

THE RETAIL SHOP LEASES ACT

In the matter of

Dispute No 2006/0051

Ananda Trading Company Pty Ltd (ACN 115 081 322)

- Claimant

- and -

**Bruce Chalmers, Laurel Chalmers, RSW Nominees Pty Ltd (ACN 005 067
363), and RP & LF Lord Pty Ltd (ACN 006 001 298)**

- Respondents

Coram: Mr Barry Cotterell (Chair)

RULING ON JURISDICTION OF TRIBUNAL

Given on Friday, 10 August 2007

In the Amended Outline of Dispute, the Claimant claims compensation against the Respondents under a lease. It relies upon sections 43(1)(c) and 46A of the *Retail Shop Leases Act 1994 (the Act)*.

This preliminary application arose because the Tribunal requested submissions on the Tribunal's jurisdiction and specifically requested submissions on:

1. the impact upon the matter of the 2006 amendment to the definition of *retail shopping centre* in section 8 of the *Act*.
2. the impact upon a claim under section 43(1) of the *Act* of *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal [2006] QSC 172: BC 200605373 (P McMurdo J)*

In addition the Claimant sought in this preliminary application, a decision on whether or not it could add a head of claim under section 52 of the *Trade Practices Act 1974 (Cth)*.

In its submissions in response the Respondents alleged that the subject lease was an "existing retail shop lease" under the *Act* with the consequence that the *Retail Shop Leases Act 1984 (the old Act)* applied and sections 43(1)(c) and 46A of the *Act* were not available to the Claimant. They also submitted that the Tribunal did not have jurisdiction under section 86(2) of the *Trade Practices Act 1974*. They sought orders that the Tribunal make findings accordingly and dismiss the claim at this preliminary application.

THE FACTS

The Respondents are owners of Lot 4, BUP 8810, County of Marsh, Parish of Weyba located in Noosa (the premises). On 1 June 1998 the premises were leased to Mr and Mrs Powell.

Mr Bruce Chalmers, one of the Respondents, who incidentally is a Victorian solicitor, states in his affidavit of 4 July 2007:

"11 After Mr and Ms Powell exercised the option to renew contained in the Previous Lease, the Respondents entered into a new lease agreement with Mr and Ms Powell. The written lease agreement is Registered Lease No 70402175 ("the lease") (sic)." (my emphasis)

The registered lease is actually No. 704102175 and is in evidence before the Tribunal (the lease). It commenced on 1 June 1998 with a term of 5 years to 31 May 2003 and one option to renew for a further term of 5 years.

By July 2005, this lease had been assigned on three occasions and the lessee was now Pulp Juice Bars Operations Pty Ltd. They advertised the premises for lease through Century 21 Noosa (Century 21). The Claimant,

through its sole director, Maysie Bestall-Cohan, (Ms Bestall-Cohan) identified the premises as a suitable location to operate its business and commenced negotiations through Century 21.

It is common ground that:

- a) The lease in July 2005 provided that the premises could not be used for any purpose other than “for the conduct of a Café business” and;
- b) The permitted use restriction in the lease was changed at the time of entry into the assignment of the lease by deed of 1 September 2005 when the permitted use clause was changed to “for the conduct of a concept store stocking fashion clothing, fashion accessories, scarves, jewellery, gift ware, shoes and beauty products and other associated products”. This amendment was recorded by dealing no. 704102175.

THE LAW

The Act came into effect on 28 October 1994.

Is the lease a Retail Shop Lease?

A retail shop lease is defined in the Schedule Dictionary to the Act as a lease of a retail shop, subject to certain exclusions which are not relevant here.

Retail shop is defined as premises that are:

- (a) situated in a retail shopping centre; or
- (b) used wholly or predominantly for the carrying on of 1 or more retail businesses.

Retail business is defined as a business prescribed by regulation as a retail business.

The permitted use, either in its original form or the amended form, falls within business prescribed by the Retail Shop Leases Regulations.

The Lease is a retail shop lease within the meaning of the Act and comes within part (b) of the definition.

Section 13(1) of the Act provides that the Act applies to all retail shop leases whether entered into or renewed before or after 28 October 1994, subject to sections 13(2) to 13(7) the relevant subsections of which provide as follows:

“(2) This part (other than section 14), part 5 and part 6 do not apply to existing retail shop leases.

...

(6) Part 6, division 8A, applies only to a retail shop lease entered into after the commencement of the division.

(7) Subsection (1) has effect subject to the following provisions—

- section 15*
- section 16*
- section 17*
- section 21*
- section 42*
- section 45(3)*
- section 46(9)*
- part 7.”*

Section 14 is headed “Continued application of certain provisions of former Act to existing retail shop leases” and may need to be considered here if it is determined that the lease is an “existing retail shop lease”.

Part 5 of the Act is headed “Preliminary disclosures about leases” and Part 6 is headed “Minimum lease standards” and is of particular relevance because it includes Division 7 headed “Implied provisions for compensation” and includes sections 42 to 44 which deal with compensation and “When compensation is payable by lessor”. Therefore, if this lease is an “existing retail shop lease” Parts 5 and 6 of the Act would not appear to be available to the Claimant. Part 6 division 8A is headed “Provisions about unconscionable conduct” and contains sections 46A and B. This division came into effect on 1 July 2000.

As I understand the situation here, the parties did not comply with disclosure provisions of Part 5 which “may” have required the Respondents to disclose the pending renovations to the Claimant.

Because section 13(2) states that Part 5 does not apply to existing retail shop leases the fact that section 21, which is within Part 5, states amongst other things, that this part (Part 5) does not apply to “(b) a retail shop lease entered into or renewed under an option under a retail shop lease” can only mean that Part 5 does not apply to leases entered into or renewed under an option which occurs after the Act has come into effect.

Because of this, Part 5 appears only to apply to a fresh grant of a lease after 28 October 1994. It is hard to understand that this is what the Parliament intended when dealing with disclosure issues but because of the convoluted way in which the Act is drafted, this is the only result which is available using statutory interpretation.

While sub-section 13(2) states that Part 6 does not apply to existing retail shop leases sub-section 13(7) states that sub-section 13(1) which states that the Act applies to all retail leases whether entered into or renewed before or after 28 October 1994, is subject, amongst other sections, to section 42 (Compensation provisions implied in certain leases) which applies section 43 (When compensation is payable by lessor) and section 44 (Amount of

compensation) into all retail shop leases (other than leases for a periodic tenancy or a tenancy at will). Therefore, by virtue of sub-section 13(7) the compensation provisions of sections 42, 43 and 44 apply to all retail leases whether entered into or renewed before or after 28 October 1994.

Just to complicate matters further, section 21 goes on to provide that sections 22 (Lessor's disclosure obligation to prospective lessee), 22A (Prospective lessee's disclosure obligation to lessor) and 23 (Lessor to give lessee certified copy of lease), all of which are in Part 5, do not apply to an assignment of a retail shop lease. Because 13(2) states that part 5 does not apply to existing retail shop lease, section 21 can only have effect if it applies to assignments which occur after 28 October 1994.

Is the lease an existing lease under the Act?

In the Schedule Dictionary to the Act "existing retail shop lease" is defined as follows:

"existing retail shop lease means—
(a) a retail shop lease entered into or renewed before the commencement of this section; or
(b) a retail shop lease entered into, or renewed, under an option under an agreement that was entered into before the commencement of this section; or
(c) a retail shop lease entered into under an agreement for lease that was entered into before the commencement of this section; or
(d) an assignment of a retail shop lease mentioned in paragraph (a), (b) or (c)."

As I understand the Respondents submissions, they argue that the lease is an *existing retail shop lease* because at clause 10 it states "This lease has been executed by the parties as a result of the Lessee's exercise of the option to renew contained in Lease No L691269G. This is contrary to the evidence of Mr Chalmers referred to above where he referred to it as a "new lease agreement" with which I agree as a statement of fact and of law.

In *De Rose and others v State of South Australia and others* [2003] FCAFC 286, to which I was referred, the court, after discussing the law, and in relation to the South Australian *Pastoral Act 1989* stated:

"402 There is a clear distinction between the grant of a new leasehold estate and the continuation of an existing tenancy in an altered form. In adopting the expression "grant of... a pastoral lease", both provisions use language that is apt to embrace the former, but not the latter. It would be a misuse of language to refer to an extension of the term of an existing lease, where the existing lease remains on foot, as the grant of a lease. The position is different where there is a renewal of a lease upon the expiry of the initial term, since the renewal operates as the grant of a fresh lease."

I adopt this as a statement of the law which needs to be applied here.

As Mr Chalmers has correctly stated in relation to this lease, on 1 June 1998 there was a renewal of the lease upon the expiry of the initial term and the renewal operated as the grant of a fresh lease. This is also clear from the document itself.

As the Act came into effect on 28 October 1994, this lease is governed by the Act subject to its various sections.

For these reasons I accept the submissions of Mr Marks of Counsel, on behalf of the Claimant, that the exercise of an option to renew, in a lease, brings into existence a new lease, and does not simply extend the term of the existing lease. He also submitted that there is authority for the proposition that this operates as a surrender and re-grant, though it is a matter of construction. He referred to the law as gathered by Sackville J in *DB Reef Funds Management Ltd v Commissioner of Taxation* (2005) 218 ALR 144; 2005 ATC 4302. Under the circumstances here I do not think I need to decide that point.

Likewise, because of my finding as to this lease, I do not need to consider the effect of the amendment of the lease which occurred in 2003.

However, the lease was assigned by deed on 1 September 2005 to the Claimants and this brings into play section 21 of the Act, which as I have already stated, can only have effect if it applies to assignments which occur after the Act has come into effect. Therefore, the parties did not have to comply with sections 22 (Lessor's disclosure obligation to prospective lessee), 22A (Prospective lessee's disclosure obligation to lessor) and 23 (Lessor to give lessee certified copy of lease).

If the Respondents had been required to comply with section 22 this may have partly prevented some of the problems for which the Complainant seeks compensation as the Respondents may have revealed the fact that renovations to the complex were about to be commenced by the Body Corporate or, at the very least, that they were being actively considered by the Body Corporate. The Act appears to be deficient in regard to ensuring transparency.

That having been said, section 43 upon which the Claimant relies for its compensation claim is available to it on the basis of my finding that the lease was entered into 1 June 1998 after the Act was in effect. Section 46A (Unconscionable conduct) is also available as it commenced on 1 July 2000. Its terms do not limit its application to entering into leases.

Succeeding with a claim under these sections, of course, is a different issue to having them available.

There is no doubt as to the Tribunal's jurisdiction to hear this dispute which is clearly a *retail tenancy dispute* which in the Schedule Dictionary is defined as:

“retail tenancy dispute means any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.”

JURISDICTION UNDER THE TRADE PRACTICES ACT 1974?

There is not an actually a claim before the Tribunal which relies on the *Trade Practices Act* and given the findings made above, a claim which relies on the *Trade Practices Act* may not arise. Under the circumstances where there is not a *retail tenancy dispute* involving the *Trade Practices Act*, the Tribunal lacks jurisdiction to make a determination. It would simply be an advisory opinion which courts decline to make and I think this Tribunal should also decline to make.

SECTION 8

Upon considering the submissions of the parties that this lease falls within part (b) of the definition of “retail shop lease” I am satisfied that the 2006 amendment to the definition of *retail shopping centre* in section 8 of the *Act* is irrelevant to this dispute.

LOGAN CITY SHOPPING CENTRE PTY LTD V RETAIL SHOP LEASES TRIBUNAL

In *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal [2006] QSC 172: BC 200605373*, McMurdo J found that section 43(2) of the *Act* did not entitle an assignee to claim compensation from a lessor under the circumstances outlined in sub-sections (a) and (b).

Upon considering the submissions by the Claimant that it is claiming under section 43(1)(c) of the *Act* and not section 43(2) it is not necessary for me to consider this matter as there appears to be no impact.

CONCLUSION

The Tribunal finds that it has jurisdiction to hear this dispute for the reasons set out above and consequently declines to dismiss the claim at this preliminary application.



Barry Cotterell
Chairperson
10 August 2007