Reported	(2000) 10 BPR 18,407
Decision :	[2001] ANZ ConR 176
	[2001] NSW ConvR 55-954

New South Wales Court of Appeal

CITATION :	**Conoid Pty Limited & Anor v International Theme Park Limited [2000] NSWCA 189**
FILE NUMBER(S) :	**CA** 40944/95
HEARING DATE(S) :	12 May 2000
JUDGMENT DATE :	25 July 2000
PARTIES :	Conoid Pty Limited and Plangloss Pty Limited v International Theme Park Pty Limited
JUDGMENT OF :	Meagher JA at 1; Sheller JA at 11; Giles JA at 12

LOWER COURT JURISDICTION :	Supreme Court - Equity Division
LOWER COURT FILE NUMBER(S) :	2247/99
LOWER COURT JUDICIAL OFFICER :	Simos J

COUNSEL :	Appellant: B. Coles QC/ M Ashurst. Respondent: N C Hutley SC
SOLICITORS :	Appellant: Landerer & Co Respondent: Baker & McKenzie

CATCHWORDS :	Retail Leases Act - Conveyancing Act - sub leases - assignment - term of sub-lease greater than that of head-lease - meaning of inconsistency s.16 Retail Leases Act.
LEGISLATION CITED :	Retail leases Act, 1994 s.16, Conveyancing Act, 1919 s.127,
CASES CITED:	Hoyts Pty Limited v Spencer (1919) 27 CLR 133, Milmo v Carreras (1946) 1 KB 306, Wilson V Jolly (1948) 48 SR 460, Neva Holdings Ltd v Wilson (1991) 3 NZLR 422, Lee v Ferno Holdings Pty Limited (1993) 33 NSWLR 404), William Shelton & Son Ltd v Harrison & Pinder Ltd (1975) QB 361, Peirse v Sharr (1828) 2 Man & Ry 418, Oxley v James (1844) 13 N & W 209;153 ER 87, Coumbis v Metropolitan Trade Finance Pty Limited (1972) 1 NSWLR 1 (CA); Metropolitan Trade Finance Pty Limited v Coumbis (1973) 47 ALJR 719 (HC), Barrett v Morgan (2000) 2 WLR 284, Jones v Lavington (1903) 1 KB 253, King v David Allen & Sons, Billposting Ltd (1916) 2 AC 54 Suatu Holdings Pty Limited v Australian Postal Commission (1989) 86 ALR 534, Maybury v Atlantic Union Oil Co Ltd (1953) 89 CLR 507.
DECISION :	Appeal dismissed with costs.

S16 RETAIL LEASES ACT 1994-MINIMUM TIME FRAME FOR RETAIL LEASE - STATUTORY INTERPRETATION-COLLATERAL CONTACT-WHETHER STATUTORY REQUIREMENT CREATED INCONSISTENCY WITH HEAD LEASE-CONVEYANCING ACT 1919

Facts: The respondent leased premises on which it conducted a theme park. The nature of the agreement was a periodical tenancy from month to month.
The respondent then licensed retails shops for a period of 15 months to the

appellants. For the purposes of the *Retail Leases Act* 1994, these licences were deemed to be leases.
Pursuant to s.16 of the *Retail Leases Act*, the minimum period of a retail lease was 5 years. If there was any inconsistency between the requirements of the section and the term of the lease actually granted, s.16(2) operated to bring the offending lease into compliance with the provisions of the act. The respondent submitted this provision contradicted the provisions in s.16(5) of the act, which effectively stated that nothing in S16 operated to contradict any terms contained in a head lease. They submitted that the obligations incurred by the appellants via s.16 were inconsistent with its right contained in the head lease.
The trial judge agreed with this line of reasoning. The appellants appealed against this decision. They argued the construction of the section extended their tenure to five years and that it was possible for a lessee of a periodical tenancy to grant a sub-lease of some years duration.

Held:

Meagher JA, Sheller JA agreeing:

1. Two rights or powers would be inconsistent if they were radically different even if it were possible they could co-exist. The respondent's present power to terminate the head lease without penalty is radically different from a power to terminate it and thereby incur a heavy liability in damages; in fact, so radically different that the two powers can properly be classified as "inconsistent".

By Giles JA, Sheller JA agreeing
2. A collateral agreement may only be enforced if the two agreements stand together consistently so the provisions of the main agreement remain in full force and effect. *Hoyts Proprietary Limited v Spencer* (1919) 27 CLR 133.
3. If the sub lease were extended, and the head lease was subsequently terminated, the respondent would be liable to pay damages to the appellants for breach of contract. This effectively means the respondent is bound not to exercise its right to terminate the head lease, which creates an inconsistency between its rights under the head lease and its obligations under the sub-lease.
4. The head lessor who granted only a periodical tenancy will be no more bound to an extended term under a sub lease than to the original term.

ORDERS

1. Appeal dismissed with costs.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40944/99; ED 2247/99

MEAGHER JA
SHELLER JA
GILES JA

Tuesday, 25 July 1999

CONOID PTY LIMITED & ANOR v INTERNATIONAL THEME PARK PTY LIMITED

JUDGMENT

1 **MEAGHER JA**: A company called Hartford Lane Pty Limited was, at all relevant times, the registered proprietor of certain land situated at a location in New South Wales called Eastern Creek. It leased that land to the respondent International Theme Park Pty Limited. At all relevant times the respondent was holding over on a monthly tenancy and s.127 of the *Conveyancing Act, 1919* applied to its tenure. The respondent conducted a "theme park" on the land. On 23 March 1998 the respondent granted to each of the two appellant companies, Conoid Pty Limited and Plangloss Pty Limited, what would be apart from statute, a non-exclusive licence in respect of certain parts of the land. Each document was, for the purposes of this litigation, in the same terms as the other. The purposes for which the licences were granted involved such esoteric activities as "Space Probe 7", "Beastie", "Bush Beast" and "The Demon Roller-Coaster".

2 Each document was dated 23 March 1998 and was said to expire on 30 June 1999.

3 The questions before the trial judge, Simos J, from whose judgment this appeal is brought, concerned the application of the *Retail Leases Act 1994*. The first question was whether, despite their terms, the documents were "leases" within the meaning of the Act. His Honour held they were, and no appeal is brought from that holding. The next question was whether the appellants' activities could be described as "retail" within the meaning of the Act, and his Honour held they could, and nothing in that finding is the subject of the present appeal. Finally, his Honour had to consider the question of the effect of s.16 of the Act on the documents.

4 That section is in the following terms:

> "Minimum 5 year term
> (1) The term for which a retail shop lease is entered into, together with any further term or terms provided for by any agreement or option for the acquisition by the lessee of a further term as an extension or renewal of the lease, must not be less than 5 years. An agreement or option is not taken into account if it was entered into or conferred after the lease was entered into.
> (2) If a lease is entered into in contravention of this section, the validity of the lease is not thereby affected but the term of the lease is extended by such period as may be necessary to prevent the lease contravening this section.
> Note. For example, if a lease is entered into for a term of 3 years,

its term is extended by 2 years to 5 years. If a lease is entered into for a term of 2 years with an option for a further 1 year after that initial 2 years, the term of the lease is extended to 4 years (with the option for a further 1 year after that initial 4 years).
(3) This section does not apply to a lease if a lawyer, or a licensed conveyancer, not acting for the lessor certifies in writing that he or she has, at the request of the prospective lessee, explained the effect of subsections (1) and (2) to the prospective lessee and that the giving of the certificate will result in this section not applying to the lease.
(4) This section does not apply to a lease that results from the renewal of an earlier lease pursuant to an option conferred on the lessee, so long as there was no break in the entitlement of the lessee to possession of the retail shop and the option was granted by that earlier lease or by an agreement entered into before or at the same time as that earlier lease was entered into.
Note. Because of subsection (4), a lease will not be required to be for 5 years if it is a renewal of an earlier lease (because the minimum 5 year term requirement applied to the earlier lease and the availability of the renewal will have been taken into account in determining the term of that earlier lease).
(5) This section does not apply to a lease to the extent that its application would be inconsistent with the terms of any head lease under which the lessor holds the retail shop."

5 The present appellants contended, both before Simos J and before us, that the section, when applied to the present documents, had the effect of extending the term of the appellants' tenure from 30 June 1999 to 22 March 2003. The respondent contended to the contrary, and its argument prevailed.

6 His Honour's reasoning in this respect is set out in paragraph 112 of his judgment, which is in the following terms:

> "It would, in my opinion, be extraordinary in the context of the Act, that a head periodic tenant (head lessee) of a retail shop under a periodic tenancy terminable on, for example, one month's notice could, by granting a sub-lease of a retail shop for a term of, say, five years, produce the result under section 16 of the Act that the sub-lessee of the retail shop had a lease for a term of five years which would bind not only the periodic head tenant (sub-lessor), but also the head lessor who had granted no more than a periodic tenancy to his tenant. In my opinion, the Act could not have been intended to produce such a result and indeed, it is plain, in my opinion, that the legislative purpose of section 16(5) of the Act was to protect the position of a head lessor from what would otherwise have been an unintended consequence of section 16."

7 The view there espoused seems to me to be inapplicable, and is contrary

to the established law, which his Honour himself quoted, that a tenant under a periodic tenancy (or even a tenancy at will) may grant a valid lease for a term of years. Neither the appellants nor the respondent sought to validate it. However, the respondent contended that one reaches the same result on a rather different approach.

8 The appellants, in an able argument presented by Mr Coles QC, their learned Senior Counsel, submitted that "inconsistent", the vital word in s.16(5), meant "impossible to exist at the same time". Thus, he said, a sub-lease could exist from 30 June 1999 to 22 March 2003 together with the head lease. If International Theme Park Limited during that time caused the head lease to terminate, the sublease would also terminate, and in addition, International Theme Park Pty Limited would render itself liable in damages to the appellants' for derogating from its grant. Nevertheless, he said, that does not amount to an inconsistency.

9 The respondent's learned senior counsel, Mr N. Hutley SC, however, submitted that the true legal meaning was a little narrower than that. He drew our attention to High Court authorities, including *Hoyt's Proprietary Limited v Spencer* (1919) 27 CLR 133. In his submission, two powers (or rights or obligations) would be "inconsistent" if they were radically different even if it were possible they could co-exist. Thus, in the present case, on this submission, the respondent's present power to terminate the head lease after 30 June 1999 without penalty is radically different from a power to terminate it and thereby incur a heavy liability in damages; in fact, so radically different that the two powers can properly be classified as "inconsistent". In my view, this argument compels acceptance.

10 I think the appeal should be dismissed with costs.

11 **SHELLER JA:** I have had the benefit of reading in draft the judgments of Meagher JA and Giles JA. For reasons their Honours have given I agree that the appeal should be dismissed with costs.

12 **GILES JA**: The issue in this appeal may be shortly stated. The respondent had a monthly tenancy from the landlord pursuant to s 127 of the *Conveyancing Act* 1919, that is, a tenancy terminable at the will of either party on one month's notice in writing ("the tenancy"). It granted to the appellants retail shop leases within the meaning of the *Retail Leases Act* 1994 ("the Act") for terms of approximately fifteen months ("the sub - leases"). Section 16 of the Act would extend the sub-leases to terms of five years, save that by s 16(5) it does not apply to the sub-leases "to the extent that its application would be inconsistent with the terms of" the tenancy. Was there inconsistency for the purposes of s 16(5) if the terms of the sub-leases, already greater than the period of the underlying tenancy, were extended, and if so to what extent?

13 Section 16 of the Act provides so far as immediately relevant -

> "16. **Minimum 5 year terms**
> (i) The term for which a retail shop lease is entered into, together with any further term or terms provided for by any agreement or

option for the acquisition by the lessee of a further term as an extension or renewal of the lease, must not be less than 5 years. An agreement or option is not taken into account if it was entered into or conferred after the lease was entered into.

(ii) If a lease is entered into in contravention of this section, the validity of the lease is not thereby affected but the term of the lease is extended by such period as may be necessary to prevent the lease contravening this section.

…

(v) This section does not apply to a lease to the extent that its application would be inconsistent with the terms of any head lease under which the lessor holds the retail shop."

Some principles relevant to the sub-lease

14 There was no disagreement as to the principles in the following paragraphs.

15 If the lessee under a lease for a term of years sub-leases for the same or a greater term, the sub-lease is treated as an assignment of the lease because the lessee is left without any reversionary interest (*Milmo v Carreras* (1946) 1 KB 306; *Wilson v Jolly* (1948) 48 SR 460; *Neva Holdings Ltd v Wilson* (1991) 3 NZLR 422; *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404).

16 But this is so only when it is certain that the interest granted by the lessee will last as long as, or longer than, the lessee's interest. If by statute the lessee's term continues until brought to an end by notice (*William Shelton & Son Ltd v Harrison & Pinder Ltd* (1975) QB 361), if the lessee has an option for renewal which, if exercised, will extend the term of the lease beyond the term of the sub-lease (*Neva Holdings Ltd v Wilson*), or if the sub-lessee might not exercise an option for renewal which would take the term of the sub-lease beyond the term of the lease (*ibid*), the sub-lease is effective as such.

17 And, on the same basis, if the tenant under a periodical tenancy grants a sub-lease for a term greater than the relevant period there is no assignment and the sub-lease is effective as such: the tenancy is of indefinite duration, and is regarded as capable of supporting the term (*Peirse v Sharr* (1828) 2 Man & Ry 418; *Oxley v James* (1844) 13 N & W 209; 153 ER 87, in which the grant by a yearly tenant of a sub-lease for 34 years was upheld; *Wilson v Jolly*; *William Shelton & Son Ltd v Harrison & Pinder Ltd*; *Coumbis v Metropolitan Trade Finance Pty Ltd* (1972) 1 NSWLR 1 (CA); *Metropolitan Trade Finance Pty Ltd v Coumbis* (1973) 47 ALJR 719 (HC); *Lee v Ferno Holdings Pty Ltd*).

18 The ability of the tenant under a periodical tenancy to grant a sub-lease for a term greater than the relevant period does not mean, however, that

the term is good against the tenant's landlord. If the landlord terminates the periodical tenancy the sub-lease also comes to an end, and the sub-lessee has no right to possession as against the landlord (*Oxley v James*; *Wilson v Jolly*; *Barrett v Morgan* (2000) 2 WLR 284). Subject no doubt to the provisions of the sub-lease, if the landlord terminates the periodical tenancy it seems that the sub-lessee has no claim against the tenant as sub-lessor (*Jones v Lavington* (1903) 1 KB 253; *Foa's General Law of Landlord and Tenant*, 8th ed (1957) para 436; *Woodfall's Law of Landlord and Tenant*, 1944 ed, paras 11.268, 11.270). In *William Shelton & Son Ltd v Harrison & Pinder Ltd* at 367 the tenant was described as having an indefinite but defeasible reversion, and the sub-lessee's interest must be regarded as similarly defeasible in the event of the landlord's termination of the underlying tenancy.

19 If the tenant terminates the periodical tenancy, the sub-lessee still has no right to possession as against the landlord (*Oxley v James*). But, again no doubt subject to the provisions of the sub-lease, the sub-lessee has a claim for damages against the tenant as sub-lessor (*Barrett v Morgan*). By an act which brings an end to the sub-lessee's possession in the tenant derogates from his grant (*ibid*): the nature of the claim for damages was not amplified in the appeal, but it was accepted that there is a claim.

20 The sub-leases in the present case were in truth non-exclusive licences, although by the definition in the Act leases for the purposes of the Act. The respondent adverted to this. Termination of a periodical tenancy by either the landlord or the tenant will bring to an end the possession of a licensee from the tenant, since the licensee's rights are only contractual rights against the tenant. Termination by the tenant will expose the tenant to a claim for damages from the licensee (*King v David Allen & Sons, Billposting Ltd* (1916) 2 AC 54); it is not necessary to consider whether termination by the landlord might do the same. The appeal was conducted on the basis that for practical purposes the principles in the preceding paragraphs could be taken to govern the status and incidents of the sub-leases.

The arguments on inconsistency

21 In holding that there was inconsistency within s 16(5) of the Act the trial judge said -

> "In my opinion, a head periodic tenancy (head lease) which can be terminated without breach, for example on one month's notice, which termination then results in the termination on one month's notice (as it were) without breach, of a sub-lease for a term of years, is necessarily inconsistent with the sub-lease for a term of years, because the head periodic tenancy (head lease) has the potential within its terms to prematurely bring to an end the sub-lease for a term of years without any breach of either the head lease or the sub-lease.
>
> It would, in my opinion, be extraordinary in the context of the Act, that a head periodic tenancy (head lessee) of a retail shop

> under a periodic tenancy terminable on, for example, one month's notice could, by granting a sub-lease of a retail shop for a term of, say, five years, produce the result under section 16 of the Act that the sub-lessee of the retail shop had a lease for a term of five years which would bind not only the periodic head tenant (sub-lessor) but also the head lessor who had granted no more than a periodic tenancy to his tenant. In my opinion the Act could not have been intended to produce such a result and indeed, it is plain, in my opinion, that the legislative purpose of section 16(5) of the Act was to protect the position of a head lessor from what would otherwise have been an unintended consequence of section 16."

22 So far as his Honour's conclusion was founded on the extended term binding the head lessor who had granted no more than a periodical tenancy to a tenant, I respectfully do not think it can be supported. While it extends the term of a sub-lease, s 16(2) does not say that the extended term binds the head lessor. In the light of the principles earlier summarised, the head lessor who has granted only a periodical tenancy to a tenant will be no more bound to the extended term than to the original term. The respondent did not, in the appeal, seek to support this basis for his Honour's conclusion.

23 The appellants accepted that there would be inconsistency within s 16(5) if the head lease was for a term of (say) three years, such that a sub-lease for an original term of (say) one year would only be extended for a further two years. There would be inconsistency because at the end of three years the lessee would be obliged both to deliver up possession to the head lessor and, as sub-lessor, to give the benefit of possession to the sub-lessee.

24 But the appellants said that the operation of s 16(5) is quite different when the head lease was not a lease for a term but a periodical tenancy. They submitted that in the present case the extended terms of the sub-leases were not inconsistent with the tenancy because, in accordance with the principles earlier stated, the terms would come to an end when the tenancy was terminated. The original sub-leases, they said, were for terms longer than the monthly period of the tenancy, but the law accommodated that situation; equally, the law accommodated the situation if the terms were further extended. The appellants submitted that inconsistency meant conflict with or inability to co-exist with, and that, because the law resolved any conflict and recognised the co-existence of a periodical tenancy and a sub-lease by the tenant for a term longer than the relevant period, there was no inconsistency in the present case by the application of s 16.

25 The appellants referred in particular to *Suatu Holdings Pty Ltd v Australian Postal Commission* (1989) 86 ALR 534, in which Gummow J considered (at 546-7) inconsistency between two statutory provisions in order to decide whether one had impliedly repealed the other. His Honour noted that inconsistency within the meaning of s 109 of the Constitution did not necessarily provided safe guidance in a case concerning two statutes of the same legislature, and cited from non-constitutional cases tests of

repugnancy, inability to stand together, and contradiction. He held that the earlier statutory provision would "prohibit the exercise of rights, or deny the existence of rights" given by the later statutory provision, and that there was "the direct hostility between contradictory propositions that is the hallmark of 'repugnancy' in the sense understood in the authorities I have mentioned."

26 The respondent did not contest the appellants' submission so far as it addressed inconsistency between its obligation to deliver up possession to the landlord if the tenancy was determined on one month's notice and its obligation, as sub-lessor, to give the benefit of possession to the appellants. It did not rely on inconsistency arising in that manner. It submitted that there was inconsistency upon extension of the terms of the sub-leases because the extension of the terms impaired its power to terminate the tenancy.

27 The argument was as follows. Absent the extension of the terms of the sub-leases, the respondent could terminate the tenancy on one month's notice after fifteen months without breach of any obligation owed to the sub-lessees. If the terms of the sub-leases were extended, it could terminate the tenancy on one month's notice during the further 45 months only on pain of claims for damages from the sub-lessees. The effect of the extension was that it was contractually bound to the sub-lessees not to exercise its power to terminate the tenancy, and there was conflict between its power under the tenancy and its obligation under the sub-leases. This, said the respondent, was inconsistency within s 16(5) of the Act, which encompassed inconsistency between powers or between a power and an obligation as well as inconsistency between obligations.

28 The respondent referred in particular to a passage from the judgment of Knox CJ in *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133. Spencer leased premises to Hoyt's for a term of four years. The lease provided that Spencer could terminate the lease on four week's notice in writing at any time during the currency of the term. Hoyt's sought to establish a collateral contract that, in consideration of Hoyt's taking the lease, Spencer promised that he would not terminate the lease pursuant to this provision. It was held that, even if the collateral contract was made, Hoyt's could not claim damages for its breach.

29 Knox CJ said that an agreement collateral to a main agreement is valid and enforceable only if the two agreements "may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement" (at 139). His Honour applied that proposition (at 140-1) -

> "The contention for the plaintiff Company may be stated as follows: 'In consideration of obtaining a lease of premises for a term, we agreed (inter alia) to accept a lease giving the lessor an unqualified right to determine the lease on giving four weeks' notice, but we only consented to execute the lease in consideration of a promise by the lessor that his power to

terminate the lease should be qualified by restricting its exercise to an occasion on which his lessors should request and require him to exercise it.' This is tantamount to saying that under the proviso of the lease the agreement is that the lessor may determine the lease by giving four weeks' notice whenever he chooses to do so, but under the agreement sued on the lessor is bound not to determine the lease by notice unless requested and required by his lessors so to do; or, in other words, that he has the right under the proviso to determine the lease, but is liable to an action for damages for breach of the collateral agreement if he does so.

In my opinion it is impossible to maintain that the agreement on which the present action is founded would not, if valid and enforceable, modify or vary the agreement contained in the lease executed by the parties in regard to a matter expressly dealt with by a provision of the lease, viz, the right to determine it during the currency of the term for which it was granted. If this be so, it is clear that the two agreements—that on which the action is founded and that contained in the proviso in the memorandum of lease—are inconsistent, and so cannot stand together."

30 The other members of the Court also thought that there was inconsistency between Spencer's right under the lease, in the sense of a power and also referred to as such, and his obligation under the collateral contract. Isaacs J said that "[t]he promise relied on is itself an open variation or qualification of the right conferred by the proviso in the lease" (at 143), and after discussing the law to do with collateral contracts said (at 148) -

> "It only remains to consider whether the alleged promise does leave the contractual rights of the respondent under the main contract unimpaired. *Ex concessis* , it does not. The very argument on which the claim is founded is that but for the additional promise the respondent had the power by virtue of the proviso to do what he did. And the plaintiff's case is that that power was cut down by the further promise. There is at once a conflict between the two, with the result that the appellant, though in one breath conceding the full extent of the proviso as a consideration, yet, in the next, cuts it down almost to the point of rendering it nugatory."

Rich J agreed with the judgments of Knox CJ and Isaacs J.

31 In *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507 Atlantic claimed money payable under a written agreement providing for radio broadcasts by Maybury, Maybury cross-claimed for damages for breach of a collateral contract said to have been made in consideration of entry into the written agreement, and the question was whether the collateral contract

was inconsistent with the written agreement.

32 In the joint judgment of Dixon CJ and Fullagar and Taylor JJ it was said (at 517) that a collateral contract must be consistent with the provisions of the main agreement, and that "[i]f the promise sought to modify, control or restrict the principal agreement it would detract from the very consideration which is alleged to support the promise". It was held that there was inconsistency because the written agreement gave Atlantic a discretion to determine when the radio broadcasts would take place, but the collateral contract limited the discretion by prohibiting broadcasts at a time in opposition to a broadcast of another broadcaster. Their Honours said (at 518) that the collateral contract "does impinge on the clause which I [sic] have read, and does affect to alter the rights created by it. We therefore think that the collateral agreement cannot stand with the main agreement and is unenforceable".

33 The respondent acknowledged that these cases concerned agreements between the same parties, but submitted that the notion of inconsistency to which they gave effect was equally applicable where the question was one of inconsistency between agreements with one common party. The respondent also acknowledged that, on the reasoning in these cases, there was inconsistency between the tenancy and the original, unextended, sub-leases, but said that it was inconsistency which it voluntarily assumed, and that it could not have the inconsistency thrust upon it for a longer period by s 16 of the Act.

34 The appellants responded to the inconsistency on which the respondent relied in a number of ways. They accepted that the respondent's power to give one month's notice of termination to the landlord - which they described as a right - was a term of the tenancy. But they said that the right could be "exercised unimpaired", and that there was no inconsistency: the exercise of the right "simply carries with it some potential damages difficulties because, in effect, it's a derogation from the grant to the sub-lessee". In summary, they submitted that for the purposes of s 16(5) of the Act there could not be inconsistency between the respondent's *power* (or *right*) as a term of the tenancy and its *obligation* under the sub-leases. There could only be inconsistency between the respondent's *obligations* under the terms of the tenancy and under the sub-leases.

35 As part of this response, and although the respondent's power to give one month's notice of termination to the landlord was acknowledged as a term of the tenancy, the appellants submitted that "terms" in s 16(5) of the Act meant contractual provisions binding on the sub-lessor as lessee under the head lease, that is, terms imposing obligations on the sub-lessor: it did not include a term conferring a power or right. They said that any extension effected by s 16 of the Act brings an impairment of the rights of the sub-lessor, and that if the sub-lessor thereby incurs a liability on exercising a power or right of termination, that was no more than a working out of the provisions of the Act. And a kind of floodgates argument was suggested, that commonly found break clauses such as that the lessee may terminate

the lease if the premises are destroyed by fire would, if the respondent's submission were accepted, negate extension pursuant to s 16 even though termination was highly unlikely.

Decision on inconsistency

36 It is necessary to return to the words of s 16(5) of the Act. Inconsistency involves comparison, and one of the things to be compared is "the terms of [the] head lease", in the present case the terms of the tenancy. The "application" of s 16 is not of itself another thing capable of comparison with the terms of the head lease, and the provision must mean that there is inconsistency if the result of the application of s 16, in the present case extending the sub-leases from terms of approximately fifteen months to terms of five years, is inconsistency with the terms of the head lease.

37 The comparison with the terms of the head lease can not be simply textual. It must be a comparison with the effect of the terms of the head lease. Similarly, it is the effect of the extended sub-lease which must be considered. There will be inconsistency if the effect of the sub-lease, because of the extension, is inconsistent with the effect of the terms of the head lease.

38 The word "terms" is used, not "term". By the definition in the Act a lease may be oral or in writing or implied, and the terms of a lease may be widely found. There is no occasion to regard "terms" as meaning only terms imposing obligations on the lessee. A power or right conferred on a lessee, provided it can be described as a term of the lease and is not simply part of the lessee's entitlement as a citizen to do as it wishes on which the provisions of the lease do not impinge, is just as much a term of the lease as an obligation imposed on the lessee. Where s 16(5) uses the word "terms", and does not restrict the terms to those imposing obligations on the lessee, the appellant's submission in this respect can not be accepted.

39 The argument that any extension effected by s 16 of the Act brings an impairment of the rights of the sub-lessor does not assist the appellants. An extension does impair the sub-lessor's rights, in that the sub-lessor must give the sub-lessee possession for a longer period. But the question, is whether there is inconsistency with the terms of the head lease. Given impairment because the sub-lessor must give the sub-lessee possession for a longer period, there may be inconsistency because, in the illustration earlier given, the head lease is for a term of three years, and by s 16(5) the impairment is alleviated. It depends on the impairment and any inconsistency within s 16(5).

40 And to describe the sub-lessor's liability to the sub-lessee on exercising a power or right of termination as no more than a working out of the provisions of the Act begs the question. True it is that any extension effected by s 16 means that the sub-lessor, previously free to regain possession without penalty at the expiry of the original term of the sub-lease, can regain possession only under pain of a claim for damages from

the sub-lessee, or even that the sub-lessor will be enjoined from regaining possession. But s 16(5) is part of the working out of the provisions of the Act. As was accepted by the parties, its purpose is not to protect the head lessor, but to protect the sub-lessor. What it protects the sub-lessor from depends on the words of s 16(5). If s 16(5) precludes extension, there will be no extension.

41 The key to the issue in this appeal, it seems to me, is whether the respondent's power to give one month's notice of termination is properly described as a term of the tenancy. That was conceded, in my view rightly so because it is by statute part of the relationship between the respondent and its landlord and regulates how the relationship is to be brought to an end - it is a power conferred on the respondent akin to Spencer's power in *Hoyt's Pty Ltd v Spencer*. As a term within s 16(5) of the Act, then, on the reasoning in *Hoyt's Pty Ltd v Spencer* the effect of the sub-leases, because of the extension, was inconsistent with the effect of the term of the tenancy, in that the exercise of the power would bring liability for damages for breach of the sub-leases. In my opinion, the words of s 16(5) extend to protecting the respondent as sub-lessor in this way.

42 If the floodgates are opened because a judicious break clause in a head lease will preclude extension of the term of a sub-lease, that is the consequence of the words used by the legislature, when other words could have been used. Inundation is unlikely, however, because as the respondent pointed out parties so inclined may already frame a head lease in a manner precluding extension of the term of the sub-lease, simply by including an obligation not to sub-lease for a term exceeding (say) one year.

The extent of inconsistency

43 The appellants submitted that any inconsistency was only to the extent that the respondent or its landlord might terminate the tenancy on one month's notice, and that s 16(5) left the extended term of the sub-lease in place unless or until that occurred.

44 The submission was in substance a corollary to the appellants' submission concerning co-existence of a periodical tenancy and a sub-lease by the tenant for a term longer than the relevant period. The basis on which I have concluded that there is inconsistency passes beyond the submission. It follows from that basis that the extent of inconsistency is complete, in that there is no room for a wait and see period.

The result

45 In my opinion, the appeal should be dismissed with costs.

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