

SUPREME COURT OF QUEENSLAND

CITATION: *Harrison v Inala Plaza P/L & Anor* [2002] QCA 543

PARTIES: **WARREN GEORGE HARRISON**
(applicant/appellant)
v
INALA PLAZA PTY LTD ACN 081 899 247
(first respondent/first respondent)
MEDIHELP GENERAL PRACTICE LIMITED
ACN 010 695 173
(second respondent/second respondent)

FILE NO/S: Appeal No 9652 of 2002
SC No 7285 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 December 2002

DELIVERED AT: Brisbane

HEARING DATE: 28 November 2002

JUDGES: Davies and Williams JJA and Helman J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Appeal dismissed.**
2. Appellant to pay the first respondent's costs of the appeal.

CATCHWORDS: CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - OTHER MATTERS - where lease between the first respondent and the second respondent for a "Medical Centre" - where the legal context in which the lease was made meant the premises could not have lawfully been used as a pharmacy - whether the term "Medical Centre" in the lease may include a pharmacy

LANDLORD AND TENANT - USE AND OCCUPATION - whether the term "Medical Centre" in a lease between the first respondent and the second respondent may include a pharmacy

National Health Act 1953 (Cth), s 90, s 92, s 93, s 99L
Pharmacists Registration Act 2001 (Qld), s 237

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, applied
Edwards v O'Connor [1991] 2 NZLR 542, considered
The World Symphony [1992] 2 Lloyds Rep 115, considered
Toomey v Eagle Star Insurance Co Ltd [1994] 1 Lloyds Rep 516, considered

COUNSEL: P D McMurdo QC, with T Bradley, for the appellant
 J S Douglas QC, with M Gynther, for the first respondent
 No appearance on behalf of the second respondent

SOLICITORS: Minter Ellison for the appellant
 Corrs Chambers Westgarth for the first respondent
 No appearance on behalf of the second respondent

- [1] **DAVIES JA:** The central question in this appeal is whether "Medical Centre" in a lease dated 4 February 2002, but expressed to be from 6 January 2001 between the first respondent as lessor and the second respondent as lessee ("the subject lease"), may include a pharmacy. The question arises in the following way.
- [2] The first respondent is the lessee from the Queensland Housing Commission, pursuant to a perpetual town lease, of land on which a shopping centre called Inala Town Centre ("the centre") is situated. The first respondent acquired its interest by purchase and assignment of the lease from Maembe Pty Ltd. The centre is an enclosed air conditioned shopping centre with about 40 to 50 commercial tenants. It is convenient, as the learned primary judge did, to refer to the interests granted by it or by its predecessor Maembe as leases.
- [3] The first respondent completed its purchase of the centre in July 1998. The second respondent, prior to that date, had been a lessee of an area of the centre described as Shop B19, subsequently described as Shop 27. Its lease provided:
 "The Tenant shall not use the demised premises for any purpose other than the purpose specified in Item 9. The Tenant shall conduct the permitted use in a proper orderly and businesslike manner."
 The permitted use in item 9 was "Medical Centre". That term was not defined.
- [4] On 6 January 2001 the second respondent relocated from the premises to which I have just referred to other premises in the centre described as Shop 1. This was the commencement of the subject lease dated 4 February 2002, but expressed to commence on 6 January 2001. The subject lease contained the following term:
 "9.1 **Permitted Use**
 The Tenant must use the Premises for the Permitted Use only."
 The "Permitted Use" is "Medical Centre". Again the term "Medical Centre" is not defined. The first respondent did not use the premises described in the previous paragraph or the premises described in this paragraph for any purpose other than for the provision of services of the kind provided by a medical practitioner (hereinafter "medical services").
- [5] On 13 February 1998 the appellant acquired by assignment from Fosscode Pty Ltd the lease of premises in the centre described as Shop 33. The appellant did not renew his lease when it expired on 31 July 2001 but held over on a monthly

tenancy. At all times during the term of that lease and during the monthly tenancy the appellant carried on the business of a pharmacy in Shop 33.

- [6] The lease referred to in the preceding paragraph contained the following term:
 "7.1 PERMISSIBLE USE:
 The Tenant shall not use the Demised Premises for any purpose other than the purpose specified in Item 9 of the Reference Schedule. The Tenant shall conduct the permitted use in a proper orderly and businesslike manner and will be the only Tenant in the Centre permitted to dispense prescriptions under the National Health Act."
 Under item 9 of the Reference Schedule the permissible use was described as "Pharmacy". That term was not defined.¹
- [7] Having not renewed his lease the appellant sought to sublease an area smaller than Shop 33 from the second respondent. The second respondent agreed to this but the first respondent has refused to consent to such sublease, principally on the basis that that would be a breach by the second respondent of its lease.
- [8] Clause 11 of the subject lease deals with assignment and sub-letting. Clause 11.1 provides that the tenant must obtain the landlord's consent to any sub-letting and cl 11.2 provides:
 "The Landlord must give its consent if:
 (a) the Tenant satisfies the Landlord that the new tenant ... has the ability to carry out the Tenant's obligations in this Lease;
 ...
 (d) the Tenant is not in breach of the Lease;
 ... "
- [9] The second respondent would not have been able to so satisfy the first respondent and would have been in breach of the subject lease in sub-letting to the appellant for a pharmacy if that meant that the premises were being used other than for a medical centre. That would be so if the use proposed in the sublease were not for use as a medical centre or as part of a medical centre.² The proposed sublease from the second respondent to the appellant provides, in effect, that the premises subleased will be used only for the purpose of a pharmacy.
- [10] That is the factual context in which the question posed at the outset of these reasons arises. The principal relief sought by the appellant was a declaration that the use of part of the premises the subject of the subject lease, being the use under the proposed sublease, was within the use permitted by cl 9.1 of the subject lease. The parties to this appeal are, for all practical purposes, only the appellant and the first respondent. The second respondent is content to abide the order of this Court and is concerned only to protect its potential liability for costs.
- [11] The phrase "Medical Centre" is susceptible of more than one meaning. It could mean a centre in which there is provided only medical services. Or it could mean a

¹ It is, however, defined in s 237 of the *Pharmacists Registration Act 2001* (Qld). That definition excludes premises from which medicines, compounds or drugs are dispensed by a medical practitioner authorized to do so under s 92 and s 93 of the *National Health Act 1953* (Cth).

² "Premises" is defined in cl 1.2(19) of the subject lease and Item 3 of the Reference Schedule thereto to mean, in effect, Shop 1.

centre in which there is provided medical and other ancillary services. In the latter, but not the former case, that might include a pharmacy. In those circumstances it is permissible to look at background facts known to both parties at the time the subject lease was made in order to determine which of those meanings was intended.³

- [12] On 4 February 2002 when the subject lease was entered into, the following were background facts⁴ known to both parties in the context of which the lease was made:
1. that the lease was of premises in an enclosed shopping centre of 40 to 50 shops each presumably leased for a specified use;
 2. that one of those shops was already leased for use as a pharmacy from which the lessee was authorized to supply pharmaceutical benefits under the *National Health Act 1953 (Cth)*;⁵ and
 3. that the lease was in substitution for a previous lease of another shop in the shopping centre the use of which had also been "Medical Centre" from which the second respondent had provided only medical services.
- [13] It is also permissible to look at the legal context in which the lease was made.⁶ On 4 February 2002 the legal consequence of the existence of an authority under the *National Health Act* to supply pharmaceutical benefits from Shop 33 was that no other premises in the centre could be the subject of such an authority.⁷ Consequently on the date on which the lease was made no part of the subject premises could have been lawfully used as a pharmacy.
- [14] Mr McMurdo QC, for the appellant, submitted that it did not follow from either this factual or legal context that the narrower sense of the term "Medical Centre" was intended. He rightly submitted that it would have been open to the parties to include, in the permitted uses in the subject lease, a pharmacy on the assumption that, if for any reason the existing authority for a pharmacy in the centre were cancelled, and an authority obtained for the subject premises, that use could commence. However when both the legal and factual context are taken into account such an intention on the part of the parties to the subject lease at the time it was made was most unlikely. It is much more likely that they intended to provide as the

³ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348 - 352.

⁴ The first respondent relied on other facts which it submitted were background facts which could be taken into account in construing the subject lease. They were:

- (a) that the pharmacy the subject of the lease of Shop 33 had the exclusive right in the centre to dispense prescriptions under the *National Health Act* (relying on cl 7.1 of the appellant's lease);
- (b) that that pharmacy was adequately servicing the needs of the customers of the centre; and
- (c) that pharmacies in shopping centres are generally positioned some distance from medical practices in such centres.

However it was not established that any of these facts, even if established, was known to the second respondent.

⁵ Section 90. The second respondent must have known that the appellant was authorized under the *National Health Act* to dispense prescriptions from Shop 33. The appellant concedes that the second respondent knew of the pharmacy at Shop 33.

⁶ *The World Symphony* [1992] 2 Lloyds Rep 115 at 117; *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyds Rep 516 at 520; *Edwards v O'Connor* [1991] 2 NZLR 542 at 549.

⁷ *National Health Act*, s 99L; Determination PB8 of 2000, par 2, definition of "large shopping centre", par 7; defence of first defendant, par 2(g)(h) and (i), reply par 2.

use one which could be lawfully carried on in a context in which there was already an authorized pharmacy in the centre.

- [15] For those reasons I would, like the learned trial judge, construe the term "Medical Centre" in the subject lease so as not to include a pharmacy but to mean a centre for the provision of medical services. The principal declaration sought was therefore correctly refused by her Honour. And it follows from that conclusion that the other declarations sought should also have been refused.

Orders

1. Dismiss the appeal.
 2. Order that the appellant pay the first respondent's costs of the appeal.
- [16] **WILLIAMS JA:** I agree with the reasons of Davies JA and with the orders proposed.
- [17] **HELMAN J:** I agree with the reasons of Davies JA and with the orders he proposes.