The abandoning tenant, on the other hand, is almost completely remediless and at the landlord's mercy. If the landlord chooses to hold him to it he will be legally bound to the lease for the residue of its term. It is inconsequential that he has the most laudable reason in the world to prematurely terminate the lease. Nor does it matter that he has done all he could to safeguard the landlord's interest as, for instance, by seeking out and offering a good substitute-tenant to the landlord. However ill-motivated he may be the landlord is within his legal rights to reject the substitute-tenant.

Any decision following the *Hughes* approach will only be but another remedy to add to the landlord's already more than adequate armoury. It will not in any way provide compensatory allowance to the highly vulnerable position of the abandoning tenant because nothing in that approach requires the landlord to mitigate the tenant's losses. It will in fact give rise to the anomaly that whilst a contractual remedy (favouring the landlord) is immediately made part of landlord-tenant law its twin concept, the obligation to mitigate losses (favouring the tenant), is not applicable until when it becomes too late.[19]

On the other hand the *Maridakis* approach, if followed, will serve as a mere palliative to the abandoning tenant. It will provide him some relief only in the sense that the landlord may, by his own conduct, cause a surrender by operation of law to arise and thereby terminate all the tenant's prospective liabilities under the unwanted lease.[20]

Whichever line of approach eventually prevails will only be of momentary significance. It seems abundantly clear that a complete re-adjustment of the rights and obligations of landlord and tenant is urgently called for as a long-term solution to what is yet another inherently maladjusted feature in today's landlord-tenant law.

GIM L. TEH*

271 WILLIAM STREET, PTY. LTD. v. THE CITY OF MELBOURNE[1]

This case is yet another which highlights the dilemma confronting the Courts in analyzing and applying the concepts involved in town planning legislation.

19 The obligation to mitigate losses arises only at the point when acceptance of repudiation has occurred: *Buchanan's* case (1906) 3 C.L.R. 704, 714, 718, 720-1. As the facts in the *Maridakis* case showed, that may occur only after the premises have been left lying idle for many months and at great expense to the abandoning tenant.

20 The concept of an implied surrender was probably introduced into the common law as a device to safeguard landlords from committing trespass when they re-enter or re-let premises abandoned by their tenants: see C. M. Updegraff, "*The Element of Intent in Surrender by Operation of Law*" (1924) 38 Harv. L.R. 64. However, this landlord-oriented rule has ironically turned out to be of some advantage to the tenant: see Charles T. McCormick, *op. cit.*

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1 [1975] V.R. 156; Harris J.

In 1971 the Melbourne City Council granted a permit to erect a ten storey building on the north-west corner of William and Little Lonsdale Streets, Melbourne. The City Council was a permit granting authority for the purposes of the *Town and Country Planning Act* 1961 (Vic.). In May of the same year the Company owning the building was granted an amended permit containing a special condition which provided that an open ground-floor area on the corner of the building be made available as a pedestrian thoroughfare, allowing people, not necessarily the users of the building, to use the thoroughfare as a shortcut. However, to the concern of the owners, a few months after the completion of the building it was discovered that the paved area was serving more than the purpose of a pedestrian walkway. It had become a haven for drunks, derelicts and "undesirables" who, in the words of the appellants, were "befouling" the area. In response to the misuse of this paved area the owners sought an amendment to one of the conditions of the permit so that the area could "be closed to all pedestrian public outside normal office hours". The Council acceded to their request and granted a third permit allowing alterations to be made to enclose the ground floor area. A condition in the third permit specified the hours during which the area should remain open to the public.

The Company owning the building then wrote to the Town Planning Appeals Tribunal (which treated the letter as amounting to an appeal pursuant to Section 19(1)(b) of the Act) asking it to rule the condition inappropriate or alternatively to modify the condition regarding pedestrian access, so that the walkway area could be permanently enclosed to give entry only to users of the building. The Company argued that the volume of pedestrian traffic passing through the enclave was low and also that the use to which the lobby area was being put by persons other than pedestrians was causing considerable inconvenience to the owners and users of the building. The Melbourne City Council responded by asserting that the provision of walkways in buildings was to assist the existing movement of pedestrians in the vicinity and to provide for the future pedestrian traffic in the Central City District. It emphasized that to allow the appeal would defeat one of the major themes in the proposed City of Melbourne (Central Area) Planning Scheme, which aimed to provide adequate movement of pedestrian traffic within this central area. The Town Planning Appeals Tribunal upheld the City Council's submission and ruled that the condition was reasonable and not *ultra vires* the permit granting authority.

In February, 1974 the Company was granted an Order Nisi to Review the decision of the Town Planning Appeals Tribunal pursuant to Section 22B(3) of the *Town and Country Planning Act*. Upon the return of the Order Nisi before Harris J. of the Supreme Court of Victoria it was submitted by Counsel on behalf of the appellant Company that the condition requiring the ground floor area to be kept open to pedestrian traffic was *ultra vires* on the following grounds:

1. That the condition was not fairly and reasonably related to the permitted development.

2. The condition substantially altered or interfered with the property rights given to the appellant by the general law, and the *Town and Country Planning Act* contained no clear or express indication of a parliamentary intention that rights are to be affected in that way.
3. The condition was unreasonable, in that the land was to be dedicated to the public without compensation.

Although all three grounds were dealt with by the Court the decision basically turned on the first ground, namely to determine whether the condition regarding access was "fairly and reasonably related to the permitted development". The appellant argued that, in order to be valid, the Condition had to be closely tied to the particular development or site, and would be invalid if imposed to achieve some ulterior purpose, either not related to the building or too remotely connected with the development. In particular the condition imposed in the present case was not designed to achieve a legitimate purpose associated with the development in question but was related to the respondent's general policy of facilitating pedestrian traffic within the central business district and, more specifically, to anticipated future increases in pedestrian traffic consequent upon the opening of the nearby underground railway loop terminus. The appellant relied on Lord Justice Denning's judgment in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[2] where, in speaking of a similar power to attach conditions to a permit under the English town planning legislation, he said:[3]

> "Although the authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that these conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

The appellant's contention was that the Council was pursuing an ulterior and unauthorized object in imposing the access condition.

The Respondents, on the other hand, relied upon the wider test formulated by Mr Justice Walsh in the High Court decision of *Allen Commercial Constructions Pty. Ltd.* v. *The Council of the Municipality of North Sydney*,[4] namely, that while the permit granting authority's discretion to impose conditions is limited to conditions:[5]

> ". . . which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised as ascertained from the consideration of the Scheme and the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkin in *Fawcett Properties Ltd.* v. *Buckingham County Council*[6] as being 'the implementation of planning policy', provided that it is born in mind that it is from the Act and from any relevant provisions of the ordinance, and not from

[2] [1958] 1 Q.B. 554.
[3] Ibid. p. 572.
[4] (1970) 123 C.L.R. 490.
[5] Ibid. p. 499.
[6] [1961] A.C. 636 p. 684-5.

some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained."

In formulating his judgment Mr Justice Harris adopted the latter test, observing that the real issue to be determined was not whether the condition reasonably related to the permitted development but was whether it was:

". . . reasonably capable of being related to the implementation of planning policy."[7]

The scope of such policy however, was to be ascertained from the *Town and Country Planning Act* 1961 and the Interim Development Order. The legitimacy of a condition will depend on whether or not it is consistent with the policy of the Act. Thus while the restrictions and regulations which the Planning Scheme may contain must be applied to particular properties they do not necessarily have to relate *solely* to the development or use of those particular sites or properties, but may relate to the planning objective for the whole area.

In accepting and applying the test stated in *Allen Commercial Constructions* Mr Justice Harris was correctly, it is submitted, giving effect to a development in town planning law exhibited in all the English cases[8] following the *Pyx Granite* case. In cases like *Fawcett Properties* (cited by Walsh J. in *Allen Commercial Constructions*) the English Courts examined the Denning test and expanded it, to allow greater width of flexibility for the authorities responsible for town planning. The present case is in line with that development.

With regard to the second submission by the appellant Company, namely, that the condition substantially altered or interfered with property rights, his Honour held that the *Town and Country Planning Act* did authorize interference with such rights and in support cited the decision of *Hall Co. Ltd.* v. *Shoreham-by-Sea Urban District Council*,[9] in which Lord Justice Willmer said of the English legislation:[10]

"The whole scheme and purpose of the *Town and Country Planning Act* is to limit the exercise of the owner's property rights. The statute in question here does to my mind clearly and unambiguously authorize the imposition of conditions which will necessarily interfere with the owner's rights or property."

A similar view was expressed in *Jansen* v. *Cumberland County Council*[11] where Sugerman J. held that legislation which empowers the making of town planning schemes was:

[7] [1975] V.R. 156, 163.

[8] For example *Mixam's Properties Ltd.* v. *Chertsey Urban District Council*, [1964] 1 Q.B. 214; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council*, [1964] 1 W.L.R. 240; *Kent County Council* v. *Kingsway Investments (Kent) Ltd.*, [1971] A.C. 72.

[9] [1964] 1 W.L.R. 240.

[10] Ibid. pp. 247-8.

[11] (1952) 18 L.G.R. (N.S.W.) 167, p. 170. The Supreme Court of New South Wales cited with approval the dictum of Sugerman J. in *North Sydney Municipal Council* v. *Allen Commercial Constructions* (1969) 18 L.G.R.A. 1, 6.

> "legislation which on every hand manifested the plainest intention to interfere with the common law right of land owners to do as they will their own."

In the present case Harris J. concluded that the mere fact that an interference with property rights could be demonstrated did not of itself establish that the condition was *ultra vires* since the legislation as a whole patently intended to authorize such interference.

In 1974 exactly thirty years after town planning legislation was introduced in Victoria[12] and almost seventy years after the first Town Planning Act was passed in England[13] concepts of town planning are so well established and the authorities on the point so unequivocal that the appellant can hardly hope to succeed on the argument that this was legislation containing no clear or express indication that property rights were to be affected.

The appellant's final submission that the condition in the permit was unreasonable in that the land was to be dedicated to the public without compensation was also rejected by His Honour. The appellant relied on the English decision of *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council*,[14] where a condition in the permit required the developer to construct a road over its land and to give the public free access to it. They were, in effect, to dedicate the road to the public without compensation. This condition was held by the Court to be "unreasonable" and thus invalid. On the other hand, the respondent argued that the present case was distinguishable from *Hall's* case and relied on the High Court decision of *Lloyd* v. *Robinson*[15] where a condition in the permit required the applicant to transfer to the Crown twenty acres of land without monetary compensation, was held to be validly imposed. The Court was of the opinion that, by complying with the conditions of the permit, the developer was being granted the right to subdivide so that it could not be said that the land was being transferred to the Crown without compensation. Thus the test applicable is not whether compensation is payable or the adequacy of compensation, but simply whether the conditions in the permit, however unreasonable, are based upon proper planning considerations. If they are, they are simply the "price" the developer must pay for his permit. There is no obligation on the permit granting authority to set a reasonable "price".

His Honour held that the facts before him were more in line with the decision of the High Court in *Lloyd* v. *Robinson* than *Hall's* case and that restrictions and requirements imposed by conditions such as the condition before him were not to be classified according to concepts of real property law, but according to concepts peculiar to town planning law and that, in any event the said condition did not create any public proprietary right. His Honour was obviously correct since the condition in the permit did not give the public as such any right in law to the use of

[12] *Town and Country Planning Act* 1944 (Vic.).
[13] *The Housing and Town Planning Act* 1909 (U.K.).
[14] [1964] 1 W.L.R. 240.
[15] (1962) 107 C.L.R. 142.

the walkway as against the building owners. Thus, for example, if the owners were in breach of the condition in the permit excluding the public, only the permit granting authority may pursuant to section 49(2) of the Act, apply to the Supreme Court, or a Judge thereof, for an injunction restraining the owners of the building from contravening the condition in the permit.[16]

The importance of the *William Street* case is that it allows Municipal Councils who are ordinarily the permit granting authority under the *Town and Country Planning Act* to act more effectively in implementing planning policy for an area rather than to pursue their overall policy in a fragmented way by tieing conditions to individual buildings, sites or developments. The test adopted by Mr Justice Harris makes it easier for the authority to achieve the general objectives of an approved or proposed scheme and is consistent with accepted town planning principles in that it maximizes flexibility of action. The *Town and Country Planning Act* is characterized by the setting of minimum legal criteria within which the powers granted by the Act are to be exercised, and deliberately sets out to provide flexibility by maximum dependence on subordinate regulations and administrative decisions. This high degree of flexibility found under the town plannng legislation, which deals with broad community interests, is in marked contrast to other areas of property law such as the *Transfer of Land Act* 1958 (Vic.) and the *Property Law Act* 1958 (Vic.) which are concerned with the recognition of individual property rights by setting down stricter criteria in relation to dealings with land. This type of control is alien to town planning law and was recognized as such by His Honour in the *William Street* case.

The practical effect of the decision in this case is that Municipal Councils may make long term plans for the development needs of their area by anticipating future growth, transportation and other changes and to pursue those by attaching conditions to town planning permits even though those conditions may conflict with the immediate needs, purposes or interests of individual property owners or developers. The impact of the case on the homeless men barred from the temporary shelter of the building is, however, not recorded.

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[16] The owners of the building would also be committing an offence under s. 49(1) of the said Act and be liable to a penalty.

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