IN THE EQUAL OPPORTUNITY TRIBUNAL

No.17 OF 1996

In the Matter of a Complaint by:

KATHLEEN PENNY Complainant

- and -

STATE HOUSING COMMISSION TRADING AS HOMESWEST Respondent

Kathleen Penny, the complainant in this matter, has been living in a house at 44 Hyland Street, Bassendean since 13 April 1992. The house is rented from the Respondent in this matter, the State Housing Commission Trading as Homeswest ("Homeswest").

On 8 October 1996, the Local Court in Midland made an order pursuant to the Residential Tenancies Act ("RTA") that the Complainant deliver up possession of the premises at 44 Hyland Street to Homeswest by 6 November 1996.

On 1 November 1996, the Complainant filed with the Tribunal an application for an Interim Order pursuant to section 126 of the Equal Opportunity Act ("the Act").

Section 126 is in these terms:

The Tribunal or, where the President of the Tribunal is of the opinion that it is expedient that the President alone should exercise the functions of the Tribunal under this section, the President, may, on the application of the Commissioner under section 85, or on the application of a party to an investigation at any time after the lodging of ~~teh~~ the complaint into which that investigation is held, make an interim order to preserve -

(a) the status quo between the parties to the complaint; or

(b) the rights of the parties to the complaint.

The matter was listed to be heard in my office on 5 November 1996. I considered it expedient that I, as Deputy President of the Tribunal, should exercise the powers of the Tribunal. The most compelling factor in this regard was the urgency of the application. That morning, the complainant filed a new application for an interim order. The orders sought by the complaiant were as follows:

1. That the Respondent be restrained from evicting the complainant from 44 Hyland Street, Bassendean, Western Australia, ("the premises") pending determination of her complaint of racial discrimination against the Respondent lodged on 23 September 1996 and her amended complaint of racial discrimination against the Respondent lodged on 4 November 1996 by the Equal Opportunity Commission or by the Equal Opportunity Tribunal at a hearing of the complaint;

2. Until such time as the complaint has been determined, the Complainant is to observe in relation to the premises, the terms of the Tenancy Agreement with the Respondent existing prior to 8 October 1996;

3. There be liberty to the parties to apply on 48 hours notice.

Initially, the application was made ex parte but on 5 November, Mr Sefton, of the Crown Solicitor's Office appeared on behalf of Homeswest. I considered it desirable that Homeswest have the opportunity of considering the papers filed on behalf of the Complainant and to file an affidavit in response.

Accordingly, the matter was adjourned until 6 November.

In considering this application, the Tribunal had before it the affidavits of Kathleen Penny, Sandy Toussaint and Joanne Walsh all sworn on 1 November 1996, the affidavits of Sharon Bushby and Dr Diane Faulkner-Hill both sworn 31 October 1996 and the affidavit of William George Bowker sworn on behalf of Homeswest on 6 November 1996.

The respective contentions

The complainant deposed that she lived at the house in Hyland Street with her husband and 2 grand daughters. However, as the Complainant is an Aboriginal elder, from time to time she has provided emergency accommodation to members of her extended family and on occasions the house has been overcrowded.

The complainant said that in early 1995 she reported that the roof, ceiling and wall of the house were leaking and that the window in the left middle room had accidentally broken and needed repair. Homeswest sent someone to fix the roof but it was only partially repaired and no action was taken in respect of the ceiling and walls notwithstanding the Complainant continued to report those problems to Homeswest.

The Complainant received a Notice of Inspection dated 30 May 1996 from Homeswest. I am told this was the annual inspection of the house. As the Complainant's husband was very sick in hospital at the time, she advised that she was unavailable for the inspection and it was postponed until 21 June 1996. The Complainant deposed that due to her husband's illness she had no time to clean the premises prior to the new inspection date and as well one of her nieces had died and the Complainant had to attend the funeral and go through the mourning process.

Homeswest again postponed the inspection until 5 July 1996 warning the Complainant that any attempt to further delay access to the property would constitute a breach of the RTA and that eviction action would be commenced.

The inspection of the premises took place on 10 July 1996. Following the inspection, by letter dated 12 July 1996 Homeswest drew the Complainant's attention to her obligation to keep the house in a reasonable state of cleanliness, to notify Homeswest within 3 days of any damage and to refrain from intentionally or negligently causing or permitting damage to the premises. The letter also outlined matters which required maintenance and which were considered to be beyond fair wear and tear. The estimate of attending to those matters was $1,500.00. The letter referred to discussions concerning a program to address the issue of cleaning the house and yards and indicated that this work should be completed for inspection on 22 July 1996. The obligation to clean the kitchen and bathroom areas was to be discussed at a later date as Homeswest acknowledged that given the number of adults residing at the house that cleaning would not be able to be completed by 22 July 1996.

The letter also referred to outstanding debts payable by the Complainant including water consumption and tenant liability for repairs. Further, a request was made to verify the income of those living at the premises advising that if that information was not available by 22 July 1996 that the rent would be increased.

On 2 August 1996 Homeswest issued a Notice of Breach of Agreement pursuant to section 52 of the RTA alleging a breach of the agreement by failure to pay water consumption charges and repairs considered as tenant liability and requiring remedy of the breach within 14 days. A letter of the same date accompanied the notice explaining that unless the breach was remedied within 14 days "this may lead to your family being evicted". Further mention was made of the obligation to pay arrears of debts.

On 3 September 1996 Homeswest served a Notice of Termination on the Complainant pursuant to section 61(a) of the RTA. The notice gave notice of termination of the tenancy agreement and required the Complainant to deliver up vacant possession of the premises on 16 September 1996. The breach alleged was "failure to comply with section 38(1)(a) "the tenant shall keep the premises in a reasonable state of cleanliness"". The notice referred to the Notice of Breach dated 2 August 1996.

The Complainant deposed that Homeswest had intensified its complaints and demands against her without giving her the opportunity of explaining the difficulties she was going through. She said that she was so desperate that she wanted to be transferred to another area. She requested to be transferred to the Balga area "under a Head Leasing arrangement through Manguri Aboriginal Corporation". However, the Complainant said that the Respondent refused to consider the transfer because of "antisocial behaviour" in previous tenancies and because of the alleged lack of compliance with their demands to keep the premises in a clean state.

Homeswest wrote to the Complainant by letter dated 5 September 1996 again outlining the alleged breaches to the tenancy agreement and indicating that Homeswest intended to continue with its eviction action but advising the Complainant that if she wished to avoid eviction she would need to:

1. Make a satisfactory arrangement to clear her outstanding debts;

2. Provide a new rental subsidy form with evidence of income so Homeswest can correctly assess her rent;

3. Clean the property inside and out and bring it up to an acceptable standard;

4. Take action to control the behaviour of her family and visitors so that there are no further complaints from neighbours.

Homeswest offered the services of a supported housing assistance program worker to help Mrs Penny comply with those requests.

Homeswest then obtained an order terminating the tenancy from the Midland Local Court on 8 October 1996 to be effective on 6 November 1996.

In the meantime, on 23 September 1996, the Complainant had lodged a complaint with the Equal Opportunity Commission ("the Commission"). The substance of the complaint was that Homeswest had refused her application for a transfer to other Homeswest premises. Although not specifically outlined in the complaint to the Commission, I infer that the complainant was alleging discrimination on racial grounds in that Homeswest refused transfer of her family to other premises.

On 4 November 1996 the Complainant amended her initial complaint to the Commission and the amended complaint was filed on 5 November 1996. In essence, the amended complaint outlines the matters referred to in the complainant's affidavit in support of the interim order but did not in its terms specify which sections of the Act she alleged Homeswest had breached.

During the course of submissions in support of the application for the interim order, Mr Robson on the Complainant's behalf outlined the allegations of unlawful conduct. I refer to these later in these reasons.

Mr Bowker, in his affidavit sworn in opposition to the interim order issue with the Complainant's assertion that she continued to report problems she was having with the roof, ceiling or walls. Further, he outlined that Homeswest had spent $7,564.20 on repairs and maintenance since the tenancy commenced as well as $2,500.00 to replace a bath. Of the expenditure incurred $1,955.94 was determined to be tenant liability. Mr Bowker also advised that there was outstanding rent of $1,100.06, arrears of a Water Authority account of $1,005.21 and outstanding payment of tenants liability for repairs of $1,465.54. He also indicated that no rent had been received by Homeswest since 19 September 1996 and that no explanation had been received from the Complainant.

Mr Bowker also outlined the attempts that he and Homeswest had made to have the house inspected. In particular, he refers to the inspection which was due on 2 August 1996. Mr Bowker deposed that he attended the house and was refused access by the Complainant to advise him that she was too sick to clean it. After discussions with someone from the Aboriginal Housing Directorate of Homeswest, it was agreed that a delay was fair in the circumstances. However, the Complainant advised Mr Bowker that she wished to reschedule the inspection for 12 August 1996 and this was agreed. Mr Bowker advised the Complainant that in view of the history of the matter he intended to issue a Notice of Breach.

Mr Bowker deposed that he returned to the house on 2 September 1996 and again was denied access by the Complainant who informed him that the cleaning had not been done. On 3 September 1996 the Notice of Termination was issued.

The Complainant agreed to an inspection on 7 October 1996 and a property inspection summary of items requiring repair and cleaning was prepared. Mr Bowker conceded that due to an oversight he omitted to arrange for the repair of a window and that work which he had requested to be done in relation to a bung in the kitchen in July had not been done. On inspecting this in October he directed that immediate action be taken but when the repair person attended the house no one was available to let him in. He left a card but there has been no response from the complainant.

Mr Bowker deposed that the Complainant "has been treated no less favourably by me in relation to her tenancy than any other tenant of Homeswest. I have not treated her any less favourably by reason of her Aboriginality and indeed have treated her more leniently than most tenants would generally be treated by Homeswest".

A report prepared by Aboriginal Medical Service in respect of the Complainant's husband and by Dr Faulkner-Hill in relation to both the Complainant and her husband reveals that both are in ill health. Mr Penny is a frail 65 year old man who suffers from epilepsy, angina, hypertension, dementia, poor hearing and the effects of a stroke in 1995 and 1996.

The Complainant was described by Dr Faulkner-Hill as a "severely compromised 61 year old lady". Mrs Penny suffers from poorly controlled diabetes mellitus, moderately severe asthma with frequent chest infections and hospitalisation as well as osteoarthritis, gout, chronic dyspepsia, pancreatitis and chronic depression.

The reports indicated that eviction of the family would have a detrimental effect on the health and well-being of the family.

I was advised by Mr Sefton on behalf of Homeswest that Homeswest intended to proceed with its remedy of eviction pursuant to the court order but would defer issuing the appropriate warrant until the decision of the Tribunal concerning the Complainant's application for an interim order was handed down.

A Threshold Question

An initial question raised by the respopndent is whether the Tribunal can make an interim order which in effect would restrain Homeswest from exercising its remedy pursuant to the order of the Local Court and which would allow the Complainant to remain in possession of the house notwithstanding the effect of the Local Court order is that her present possession is unlawful.

It is clear that the tenancy agreement has come to and end by virtue of the order of the local Court and that as of 6 November 1996 Homeswest is entitled to possession of the premises. I was not supplied with a copy of the court order nor the trancript of proceedings and rely on what counsel has told me about those proceedings.

The Complainant does not challenge the validity of the Local Court order. I was not made aware if the Complainant intended to challenge that order in any jurisdiction (assuming that such a challenge was competent). The effect of an order of the Local Court such as in this case was considered in ***Riley v The State Housing Commission trading as Homeswest*** by Owen J (Supreme Court unreported decision CIV 1461 of 1995 delivered on 1 August 1995 Library No. 950406). His Honour held that the tenancy had come to an end by force of the magistrate's order and "(N)o act of the parties, consensual or otherwise, could revive it" (page 11). The tenancy had come to an end and the [landlord] is entitled to possession unless it has conferred on the tenant a right to occupy which could only be understood in terms of a new tenancy arrangement.

In the present case the Complainant's counsel submitted that the order of the Tribunal be framed to preserve the status quo - that the Complainant remain in possession of the property and that no application be made by the respondent for a warrant to evict the Complainant and that in the interim period, the Complainant abide by the terms of the tenancy agreement which existed prior to the order of the Local Court. However, the effect of such an order would be to impose on the respondent a new tenancy agreement as well as deprive Homeswest of its remedy under the RTA (ie to apply for a warrant and evict the complainant and her family).

In my view it would be very difficult to frame the order as requested. The Complainant is already in breach of the tenancy agreement by failing to keep the premises in a reasonable state of cleanliness and has been found to be so by the local Court. As well there are other alleged breaches relating to non-payment of arrears of debts and it has most recently been alleged that there has been non-payment of rent since 19 September. Given those matters, an order that includes a term that the parties agree to abide by the terms of the tenancy agreement as it existed prior to 8 October, would seem to be inappropriate unless it was conditional on all the breaches being remedied forthwith. It would hardly be fair to inflict on a landlord a new tenenacy agreement when there are continuing breaches of the previous agreement and no apparent prospect of those being remedied.

The other aspect to this application is that the order sought is an interim order. That is, it continues until a fixed date. There is no gaurantee that the Commission will conciliate the complaint and as the complaint is in its early stages, there can be no realistic estimate as to when the matter may be resolved either by concilation by the Commission or ultimately a determination by the Tribunal.

At my request, the Senior Legal Officer at the Commission informed the Tribunal that the Commission has about 100 other complaints in connection with Homeswest. This matter is being processed on the "fast track system" but it is anticipated that the conciliation process will take at least a month. I made this inquiry in order to consider whether I should defer my decision until after the conciliation process had been completed and to provide the respondent with some time frame if it were minded to defer taking eviction action against the complainant.

Certainly, it is possible to extend interim orders but the remedies which the respondent may have puruant to the order of the Local Court may well be jeopardised if the order is made in terms suggested by the complainant.

I prefer to consider the question of the competency of the Tribunal to make the order sought in the context of the principles which I must consider in deciding whether to grant the order.

Both parties agreed, rightly in my view, that the principles to be applied in determining an application for an interim order should follow the principles of injunctive applications under the general law ***(Davies v University of New England(1994) EOC 92-103).***

In a recent case in the Human Rights and Equal Opportunity Commission the learned President made an interim determination under section 25Y of the ***Racial Discrimination Act (1975) Cth*** and section 103 of the ***Disability Discrimination Act 1992 (Cth)*** in circumstances very similar to those existing in this case. The President ordered that the Housing Commission be restrained from evicting a family from their home until a certain date. The Applicant made an application for an interim injunction in the Federal Court to restrain the respondent from evicting the family as the President's decision could only be enforced in that Court ***(Michael v State Housing Commission (1996) EOC 92-929; Brandy (1995) EOC 92-662)***

Although the Federal Court was only considering an interim injunction pending the final determination of the President's order, Carr J held that the principles to be applied both at an interim stage and at the eventual hearing included whether there is a serious case to be tried; whether it would be just to confine the applicant, if eventually successful, to common law damages; and determining where the balance of convenience lies having regard to the strength or weakness of the applicant's case.

Is there a serious question to be tried?

Clearly, the Tribunal has not heard all the facts and law relating to the alleged breaches of the Act by Homeswest. The evidence before the Tribunal has not been tested by cross examination and the disputes between the parties on factual issues remain at this stage unresolved. However, it is relevant to consider whether sufficient evidence has been adduced which, if accepted as factual at an eventual hearing before the Tribunal, would establish that Homeswest has engaged in conduct or committed an act which is unlawful under the Act, ***(Michael at 79,127).***

As I have said, neither of the Complainant's formal complaints to the Commission refer to the provisions of the Act alleged to have been breached.

The Complainant's counsel informed me that the complainant alleges discrimination on the ground of race as follows:

1. In the area of provision of service contrary to section 46 of the Act in that Homeswest has

   (i) refused or failed to provide the service of repair to the premises (section 46(a)); and/or
   (ii) denied a benefit associated with accommodation to the Complainant, namely the benefit of having the repairs to the premises effected (it is said this is contrary to section 46(c)); and/or

2. Homeswest has evicted the Complainant from her accommodation (section 47(b)).

There is no dispute that the Complainant and her family are Aboriginal. There are assertions by the Complainant in her affidavit that she has been treated unfairly because of her Aboriginality. However, those assertions do not amount to evidence of discrimination.

The complainant has not of course been evicted. The respondent has indicated its intention to proceed to evict her but has postponed that process until this decision is delivered. I have no hesitation in finding that there is no evidence that the Complainant has been evicted or is to be evicted because of her race. The material attached to her own affidavit reveals a patient and understanding attitude on behalf of Homeswest in postponing inspections and offering services to assist the complainant in complying with the requests to clean her property and attend to the arrears of debts owing.

Even if I accept the complainant's assertions in her affidavit that there was a failure to repair, there is no evidence which points to this being on the basis of her race. The Complainant's counsel referred to Homeswest's Customer Service Charter which outlines the periods in which repairs are to be effected. He then poses the question, would an elderly, sick white woman in similar circumstances be treated in the same way? That question cannot be answered on the evidence before the Tribunal. I accept that discrimination is often subtle and often covert. However, I cannot at this preliminary stage find any evidence which directly establishes discrimination or any evidence from which to infer discrimination.

The possibility of indirect discrimination was raised by counsel for the Complainant. It was suggested that the apparent neutral policies of Homeswest might operate unfairly on Aboriginal people. However, he conceded, rightly, in my view, that there was insufficient evidence at this stage capable of establishing that and that further investigations would be necessary.

Accordingly, at this stage, on the basis of the evidence before me, it is my view that if this were the hearing of the Complainant's complaint before the Tribunal, it would in all probability be dismissed.

Although the issue of whether there is a serious question to be tried is only one the of factors in determining whether an interim order should be made, in my opinion, having decided that issue in the negative, it would be proper to refuse the application for an interim order. However, I think it desirable to refer briefly to at least the issue of the balance of convenience.

The Balance of Convenience.

Homeswest was granted the order of the Local Court when it established that there had been a breach of the tenancy agreement. As I understand the position, the breach relied upon was one of failing to keep the premises in a reasonable state of cleanliness (see notice of termination dated 3 September 1996).

If the Complainant and her family were to be evicted, I accept that it would have a detrimental effect of the health and well being of at least her husband and herself. Indeed, no issue was taken with this. It is not inevitable that the family would be homeless if evicted. Although no sworn evidence was before me to support this, counsel for Homeswest referred to discussions between Homeswest and the complainant with a view to securing alternative accommodation. However, there is at least a possibility that the family would be homeless in the sense of not having a home of their own even if shelter of some sort could be arranged.

Clearly if one compares the relative detriments of premises being in a state of disrepair and the very real possibility of homelessness or at least a most distressing and potentially health threatening disruption to living arrangements, then the balance of convenience would fall in favour of the complainant.

However, there are other factors to be taken into account. The evidence is that no rent has been paid since 19 September 1996; there are substantial arrears in payment of outstanding debts; there is a lawful order of the Court terminating the tenancy agreement and ordering the Complainant to deliver up possession of the premises by 6 November 1996; and there is no evidence before me that the Complainant has made or will make any reasonable offer to repay the amounts outstanding. These are also factors which I believe I must consider in determining the balance of convenience.

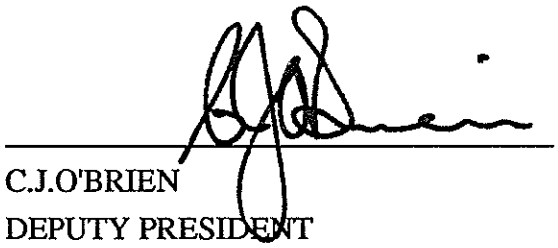
However, Homeswest provides public housing and often for people who are disadvantaged. The Complainant and her husband are elderly and suffer ill health. The Complainant has provided for herself, her husband, her grand daughters and from time to time members of her extended family in what must be very difficult personal and financial circumstances. Surely housing should be recognised as a basic human right. Even taking into consideration all of the factors in favour of Homeswest, in my view, the consequences of eviction for the complainant and her family outweigh in seriousness the consequences for Homeswest even in the context of the obligation of Homeswest to act in the public interest.

However, for reasons alreay expressed it is my decision that the application for an interim order is unsuccessful.

I have not come to this decision lightly. The prospect of Kathleen Penny and her family being evicted is one which is of grave concern. I can only hope that Homeswest will use its best endeavours to assist Mrs Penny and her family to find other accomodation.

I stress that I have not made any factual determination relating to the matters referred to in the affidavits sworn by the complainant and on behalf of Homeswest. In due course they may come to be determined in this jurisdiction at a hearing. In the meantime, the Commissioner will no doubt attempt to conciliate the complaint which has been lodged with the Commission.

The application for an interim order is dismissed.



C.J.O'BRIEN
DEPUTY PRESIDENT
11 November 1996