SUPREME COURT OF QUEENSLAND

CITATION:	*Cela Pty Ltd v Endeavour Foundation & Anor* [2003] QSC 030
PARTIES:	**CELA PTY LTD** **(ACN 054 045 26)** (applicant) v **ENDEAVOUR FOUNDATION** **(ACN 009 670 704)** (first respondent) and **RETAIL SHOP LEASES TRIBUNAL** (second respondent)
FILE NO:	S8051/02
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	21 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2002
JUDGE:	Wilson J
ORDER:	**Application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICAL REVIEW LEGISLATION – Orders in the nature of Prerogative Writs – Certiorari – Grounds for Certiorari to Quash – Prohibition – Mandamus – Jurisdictional Error – Where an application by owners of shopping centre against a tenant – Application for review of decision of Retail Shop Leases Tribunal – Whether a retail tenancy dispute ADMINISTRATIVE LAW – RULES OF NATURAL JUSTICE AND BREACH THEREOF – EXISTENCE OF DUTY TO OBSERVE RULES OF NATURAL JUSTICE – Requirement to provide reasons – Whether failure to state reasons a breach of natural justice – Whether failure to state reasons existed *Judicial Review Act 1991* (Qld), part 5 *Retail Shop Leases Act 1994* (Qld), s 3, s 5, s 18, s 19, s 20, s 22, s 87, s 87A, s 88, s 109, s 110 *Retail Shop Leases Regulation 1994* (Qld), s 3 *HR & CE Griffiths Pty Ltd v Rock Bottom Fashion Market Pty Ltd* [1999] 1 Qd R 496, considered

Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462, considered
R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310, cited
R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531, cited
R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242, cited
R v City of London Corporation, ex parte Matson [1997] 1 WLR 765, cited
Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817, cited

COUNSEL: PW Hackett for the applicant
KA Barlow for the first respondent

SOLICITORS: Colwell Wright for the applicant
Simmonds Crowley & Galvin for the first respondent

[1] **WILSON J:** This is an application pursuant to part 5 of the *Judicial Review Act* 1991 for an order in the nature of certiorari quashing a decision of the Retail Shop Leases Tribunal (the second respondent), or alternatively for orders in the nature of prohibition preventing the respondents from proceeding on the second respondent's decision and mandamus requiring the second respondent to give adequate reasons for its decision.

[2] The applicant is the registered proprietor of a shopping centre in Toowoomba known as "the Hooper Centre". The first respondent is the lessee of a shop on part of the ground floor. The lease is for a term of three years from 21 May 2001. It was executed by the first respondent on 30 October 2000 and by the applicant on 21 December 2000.

The Decision

[3] The second respondent's decision was that the applicant is liable to compensate the first respondent in respect of loss and damage suffered by it as a result of the applicant's failure to perform an obligation to refurbish certain evaporative airconditioning units.

[4] Negotiations for the lease began in about May 2000. On 5 May 2000 the applicant's agent sent a facsimile message to the first respondent described as "the lessors [sic] response to your initial offer". It went on –

> "The lessor would like to supply the following works on the concerned tenancy:
>
> - .....
> - .....
> - Existing air-conditioning to be fully refurbished

> The rental figure that the lessor would like to achieve is $100/m^2$ gross. The initial offer was $93.40/m^2$."

[5] On 22 May 2000 the first respondent replied –

> "It is the intention of the Endeavour Foundation to obtain the lease of premises situated at: Hooper Centre, Toowoomba, approximately 522 m^2...
>
> We offer you the lease payment of $52,200 per annum, including all outgoings.
>
> The letter of intent is subject to:
>
> 1) The Endeavour Foundation legal representation and Management being fully satisfied with the lease agreement.
>
> 2) Final executive board approval.
>
> 3) Premises to be made good, as per special conditions agreement in the lease.
>
> ……..
>
> ……..
>
> 9) Existing air-conditioning to be full [sic] refurbished
>
> ……..
>
> 17) Opening date 1/8/00."

[6] By s 22 of the *Retail Shop Leases Act* 1994 the lessor must give a prospective lessee a draft of the lease and a disclosure statement at least 7 days before the lessee enters into the lease. By s 5 a "disclosure statement" means "a statement in the approved form containing the particulars prescribed under a regulation." The prescribed particulars are set out in the *Retail Shop Leases Regulation* 1994 s 3; they include details of fitout costs to be paid by the lessor and mention of the agreements to be entered into by the lessor and lessee in relation to the lease.

[7] The applicant provided the first respondent with a disclosure statement dated 9 August 2000 and a draft lease. Part 7 of the disclosure statement provided to the first respondent is headed "Fitout." It lists those items to be supplied by the applicant at no cost to the first respondent, those for which the first respondent was to be responsible and those for which responsibility was to be shared. Evaporative airconditioning was included in the items to be supplied by the applicant at no cost to the first respondent. That list was followed by –

> "It is a condition of the lease that the evaporative air conditioner, doors, ceiling, etc are to be serviced by and at the expense of the Lessee."

At the end of the Disclosure statement this appeared -

"9. General

Agreements entered into by the Lessor and the Lessee in relation to the Lease and the granting thereof are: Lease and Agreement"

[8] On the first page of the lease the premises being leased are described (in item 5) as -

"part of the ground floor of the building erected on the land known as shop B2 and hatched in black on the plan herein."

Then clause 1.6 provides -

"1.6 DEMISED PREMISES

That part of the Centre described in Item 5 or any part of it extending in the case of external walls (including shop fronts and bay windows) from but not including the exterior face of it and in the case of inter-tenancy or other walls from the centre line and extending from the floor to the underside of the roof and where not repugnant to the context such of the fixtures fittings furnishings plant machinery and equipment (if any) from time to time installed in the Demised Premises and owned by the Lessor."

It provides for a base rental of $39,120.00 per annum. In the first year the first 3.5 months were to be rent-free. The only reference to airconditioning is in clause 5.28 -

"5.28 MAINTENANCE OF FITTINGS

The Lessee is to keep and maintain and replace as necessary so as to preserve their good appearance all partitions, shop fittings and fixtures, display counters, suspended ceiling, shop front including glass windows and doors, floor coverings and any air conditioning, evaporative cooler or the like, in the Demised Premises."

Clause 15.10 -

"15.10 LEASE CONTAINS ENTIRE AGREEMENT

No further or other covenants agreements provisions or terms in respect of the Demised Premises are deemed to be implied in this Lease or to arise between the parties by way of collateral or other agreement by reason of any promise representation warranty or undertaking given or made by either party to the other on or prior to the execution hereof and the existence of any such implication or collateral or other agreement is hereby negatived."

[9] On 8 or 9 June 2001 the first respondent commenced trading from the premises. In October 2001 the first respondent turned on the evaporative airconditioning for the first time. Two of the three units comprising the system failed - one stopped working and the other emitted a burning smell.

[10] The first respondent demanded that the applicant repair the airconditioning system, but it refused to do so. The first respondent had it repaired at its own cost.

[11] On 20 November 2001 the first respondent lodged a Notice of Dispute under the *Retail Shop Leases Act* 1994 with the Chief Executive of the Department of State Development. It described the dispute in these terms -

> "1. Failure by lessor to bring the cooling system up to a working order as agreed at the time of entering into the lease.
>
> 2. Lessor is making no effort to rectify the plant and equipment despite being given notice on numerous occasions."

[12] Ultimately the dispute came before the second respondent. It conducted a hearing on the issue of liability only, on the basis that if it found the present applicant liable to the present first respondent, it would hear further evidence and submissions as to the amount of compensation.

The second respondent's jurisdiction

[13] The second respondent has jurisdiction to hear "retail tenancy disputes" (with certain exceptions none of which is presently relevant), and is empowered to do all things necessary or convenient to be done for or in relation to the performance of its function: *Retail Shop Leases Act* 1994 ss 109 and 110.

[14] Section 87 gives an order of the second respondent final and binding effect, and s 88 limits rights of review (relevantly) to circumstances of jurisdictional error and denial of natural justice. Section 87A imposes an obligation to state reasons for a decision.

[15] By s 5 of the Act,

> "**Definitions**
>
> **5.** In this Act -
>
> .....
>
> "**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."

A "retail shop lease" is defined as a lease of a retail shop (with certain exceptions), and

> "**lease**" means an agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises whether or not the right is -

(a) an exclusive right to occupy the premises; or

(b) for a term or by way of a periodic tenancy or tenancy at will."

Submissions on jurisdiction

[16] Counsel for the applicant submitted that the second respondent lacked jurisdiction because there was no retail tenancy dispute as defined in the Act. In his reasons for decision the second respondent's chairman said -

> "The respondent [the present applicant] has maintained its submission that the agreement to refurbish merged in the agreement for lease, which made no reference to refurbishment, and did not bind the respondent [the present applicant] after the lease had been executed, and went on to say that there was no retail tenancy dispute as defined in the Act, and the Tribunal had no jurisdiction.
>
> On this point, the Chairman held, as a matter of law, that the claimant [the present first respondent] was entitled to rely upon the disclosure statement submitted by the respondent contemporaneously with a draft lease, in which statement the respondent as lessor acknowledged an obligation to provide evaporative air-conditioning. There was no evidence of any waiver by the claimant [the present first respondent]. The obligation (subject to proper definition) remained in force."

[17] In argument before this Court, counsel for the first respondent submitted -

(a) there was a pre-lease agreement that the applicant would refurbish the airconditioning,

(b) that pre-lease agreement was itself a "retail shop lease" within the definition in s 5 of the Act;

(c) the dispute is a retail tenancy dispute because it is one *about* a retail shop lease or alternatively one *about* the use or occupation of a leased shop under a retail shop lease;

(d) alternatively, the correspondence and disclosure statement comprised false or misleading representations on the basis of which the first respondent entered the lease;

(e) the first respondent is entitled to compensation for loss or damage suffered by entering into the lease on the basis of those representations: s 44(2);

(f) that entitlement to compensation is one *under* the lease by virtue of s 42;

(g) accordingly, the dispute is a retail tenancy dispute because it is one under a retail shop lease.

[18] Counsel for the applicant submitted -

(a) there never was a binding agreement to refurbish the airconditioning;

(b) accordingly there was no dispute about an agreement and no retail tenancy dispute;

(c) alternatively, if there was an agreement, it was an agreement simply to provide and or refurbish the evaporative airconditioning, and not an agreement by which the applicant gave or agreed to give the first respondent the right to occupy the premises;

(d) it was a collateral agreement, and not part of the lease, a conclusion supported by clause 15.10 of the lease (the entire agreement provision);

(e) accordingly, it could not be the subject of a retail shop tenancy dispute;

(f) further, when the first respondent executed the lease, "it negatived any prior representations made by the applicant";

(g) further, a dispute about a representation in a disclosure statement could not ordinarily be the subject of a retail tenancy dispute because it is not an agreement under which a person gives or agrees to give to another a right to occupy premises;

(h) further, the second respondent did not have jurisdiction to decide compensation under s 43(2) because:

(i) it expressly disclaimed reliance on s 43(2);

(ii) there was no evidence that the first respondent would not have entered into the lease if the representation had not been made, and so it could not be said that the lease was entered into on the basis of the representation;

(iii) the second respondent does not have power to determine whether a false or misleading representation was made; the applicant disputed that the representation was false or misleading; therefore the second respondent had no jurisdiction to hear the matter;

(iv) the alleged representation was about a future matter; there was no evidence that the applicant lacked a reasonable basis for making it.

Whether the second respondent had jurisdiction in the dispute

[19] The *Retail Shop Leases Act* 1994 is remedial legislation intended "to promote efficiency and equity in the conduct of certain retail businesses in Queensland": s 3. It is the Queensland Legislature's second foray into this field. In the earlier legislation (the *Retail Shop Leases Act* 1984) "retail tenancy dispute" was more

narrowly defined than it is under the present Act: in the earlier legislation it meant "disputes.... *under* retail shop leases", whereas in the present legislation it means "any dispute *under or about* a retail shop lease." The definitions of lessor and lessee have been enlarged to include the former lessor and the former lessee. See *HR & CE Griffiths Pty Ltd v Rock Bottom Fashion Market Pty Ltd* [1999] 1 Qd R 496 at 502 - 503 per Thomas J.

[20] By s 22 of the Act and s 3 of the Regulation the applicant had to give the first respondent a disclosure statement in which it listed what fittings were to be provided at its expense. They included evaporative airconditioning. It would be legitimate to look to the preceding commercial negotiations to identify what was meant by evaporative airconditioning in the circumstances. Doing so would, it is strongly arguable, reveal that the parties meant an existing system which was to be refurbished by the applicant before the commencement of the lease.

[21] This dispute relates to the applicant's obligation to provide fittings as part of the demised premises. It is a dispute *about*, if not *under*, the lease itself, and so a retail tenancy dispute within the jurisdiction of the second respondent.

[22] Clause 15.10 (the entire agreement provision) of the lease must be read subject to ss 18, 19 and 20 of the Act which are in these terms -

> "**Acts Provisions implied in leases**
>
> **18.** If, under this Act, a duty is imposed or an entitlement is conferred on a lessor or lessee under a retail shop lease, the duty or entitlement is taken to be included in the lease.
>
> **Contracting out of Act prohibited**
>
> **19.** A provision of a retail shop lease is void if it purports to exclude the application of a provision of this Act that applies to the lease.
>
> **Act prevails over inconsistent leases**
>
> **20.** If a provision of this Act is inconsistent with a provision of a retail shop lease, the provision of this Act prevails and the provision of the lease is void to the extent of the inconsistency."

[23] The correspondence does not constitute an agreement, but merely offers. However, it may be possible to establish by evidence that an agreement for lease had been reached by the time the disclosure statement and draft lease were provided or soon thereafter. Then the correspondence could be considered in resolving any doubt about the meaning of the applicant's obligation to provide evaporative airconditioning. The second respondent seems to have found or at least assumed that to have been the case. Such an agreement for lease would be a "lease" within the definition in the Act, and a dispute under or about it would be a retail tenancy dispute.

[24] In view of these conclusions, I do not find it necessary to consider the arguments about jurisdiction based on false or misleading representations.

[25] The dispute was a retail tenancy dispute, and accordingly the second respondent had jurisdiction to hear and determine it. An order in the nature of certiorari, or alternatively an order in the nature of prohibition, is refused.

Adequacy of reasons

[26] As I have noted earlier, the second respondent decided to determine the question of liability before hearing evidence and submissions on quantum. It found that the (present) applicant had breached its obligation to provide fully refurbished airconditioning units -

> "whereby the claimant [the present first respondent] suffered compensable loss and damage. The amount of such loss and damage will have to be determined in further proceedings, the date for which will be fixed at a directions hearing to be called by the Registrar."

[27] Counsel for the applicant attacked the second respondent's failure to state its reasons for finding that his client's breach had *caused* compensable loss and damage. He submitted that this was an error of principle in the nature of a denial of natural justice and cited *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 475-476 per Fitzgerald JA. There are other authorities for the proposition that in certain cases a failure to give reasons for a decision may be a denial of natural justice, including *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310, *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242, *R v City of London Corporation, ex parte Matson* [1997] 1 WLR 765, and *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

[28] However, as counsel for the first respondent submitted, that complaint misconceives the manner in which the second respondent ruled that the hearing should proceed. It dealt only with liability, and found breach established. It is unfortunate that it added "whereby the claimant suffered compensable loss and damage" because by its own ruling it left that question for another day. The applicant has not been denied the right to lead evidence and make submissions on quantum, including whether particular alleged losses were caused by its breach. Nor has it been denied natural justice by the absence of reasons for a finding.

[29] An order in the nature of mandamus is refused.

[30] The application is dismissed.