

(a) any dwelling-house the erection of which commenced after the commencement of the Landlord and Tenant (Amendment) Act, 1954;

(b) any dwelling-house that—

(i) was in existence at the commencement of the Landlord and Tenant (Amendment) Act, 1954;

(ii) has not been, either in whole or in part, the subject of a lease, other than a prescribed lease, at any time between the seventh day of December, 1941 and that commencement;

(iii) does not form part of any premises that were the subject of a lease, other than a prescribed lease, at any time between the seventh day of December, 1941, and that commencement;

(iv) is not "special premises" for the purposes of this Act; and

(v) is the subject of a lease (not being a lease of shared accommodation) —

(a) that is registered in the office of the Rent Controller;

(b) the execution of which by the lessee is witnessed by a solicitor instructed and employed independently of the lessor; and

(c) that is certified by that solicitor as provided in subsection two of this section;

(c) any dwelling-house that, being in the course of erection at the commencement of the Landlord and Tenant (Amendment) Act, 1954, is the subject of a lease (not being a lease of shared accommodation)—

(*Here follow provisions as in Section* 5A (1) (b) (v) (a), (b) *and* (c)).

(d) any dwelling-house that—

(i) was in existence on the 1st December, 1957;

(ii) that has not been, either in whole in in part, the subject of a lease, other than a prescribed lease, at any time between that date and the commencement of the Landlord and Tenant (Amendment) Act, 1958.

(iii) does not form part of any premises that were the subject of a lease, other than a prescribed lease, between that day and that commencement;

(iv) (*Same as Section* 5A (1) (b) (iv));

(v) is the subject of a lease (not being a lease of shared accommodation or a lease the lessor under which is the employer of the lessee)—

(*Same as Section* 5A (1) (b) (v) (a), (b) *and* (c)).

(e) any dwelling-house (not being a residential unit)—

(i) that was in existence at the commencement of the Landlord and Tenant (Amendment) Act, 1958;

(ii) of which a lessor has obtained vacant possession after that commencement otherwise than by an order for recovery of possession made on any one or more of the grounds specified in paragraph (g), (h), (i), (j), (k), (l), (m), (t) or (v) of subsection five of section 62 of this Act;

(iii) (*Same as Section* 5A (1) (b) (iv)).

(iv) (*Same as Section* 5A (1) (d) (v)).

(f) any residential unit that—

(i) came into existence by reason of alterations, or alterations and additions, made after the commencement of the Local Government (Regulation of Flats) Act 1955, to a dwelling-house that—

(a) was in existence at the commencement of the Local Government (Regulation of Flats) Act, 1955;

(b) has not been, either in whole or in part, the subject of a lease, other than a prescribed lease, at any time between the 7th day of December, 1941 and the 24th day of February, 1956;

(c) does not form part of any premises that were the subject of a lease, other than a prescribed lease at any time between those days;

(d) (*Same as Section* 5A (1) (b) (iv));

(ii) is one of two or three, but not more, residential units in that dwelling-house which were provided out of that dwelling-house, by those alterations, or those alterations and additions; and

(iii) (*Same as Section* 5A (1) (b) (v)).

(g) any residential unit that—

(i) (*Same as Section* 5A (1) (f) (i) (a)).

(b) of which a lessor has obtained vacant possession after the commencement of the Landlord and Tenant (Amendment) Act, 1958, otherwise than by an order for recovery of possession made on any one or more grounds specified in paragraph (g), (h), (i), (j), (k), (l), (m), (t) or (v) of subsection five of section 62 of this Act.

(c) (*Same as Section* 5A (1) (b) (iv));

(ii) (*Same as Section* 5A (1) (f) (ii));

(iii) is the subject of a lease (not being a lease of shared accommodation or a lease the lessor under which is the employer of the lessee)—

(*Same as Section* 5A (1) (b) (v) (a), (b) and (c))."

1. Does s. 5A apply to subleases and other mesne leases?
2. The effect of executing or attesting a lease not in compliance with s. 5A.
3. The meaning of "erection" in paragraphs (a) and (c).
4. The meaning of "in existence" in paragraphs (b), (d), (e), (f) and (g).
5. What premises comprise "any dwelling-house (not being a residential unit)"?
6. Obtaining vacant possession of a dwelling-house within paragraphs (e) and (g).
7. The nature of alterations and additions to a dwelling-house to enable a residential unit to come into existence.
8. Exclusion of business and commercial premises.

Before considering these specific problems, it is proposed to ascertain the meaning of the phrase "dwelling-house" within s. 5A, since all the paragraphs of s. 5A(1) apply in respect of premises which either comprise a dwelling-house or at some specified time had comprised a dwelling-house.

In s. 8(1A) this phrase is defined for the purposes of the Act (except ss. 104 to 110), unless the contrary intention appears, as being "any prescribed premises (including shared accommodation) leased for the purpose of residence . . . ". In *Thompson* v. *Easterbrook*[4] premises leased both for residential and business purposes were held to be a dwelling-house within this definition, and "dominant user" was discarded as the test of determining whether premises are a dwelling-house within the definition. However, if the residential use of the building is only incidental to its use for business purposes (e.g. residence of warehouseman in department store), the premises are not a dwelling-house. The purpose for which premises are leased is ascertained

> . . . by considering the provisions of the contract as it stands when the notice to quit is given and any facts which at that date effect their (i.e. landlord and tenant's) mutual rights and duties in relation to the user of the premises; and, if the enquiry is not thereby answered, then by considering the nature of the premises and all circumstances existing at the date of the original lease.[5]

The purpose for which premises are leased, may be altered by express or implied contract between the landlord and tenant, by conduct giving rise to an estoppel or by general waiver, but there must be a variation of the legal relationship of the landlord and tenant in respect of the user of the premises.[6] Denning, L.J., in *Wolfe* v. *Hogan*[7] remarked that the purpose for which premises are let does not change by reason only of the acceptance of rent by the landlord after a change of user, unless it can be inferred from the acceptance of rent that the landlord affirmatively consented to the change of user. The High Court in *Thompson* v. *Easterbrook*[8] did not accept this statement, and held that even an affirmative consent by the landlord to a change of user will not suffice to alter the purpose for which premises are leased, unless consent is given by express or implied contract between the parties, or unless "the circumstances lead to a conclusion that the landlord has waived any provisions of the lease inconsistent with the change of user or is estopped from objecting to the change."[9] It has been held that a few passive aquiesences by the landlord to breaches of covenant do not amount to waiver for all future time of the right to complain of other breaches.[10]

In *Allen* v. *Connelly*[11] and *In re Effie Smith*[12] the definition of a dwelling-house in the Act was held not applicable to certain provisions of the Act,[13]

[4] (1951) 83 C.L.R. 467. [5] *Id.* at 485. [6] *Id.* at 482, 483.
[7] (1949) 1 All E.R. 570.
[8] (1951) 83 C.L.R. 467, 482, 483.
[9] *Id.* at 482, 483.
[10] *Western . . .* v. *Macdermott* (1866) L.R. 2 Ch. 72.
[11] (1954) 71 W.N. (N.S.W.) 199.
[12] (1955) 72 W.N. (N.S.W.) 84.
[13] Ss. 62(5)(q) and 62A respectively.

the legislature's contrary intention being apparent from the impossibility of applying the definition to those provisions. It has been suggested that "dwelling-house" in s. 5A(1) has its common law meaning and that the legislature has asserted a contrary intention to the application of the definition of a "dwelling-house" to this Section. This contention is made on the ground that in the Section there are references to a dwelling-house that "has not been the subject of a lease" during a certain period. Since the definition of a dwelling-house refers to premises *leased* for the purposes of residence, it is argued that there cannot be a dwelling-house within the definition whilst the premises are not the subject of a lease. It is submitted that the definition of dwelling-house in the Act applies to s. 5A, and the contention that there is a contrary intention expressed in the Section is unsound on three grounds. Firstly, since premises subject to a prescribed lease are within the relevant paragraphs of s. 5A(1). Secondly, since the premises probably need only be a "dwelling-house" within the definition at a stage when a lease under s. 5A is executed and the Section is satisfied if the premises would have been a dwelling-house had they been leased during the period when in fact they were not leased. Thirdly, the provisions of s. 70A seem also to indicate that dwelling-house within s. 5A has its definition meaning.

1. *Does Section 5A Apply to Sub-leases and Other Mesne Leases?*

Paragraphs (b), (c), (d), (e), (f) and (g) of s. 5A(1) are concerned with premises which are the "subject of a lease", not being a lease of shared accommodation, which is executed, certified by a solicitor and registered in the office of the Rent Controller as specified in each of these paragraphs.

The phrase "is the subject of a lease" in these paragraphs has a double aspect. Firstly, to be entitled to registration under any of these paragraphs there must be a "lease" between the owner and occupant, i.e. the relationship of landlord and tenant, and not merely one of licensor and licensee (with which s. 6A is concerned). Thus a document which in form is a lease but in substance amounts only to a licence, would not comply with these paragraphs. It is also clear that the premises are only within s. 5A whilst the term of the lease which has been registered with the Rent Controller, is current. The lease may be in respect of a weekly tenancy, instead of a fixed term, in which case the premises are within the Section until the tenancy is terminated by the appropriate notice.

The second problem arising out of the interpretation of this phrase is whether s. 5A(1) (except paragraph (a)) applies only to a lease or whether it applies at different levels of lessor and lessee relationship. In s. 8(1), lessor and lessee are defined as "parties to a lease . . . and include . . . a mesne lessor and a mesne lessee; a sublessor and sublessee . . . ". "Mesne" refers to a succession of lessor and lessee relationships in respect of the land right down to the last sub-lessee, who is entitled to possession. Each sub-lessee only receives the protection of the Act in relation to his own lessor, unless the Act specifically gives further protection (e.g. s. 82). In *Castrisos* v. *Quarterley*[14] a flat was let under a weekly tenancy and the tenant then sublet the premises from time to time as a holiday flat for periods up to three months. It was held that as between the lessor and lessee the flat was not "holiday premises" within the Act, whilst between sub-lessor (lessee) and sub-lessee it was holiday premises. This indicates that registration may be obtained under s. 5A(1) in respect of sub-leases so long as the requirements of the particular paragraph in the Section are satisfied when applied to the sub-lease. This interpretation is reinforced by the reference in s. 5A(1) to "a" lease, and appears to have been accepted by the Rent Controller. It must be pointed out that this interpretation of the corresponding statutory provision has not been applied in England.

[14] (1950) 67 W.N. (N.S.W.) 81.

In *Cow* v. *Casey*[15] the premises leased were not a dwelling-house within the Rent Restriction Acts. However, the portion of the premises which was the subject of a sub-lease was of such a size that its rateable value (if it had been the subject of a lease) would have made that portion subject to the Rent Restriction Acts. It was held that the sub-lease was not subject to the Acts, the Acts being applied in England to premises and not to levels of lessor and lessee relationship. It is not unnatural in England to apply the Act in this manner, since the size of the premises let should not effect the application of the Act to premises.

2. *The effect of executing or attesting a lease not in compliance with Section 5A.* In each of paragraphs (b), (c), (d), (e), (f) and (g) of s. 5A(1), the lease which is registered with the Rent Controller must have its execution by the lessee witnessed by a solicitor who is instructed and employed independently of the lessor and the solicitor must give a certificate as provided in s. 5A(2). Richardson, J. in *Barker* v. *Holloley*[16] examined the effect of an omission in the certificate of the solicitor to state matters which by virtue of s. 5A(2) had to be referred to therein. In this case the solicitor omitted to state that he examined the lessee touching his knowledge of the lease. His Honour rejected a Statutory Declaration by the solicitor attempting to rectify the defect, since the requirements of the Section have to be strictly complied with, being a means of exclusion from a protective statute. Accordingly, a proper lease was not registered within the Section and the premises were held not to have been excluded from the Landlord and Tenant (Amendment) Act, 1948-1958. It appears from this decision that registration of a lease with the Rent Controller is not *prima facie* evidence of the validity of the registration or of compliance with the provisions of s. 5A. The position is different from ss. 86 and 87, where the Rent Controller has extensive powers of seeking information and a discretion whether or not to grant the exclusion. Under s. 5A the Rent Controller by virtue of the Regulations under the Act "shall" register a lease submitted for registration, which is an absolute duty upon the Rent Controller. Since the Rent Controller is granted no powers or duties to obtain information or to examine the lease to ensure the validity of execution, it seems the proper inference that the validity of the registration can subsequently be challenged by the lessee by proving omission to comply with the provisions of the relevant paragraph of s. 5A(1). It is submitted that the Rent Controller cannot refuse to register a lease, however improper the execution or form, but it appears that the Controller need only register "a lease" and may properly refuse to register a document which in substance is only a licence.

It is submitted that the important decision of the Supreme Court in connection with s. 86, *Fricker* v. *Blower*,[17] does not apply to s. 5A. There the lessor, with the knowledge and approval of the lessee, submitted a lease to the Rent Controller which was a sham, since the terms of the lease as were verbally agreed upon between the parties were not such that the Rent Controller in the exercise of his discretion would have granted an exclusion certificate within s. 86. When the tenant challenged the exclusion of the premises from the provisions of the Act, his arguments were rebutted, since the Certificate granted under s. 86 was conclusive evidence of the exclusion and the court could not review the exercise of the Controller's discretion. This is not so under s. 5A, neither would the second ground of this decision apply, whereunder it was held that the tenant, being a party to the fraud, could not invalidate

[15] (1949) 1 K.B. 475 (C.A.).
[16] Unreported, 24/6/1957, Supreme Court of New South Wales.
[17] (1956) 56 S.R. (N.S.W.) 277.

his own deed. Either s. 5A is or is not satisfied, and the lessor would deceive himself if he took the view that by informing the lessee that he is proposing to attempt registration of a lease whose form or the relevant circumstances whereof do not amount to a compliance with any paragraph of s. 5A(1), he has bound the lessee not to attempt to set the registration of the lease aside, on the ground that the lessee has become the party to a "fraud".

3. *The meaning of "erection" in paragraphs (a) and (c).* In paragraph (a) of s. 5A(1) the erection of the dwelling-house must have commenced after the commencement of the 1954 amending Act, and in paragraph (c) of s. 5A(1) the dwelling-house must have been at that date in the course of erection. There is a twofold problem in interpreting the word "erection" within these paragraphs. Firstly, when does the "erection" of a dwelling-house commence? And, secondly, what additions or alterations to an existing building amount to the "erection" of a dwelling-house? It is submitted that the erection has not commenced when specifications are being prepared or building plans are submitted to the Council for approval, and some physical changes must take place upon the land with a view to the building of a dwelling-house, before its "erection" is commenced. If either (1) foundations have been laid and the work was abandoned before 16th December, 1954, or (2) if the building was being built not to be a dwelling-house and the building operations were abandoned before that date, and (3) the work was resumed in both instances after 16th December, 1954 for the purpose of building a dwelling-house (using the foundations and/or already built portion of the proposed commercial premises), it is submitted that the "erection" of a dwelling-house "commenced" after 16th December, 1954.

In *Barr* v. *Baird & Co.*[18] the Scottish Court of Sessions considered the words "the houses and other buildings existing at the date hereof" in a conveyance. This decision is relevant in discussing the meaning of "erection" in relation to the conversion of a building into several dwellings. A distinction was drawn in the case between "existing" and "erected" since a building which is "erected" after a certain date is not "existing" as at that date. "Dwelling-house" within s. 8 (1A) includes "any part of premises which is leased separately for the purposes of residence", and the division of a building into several complete dwellings with the usual conveniences that comprise a home, may result in the creation of several dwelling-houses out of one building. As shown by the Scottish decision, the alteration would not result in the erection of a new building, but new dwelling-houses would be erected, since the dwelling-houses were not in existence before the alterations to the building. It is submitted that where a building is converted into several dwelling-houses without structural alterations, there would be no "erection", since this phrase implies the carrying out of some building operations. A change in the character of the building by subdivision (without structural alterations) or by a change in the terms of the letting would not constitute the "erection" of a dwelling-house within this Section.

The opinion has been expressed that the alteration of an old building by reconstruction is an "erection" commenced after the date of the alterations, provided that during the alterations the character of the building was so substantially changed, that it could not, at some stage of the alterations, be reasonably described as a dwelling-house. It is submitted that this opinion is sound and it is consistent with the view expressed here relating to the alteration of one dwelling-house into several dwelling-houses by structural alterations, since during these alterations the character of the building as a dwelling-house must inevitably have been lost. If a dwelling-house is completely de-

[18] (1904) 6 Fraser 524.

molished, the new premises commenced to be built after 16th December, 1954 would be "erected" after 16th December, 1954.

The crux of the submissions is that the word "erection" in its particular context in s. 5A(1)(a) does not mean that a new building must be built after 16th December, 1954 to comply with the Section, and it does not exclude the alteration of existing buildings in certain circumstances.

4. *The Meaning of "in existence" in Paragraphs* (b), (d), (e), (f) and (g). In each of these paragraphs there is a reference to "any dwelling-house . . . that was in existence" at a specified date. There is difficulty in attempting to ascertain when does a dwelling-house come into existence during the erection of a new dwelling-house or during the alteration of or addition to a dwelling-house.

In *Oberman* v. *Helbraun*,[19] Gavan Duffy, J. held that for fair rent purposes premises were "in existence" at a certain date and the same premises were in existence later, though at the first date they were unfurnished and at the later date they were furnished. In *Gogel* v. *Lambie*[20] this decision was followed where at the later date a garage was added to the premises. These decisions indicate that within s. 15 of the Act the same premises may remain "in existence" although there was in the meantime an alteration to the premises. Under s. 5A the legislature furnishes no test to ascertain when a particular dwelling-house is "in existence" at a certain date, but it is submitted that premises are in existence as a dwelling-house until they have been so extensively altered (e.g. by demolition of part) that they lose their character as *a dwelling-house*. Thus the erection of one or more new dwelling-houses upon the premises would bring into "existence" new dwelling-houses. As was submitted in discussing the meaning of "erection", the phrase "erected" and "in existence" should be read together, since premises "erected" within the meaning of s. 5A(1)(a) are "in existence" within s. 5A. Whether alterations or additions to a dwelling-house which do not constitute an "erection" within s. 5A(1)(a) may bring "into existence" a new dwelling-house, is an unsolved problem, but according to the restricted interpretation of "in existence" suggested here, such alterations or additions would not suffice.

5. *What Premises comprise "any dwelling-house (not being a residential unit)"?* Paragraph (e) of s. 5A(1) applies to any dwelling-house, not being a residential unit, which was in existence at 10th April, 1958, of which a lessor obtained vacant possession as specified in the paragraph after that date. Under this paragraph the nature of flats, cottages and other forms of dwelling must be considered to determine what type of dwelling comprises a dwelling-house, whilst not being a residential unit. Accordingly, it is proposed to consider the meaning of "dwelling-house" and "residential unit" within this paragraph.

In *Cobbold* v. *Abrahams*,[21] Lowe, J. said that one house may consist of several dwellings, and " . . .where one portion of the building is structurally so separated from the rest of the building as to be capable of occupation by a separate family or household, it may constitute a separate dwelling".[22]

In *Ex Parte High Standard Constructions Limited*,[23] Harvey, C.J. in Eq. examined a covenant not to erect more than "one house" upon certain land, and remarked[24] that " . . . when there is no front door or staircase, no internal communication, when the residential units are structurally separate in every respect, they must, in my opinion, be regarded as separate dwelling-houses within the meaning of a simple covenant such as the present."

[19] (1950) V.L.R. 55.
[20] (1954) V.L.R. 83.
[21] (1933) V.L.R. 385.
[22] *Id.* at 391.
[23] (1929) 29 S.R. (N.S.W.) 274. [24] *Id.* at 279.

In this case each flat had its own external cavity walls and an entrance through a common portico, the flight of stairs leading to the front door of each flat. His Honour remarked[25] that where there was a flat house with a common entrance hall, along which was situate the front door of each flat, it *may be* that such a building is not offensive to a covenant not to build more than one dwelling house. However, in *Murgatroyd* v. *Tresarden,*[26] the Court of Appeal held that two self-contained flats with a common entrance and common stairway, each comprised separate dwelling-houses within the Rent Restriction Acts. In *In re Marshall and Scott's Contract,*[27] Mann, C.J. had occasion to consider the remarks of Harvey, C.J. in Equity in relation to a covenant not to build "any building, save one dwelling-house", and the erection of a villa containing two flats was held to constitute a breach of this covenant. Mann, C.J. followed Harvey, C.J. in giving to dwelling-house the meaning of "a house designed and constructed as a house to be dwelt in by one family", and a building with a common roof and dividing wall between two flats, here in question, was held incapable of being described as one dwelling-house. The Chief Justice remarked[28] that there was much to be said for the view that a building such as this was not a dwelling-house and each flat constituted a separate dwelling-house. This view had already been upheld by the Court of Appeal in *Rogers* v. *Hosegood.*[29] In *Rider* v. *Rollit*[30] two flats in a building, let together, were held to constitute a dwelling-house, but this case rests on its particular facts.

The definition of "dwelling-house" in s. 8(1A) includes "any part of premises which is leased separately for the purposes of residence". Thus most flats, the natural meaning of which, according to Somervell, L.J.,[31] is a "separate self-contained dwelling", would constitute a dwelling-house within the Act. In s. 5A(4), for the purposes of the Section, a residential unit is defined as "any part of a dwelling-house which is or has been designed for occupation as a residence independently of any other part of the dwelling-house", particular attention being focused on the word "part". Accordingly, where a block of flats is built, each flat would constitute a dwelling-house, but not a residential unit within this Section. If several flats are created out of a dwelling by subdivision, alterations or additions, they may comply with the definition of residential unit, but it is submitted that this only arises if during the alterations the character of the building as a dwelling-house is not lost, since in that event new dwelling-houses would be erected instead of merely "parts of a dwelling-house". Thus it seems that residential units within the Section can come into existence through alteration of existing premises by subdivision or by alterations in the nature of the letting, but they cannot come into existence through the erection of a new building.

An important distinction between a dwelling-house and a residential unit within their respective definitions is that a dwelling-house need only be leased for the purposes of residence, whilst a residential unit must also be or have been "designed for occupation as a residence . . . ". It appears that a residential unit must comprise a complete residence in itself and not merely comprise shared accommodation; however, this question awaits decision. It is submitted that one single room used as a bedroom would not constitute a residential unit where the tenant uses other rooms for recreation, meals and other purposes.[32] In *Clutterbuck* v. *Taylor,*[33] policemen living in barracks with separate cubicles for sleeping and sharing other conveniences, sought to have it determined whether these cubicles comprised "a part of a house separately

[25] *Ibid.*
[26] (1946) 63 T.L.R. 62 (C.A.).
[27] (1938) V.L.R. 98.
[28] *Id.* at 99.
[29] (1900) 2 Ch. 288 (C.A.).
[30] (1920) 36 T.L.R. 687 (C.A.).
[31] (1946) 63 T.L.R. 62, 63 (C.A.).
[32] *Barnett* v. *Hickmott* (1895) 1 Q.B. 691.
[33] (1896) 1 Q.B. 395 (C.A.).

occupied as a dwelling" within s. 5 of the Parliamentary and Municipal Registration Act, 1878. This definition is not dissimilar from the definition of residential unit within s. 5A(4), and the test applied by the Court of Appeal in *Clutterbuck's Case*, which may be useful in determining whether part of premises comprise a residence within the definition of residential unit, is as follows: " . . . Taking them (i.e. the tenant's terms of occupation) altogether, are they consistent with the ordinary idea of a man's rights and practice in respect of his own dwelling."[34]

Another problem awaiting solution is whether a "residential unit" within the Section may only arise through alterations or additions made by virtue of the Local Government (Regulation of Flats) Act, 1955.[35] That Act was enacted to enable flats to be provided out of certain existing buildings erected before 30th June, 1949. In the definition of a residential unit no reference is made to the Act, although it is referred to in paragraphs (f) and (g) of s. 5A(1). In these paragraphs the commencement of the Act (13th December, 1955) is referred to as a relevant date and the alterations or additions are not referred to as those carried out by virtue of the Act. It is submitted that there may be residential units within the definition which have not been erected by virtue of the Local Government (Regulation of Flats) Act, 1955, since there is nothing in that Act to prohibit Councils from approving the provision of residential units out of a building erected before 30th June, 1949, by alterations or additions. Even in respect of buildings erected after this date, alterations may be made to provide residential units. However, there must be compliance with the Local Government Act Ordinances relating to flat houses. This would be the case where business premises erected before 30th June, 1949 were between that date and 13th December, 1955, altered into a dwelling-house and residential units were provided out of the dwelling-house after 13th December, 1955.

6. *Obtaining Vacant Possession within Paragraphs* (e) *and* (g). Section 5A(1)(e) and (g) apply if the lessor obtained after 10th April, 1958 vacant possession of a dwelling-house or residential unit respectively otherwise than by an order for recovery of possession made on any of the grounds in s. 62(5)(g), (h), (i), (j) (k), (l), (m), (t) or (v). Obtaining vacant possession by an order on other grounds than the above would be within the paragraphs, and these include non-payment of rent, failing to perform a condition of the lease and being guilty of conduct which is a nuisance and annoyance to adjoining or neighbouring occupiers.

The word "obtain" indicates that if the premises were vacant at 10th April, 1958, these paragraphs cannot be complied with. Vacant possession of the whole of the dwelling-house should be obtained and where only part of a dwelling-house is let, a surrender of that part would not, it is submitted, amount to obtaining vacant possession of a dwelling-house. The surrender of the tenancy, to comply with these paragraphs, may be express or by operation of law (this arises by such conduct of the parties to the lease as is inconsistent with the continuance of the lease). If the surrender arises by granting a new lease for a longer term than the previous term, there is not a valid surrender of the first lease, if the second lease recites that it was granted in consideration of the surrender of the first lease.[35] Surrender under the Landlord and Tenant (Amendment) Act, 1948-1958 must be approached with caution due to the provisions of s. 8 (2), which defines "lessee" as including a person who remains in possession of premises after the termination of his lease. Accordingly, in *Armytage & Jones Pty. Ltd.* v. *Jones*[36] it was held that there was no surrender by operation of law within the Act, unless the old tenant

[34] *Id.* at 400, *per* Lord Esher.
[35] Act No. 50, 1955 (N.S.W.).
[36] (1952) 69 W.N. (N.S.W.) 299.

gives up possession of the premises to the new tenant. For a valid surrender of the tenancy, the whole of the premises leased must be surrendered and not only a part, and sub-tenants should not be left in possession of any portion of the premises.

Where there is a change of tenants otherwise than by assignment of the tenancy, there is a surrender and a new lease even if the new tenant enters into possession as soon as the old tenant moves out, since the landlord must have (even if only for a notionally short period), "obtained vacant possession" of the premises, as appears from *Goodier* v. *Cooke*.[37]

The application of these paragraphs is uncertain where a house is purchased under a contract of sale which provides for sale with vacant possession, and completion takes place after 10th April, 1958. The Section refers to "a lessor" obtaining vacant possession after 10th April, 1958, thus if the vendor obtains vacant possession of the whole dwelling-house from his tenant after 10th April, 1958 with a view to selling with vacant possession, the premises would be within s. 5A(1)(e). To obtain vacant possession within the paragraph is not the opposite of giving vacant possession (which is the obligation of a vendor under the contract of sale) but this phrase is the opposite of "to yield up" or "to surrender". In *Green* v. *Litherland*,[38] it was held that for the purposes of s. 36(1)(a)(v) a person who is not in actual occupation of premises, although entitled to occupy them, cannot vacate them within the Section. Accordingly, it is submitted that where vacant possession from a tenant is obtained before 10th April, 1958 and completion with vacant possession takes place after 10th April, 1958, the purchaser has not obtained vacant possession within the paragraph. In the *Green Case* vacant premises were handed over, and the vendor merely transferred his possessory rights to the purchaser (which he retained till completion of the sale by keeping possession of the keys to the dwelling-house), without doing an act which amounts to yielding up or surrendering possession. Where the landlord occupies the dwelling-house up to completion of the sale and moves out to give vacant possession, then it is doubtful whether or not the purchaser obtained vacant possession within the paragraph, but it is submitted that he does not do so.

7. *The nature of alterations and additions to a dwelling-house to enable a residential unit to come into existence.* Both of paragraphs (f) and (g) of s. 5A(1) apply to any residential unit that came into existence by reason of alterations and additions, made after 13th December, 1955, to a dwelling-house.

The dwelling-house, which is subsequently altered, must, to comply with these paragraphs, have been in existence at the commencement of the Local Government (Regulation of Flats) Act, 1955. That Act was enacted "to enable residential flat buildings to be provided out of buildings" erected before 30th June, 1949. Section 2 provides that the owner of such a building could apply to the Council for permission to make alterations to the building to convert it into a residential flat building, or to make alterations or additions (not exceeding 30 per cent. of the ground floor plan area of the building) for this purpose. Before grant of approval to the proposed alterations, each flat must contain at least two rooms designed for use as bedrooms and one room designed for use as a living room. In regard to the alteration of buildings erected after 30th June, 1949, it is submitted that the local Council may grant permission to make alterations or additions to the building to provide residential units out of it, provided that the Local Government Act Ordinances relating to residential flat buildings are complied with. It may be argued that the reference in paragraphs (f) and (g) of s. 5A(1) to the

[37] (1940) 2 All E.R. 533 (C.A.).
[38] (1949) 66 W.N. (N.S.W.) 201.

Local Government (Regulation of Flats) Act, 1955 mean that only alterations or additions made by virtue of the provisions of that Act comply with these paragraphs, and that "residential unit" in paragraph (e) has a different meaning from its meaning in these paragraphs. It is submitted, however, that the omission from the definition of a residential unit of any reference (even by implication) to the Local Goverment (Regulation of Flats) Act, 1955, is a very important consideration. Together with the arguments already advanced in this connection, it indicates that paragraphs (f) and (g) are not restricted to such residential units as come into existence by virtue of the Local Government (Regulation of Flats) Act, 1955.

8. *Exclusion of Business and Commercial Premises.* Section 5A(1)(a) excludes from Parts II to V of the Act premises used for business or commercial purposes the erection of which commenced after 27th September, 1957. In *Cole* v. *Evans*[39] it was held that even premises used partly as a dwelling-house may be premises used for "business and commercial purposes", and that a shop and dwelling would come within this subsection.

II. *Provisions for Proof of Availability of Alternative Accommodation — Section 70A.*

Section 70A, which is new, was enacted to overcome the unsatisfactory position which arose when a lessor offered to the lessee alternative accommodation. The Court was often left in some doubt either as to the availability of the alternative accommodation at the expiration of the notice to quit, or as to the ability of the lessor to arrange for a valid assignment of the tenancy of the alternative accommodation to the lessee.

Section 70A provides that where a lessor institutes proceedings after 10th April, 1958 on the grounds contained in s. 62(5)(g), (i), (l) or (m) to recover possession of a dwelling-house, an order for recovery of possession cannot be made unless the Court is satisfied that reasonably suitable alternative accommodation was available to the lessee at the date of expiry of the notice to quit, and that this accommodation is immediately available for the occupation of persons at present occupying the dwelling-house. The machinery provided for proof of the availability of the alternative accommodation is that a statutory declaration must be made by the owner of the dwelling-house which is being offered as alternative accommodation (or by the person having authority to lease the same) and filed at the time of laying the information, stating the following: 1. That the premises described in the declaration are the premises provided as alternative accommodation by the lessor at the expiration of the notice to quit; 2. that such premises would be immediately available for occupation by the lessee and other persons occupying the dwelling-house; 3. that the person making the declaration is aware of the provisions of s. 70A(2) and understands its effect.

From the date of filing the statutory declaration the premises specified in the declaration become subject to the Act (even if previously excluded under s. 5A). However this controlling provision does not apply, if either 1. the Court finds that the alternative accommodation is not reasonably suitable or is not provided at the date of expiry of the notice to quit or is not immediately available for occupation by the lessee or other persons then occupying the dwelling-house; or 2. the lessee does not accept the alternative accommodation, although reasonably suitable; or 3. the lessee vacates the dwelling-house and does not accept the alternative accommodation; or

[39] (1954) 71 W.N. (N.S.W.) 246.

4. the lessor discontinues the proceedings and the Court orders that this Section shall no longer apply to the alternative accommodation; or 5. the lessee accepts the alternative accommodation and then vacates it.

III. *Controlling of Decontrolled Premises to Protect Lessees — Section 81A.*

The enactment of s. 81A was necessitated by the provisions of s. 5A(1)(e) and (g), whereby a dwelling-house (or residential unit under paragraph (g)) of which a lessor obtains vacant possession after 10th April, 1958 otherwise than by an order of court on certain specified grounds, is excluded from the provisions of Parts II to V of the Act. Such a provision is an inducement for lessors to seek to persuade lessees to vacate their premises, employing forceful and unpleasant means of persuasion. Section 81A seeks to protect tenants against the use of what the legislature considered unfair means of obtaining vacant possession on behalf of the landlord and s. 5A is made subject thereto.

The section provides that a Court of Petty Sessions for the district in which a dwelling-house (which is not exempted by s. 5A from the provisions of Parts II to V of the Act) is situate, may order on an application by the lessee that the premises, if vacated by the lessee, shall remain subject to the Act as if s. 5A had not been enacted, if any one of four conditions is satisfied.

The first is that the "lessor has done or caused to be done or omitted . . . any act whereby the ordinary use or enjoyment by the lessee of the premises . . . or of any conveniences usually available to the lessee . . . is interferred with or restricted". Conveniences usually available to the lessee are defined as such conveniences as the lessee has been allowed to use at all times during the tenancy or upon a limited number of occasions agreed upon between the lessor and lessee. Ordinary use or enjoyment of premises has been held to include (under an identical provision in s. 81(1)) uninterrupted electricity supply, use of laundry, reasonable access to toilets, or the use of lifts. These decisions are not sufficiently extensive to permit the deduction of general principles as to what constitutes the ordinary use or enjoyment of premises. It is submitted, however, that the interference must relate to the physical use of premises and not be merely the use of threatening or abusive language by the lessor, unrelated to the use of the premises. The interference should be substantial and the tenant's complaint not be merely frivolous, since the interference envisaged in the section is an offence against the Act under s. 81. In *Owen* v. *Gadd*,[40] the Court of Appeal considered a covenant for peaceable enjoyment by the lessee and against interruption or disturbance by the lessor. It was held that the creation of a personal annoyance such as might arise from noise or invasion of privacy does not constitute an interference with the enjoyment of premises. Romer, L.J., said[41] that in considering whether the enjoyment of the premises has been disturbed, we must look to see what were the purposes for which such premises were leased. This decision might be useful in deducing a general principle as to what constitutes the ordinary use or enjoyment of premises.

The second condition is that the section applies if "the lessor has by his conduct endeavoured improperly to induce the lessee to vacate the premises". This would include the use of abusive or threatening words by the lessor, not covered by the first condition, or the doing of any other act or omission by the lessor with a view to inducing the lessee to vacate the premises, which

[40] (1956) 2 All E.R. 28 (C.A.).
[41] *Id.* at 32.

the Court would regard as "improper". Again, as in the first condition, the tenant should have a substantial complaint; it is submitted that some pressure must be exerted on behalf of the lessor so substantial as to compel a reasonable tenant to vacate the premises. A small degree of pressure, such as would arise from informing the tenant that the landlord wishes to "be rid of him", would not (it is believed) suffice without more.

The third condition is that the "lessor unreasonably caused expense and inconvenience to the lessee by requiring him to defend proceedings for the recovery of the premises and that those proceedings were vexatious". Bowen, L.J., in *McHenry* v. *Lewis*[42] remarked that "it would be most unwise to lay down any definition of what is vexatious or oppressive . . . ". It seems that "vexatious" is here used in a sense indicating that the proceedings were bound to fail in all reasonable probability, and that they were only commenced to embarrass the tenant and thereby to induce him to vacate the premises. In both this condition (and in the fourth condition, which applies if the lessor allows the premises "to fall into a dilapidated or dangerous condition") the provisions of ss. 2 of this section must be considered. This provides that the Court may refuse to make an order under the section although conditions one, three or four are satisfied, if the lessor can prove that he did not intend by his conduct to induce the lessee to vacate the premises.

It should be noted that the Court under this section may make an order for a specified period or for such a period as the Court otherwise orders.

IV. *New Ground for Notice to Quit — Section 62(5)(u).*

Three new grounds upon which a notice to quit may be based had been added to Section 62(5) by the amending Act, the important one amongst these being ground (u), which applies in respect of a dwelling-house, where "the lessee has reasonably suitable alternative accommodation available for his occupation for residential purposes". This ground has several advantages to the lessor, *inter alia* a statutory declaration under s. 70A relating to the availability of alternative accommodation need not be filed under this ground and the premises offered as alternative accommodation under this ground do not come within the provisions of Section 70A. Further, the alternative accommodation must be available for the occupation of the lessee. This, however, does not extend to occupants as is the case under s. 70(1)(c), although even under this ground the fact that the alternative accommodation would not be suitable for the occupation of all persons occupying the dwelling-house in respect of which the notice to quit is given, would be relevant in considering hardship. McClemens, J. in an unreported decision held that this ground is complied with even if the lessor offers the alternative accommodation to the lessee.

The amendments also seek to clarify what comprises "reasonably suitable alternative accommodation", and it is provided in s. 70(6) that in determining this the Court shall have regard to the terms and conditions of any proposed lease of the alternative accommodation and to the ability of the lessee of the prescribed premises to pay the rent reserved by the proposed lease. In *Perry* v. *Wright*[43] the Court of Appeal considered a provision whereby "the Court for its guidance may have regard to various facts. Fletcher Moulton, L.J., remarked[44] as to this phrase that "the facts, which the Court may take cognisance of are to be a guide, and not a fetter". It is submitted that under this subsection the previous law as regards the meaning of the phrase "reasonably suitable alternative accommodation" has not been altered, but two matters

[42] (1882) 22 Ch. D. 397, 407 (C.A.).
[43] (1909) 1 K.B. 441.
[44] *Id.* at 458.

were directed by the legislature to be particularly taken into consideration. In *Buckler* v. *Luxmore*[45] it was held that premises may constitute reasonably suitable alternative accommodation, although the premises offered as alternative accommodation for prescribed premises within the Victorian Landlord and Tenant Act, 1955,[46] were premises not protected by the provisions of that Act. The amendment seeks to nullify the effect of this decision, but it is submitted that the alternative accommodation may be reasonably suitable within the Act as amended, even if the premises offered as alternative accommodation are not prescribed premises, provided that the tenant would receive ample protection under the terms of the lease of the alternative accommodation. In *Scrace* v. *Windust*,[47] the Court of Appeal considered a section which provided that "accommodation shall be reasonably suitable if it consists of premises to be let as a separate dwelling on terms which will, in the opinion of the Court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply".[48] Jenkins, L.J. (with whom Romer, L.J., "entirely agreed") remarked,[49] that if the landlord offered the alternative accommodation for a term of years, instead of a weekly tenancy (as was the case there), it may be that the security of tenure in respect of unprotected premises is the same as the security of tenure in respect of premises receiving the protection of the Rent Restriction Acts.

It has been held that in determining whether accommodation is reasonably suitable, only the residential part of the accommodation is to be taken into account and this has now been affirmed by the legislature in respect of ground (u). In *Jones* v. *Millingen*,[50] Walsh, J. held that in determining whether the alternative accommodation is reasonably suitable, the matter must be tested by reference to the reasonable, as distinct from the fanciful, needs of the particular tenant concerned. In *Johnson* v. *Wong*,[51] it was held that where the alternative accommodation is reasonably suitable *prima facie*, but the lessee objects to the disrepair, cleanliness or other relevant factors in connection with the premises which would disqualify it from being reasonably suitable, it lies on the tenant to establish his objection. Considerations such as the purpose of the occupation by the tenant, the actual user of the premises occupied by the tenant, and innumerable other factors, are relevant in determining whether premises are reasonably suitable for the occupation of the lessee. The amendments now make prominent in this connection the ability of the lessee to pay the rent of the alternative accommodation, which previously was only an incidental consideration. The Legislature probably sought to overcome the effect of the decision of the Court of Appeal in *Briddon* v. *George*.[52] In that case the alternative accommodation was held to be reasonably suitable, although the rent of the alternative accommodation was more than double the rent of the prescribed premises.

V. *Tenants' Option to Purchase — Section 88A.*

Courts have constantly been faced with cases of lessors purchasing premises and then seeking to eject tenants subject to whose tenancies the premises were purchased. The lessor then invariably claims to be entitled to possession on the ground that the premises are reasonably required for his own occupation, or that the premises are required for reconstruction or demolition.

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[45] (1957) V.L.R. 329.
[46] Act No. 5884 of 1955 (Vic.).
[47] (1955) 2 All E.R. 104 (C.A.).
[48] S. 3(3) of Rent Restriction and Mortgage Interest Reductions (Amendment) Act, 1933.
[49] (1955) 2 All E.R. 104, 109 (C.A.).
[50] (1954) 71 W.N. (N.S.W.) 187.
[51] (1953) 73 W.N. (N.S.W.) 375.
[52] (1946) 1 All E.R. 609 (C.A.).

The lessor obviously was aware of such needs before purchasing the premises, and completed the purchase on the basis of a lower price than if the premises had been vacant, and that he would have to seek the assistance of the Court to obtain vacant possession. If the Court assists the lessor and an order for possession is made, the Court allows the lessor to make a profit out of his speculation. To resolve this dilemma, the legislature enacted s. 88A, whereby in a sale of a dwelling-house in certain circumstances the lessee is given rights to purchase the premises in priority to other proposed purchasers, and notice of the proposed sale must be given to him to enable him to decide whether he desires to purchase the premises.

This section provides that a person shall not sell or agree to sell any dwelling-house occupied by the lessee, being the only premises comprised in the sale, to a person other than the lessee, unless one of the following conditions is complied with:

1. "the premises are sold at an auction sale of which not less than 14 days' notice in writing is given to the lessee, or
2. the vendor has first offered in writing to sell the premises to the lessee at a price not greater than the price at which the premises are actually sold or agreed to be sold and upon terms as to payment and otherwise not less favourable to the lessee than the terms upon which the premises are actually sold or agreed to be sold and the lessee has not accepted that offer within 14 days after the receipt thereof by him.

It is expressly provided that a contravention of the section shall not invalidate any contract or agreement, but amount to an offence against the Act. Agreements entered into conditionally upon the lessee's rejection of the offer of sale of the premises are not invalidated. It is important to note that this section applies only in respect of a dwelling-house which is occupied by a lessee and which is the only premises comprised in the sale. Thus the section does not apply to the sale of a "flat" house, nor where the premises are sub-let and are occupied only by the sub-lessees. It also appears that the Section does not apply if the lessee is not an occupant of the premises, and only his family occupy the premises. In *Hankin* v. *Clayton*,[53] Napier, C.J., considered s. 26 of the Landlord and Tenant (Control of Rents) Act, 1942-1951, which provides that "an order shall not be made against a tenant who is a protected person under the Act unless it is proved that the premises have been offered for sale to the protected person . . . at a price which in the opinion of the Court is a fair price, the offer has not been accepted by the protected person, . . . ".

It was held that the landlord cannot demand from the tenant under this provision the same price as in a sale on the open market with vacant possession. In s. 88A there is no reference to "fair price", but the terms as to payment and otherwise (meaning probably the terms of sale), must be not less favourable to the lessee than the terms upon which the premises are actually sold. It seems that the terms upon which the premises are offered to the tenant must take into account the tenant's interest.

Conclusion

The sections of the amending Act of 1958 above discussed are of the utmost importance to practitioners and laymen in New South Wales and they are useful amendments of the Landlord and Tenant Act, 1948-1954, notwithstanding the numerous problems of interpretation which attend them. The amending Act also contained important amendments to existing sections, such as ss. 6A, 15, 77 and 87, designed mainly to overcome various decisions

[53] (1952) S.A.S.R. 6.

by appellate courts. The present writer felt that it would be of greater interest to practitioners to canvass here the more novel provisions rather than the mere amendments to old sections. Even then, it remains appropriate to follow the lead given by R. E. Megarry in dedicating this article also to the draftsman of the Act with awe and affection, and to the Bench with a sympathy as profound as it is respectful.

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