

SUPREME COURT OF QUEENSLAND

CITATION: *GO & MJT Nominees Pty Ltd v Hollywells Homewares Pty Ltd & Ors* [2010] QSC 169

PARTIES: **GO & MJT NOMINEES PTY LTD (ACN 005 354 629)**
(applicant)
v
HOLLYWELLS HOMEWARES PTY LTD
(ACN 128 564 232)
(first respondent)
ANN FORBES (CHAIRMAN), ROSALIND HOURIGAN
and ELEANOR ROBERTSON - Constituting the Retail
Shop Leases Tribunal
(second respondent)

FILE NO/S: 13459 of 2009

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: The Retail Shop Leases Tribunal

DELIVERED ON: 19 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 26 February 2010

JUDGE: Alan Wilson J

ORDER: **Application dismissed**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW –
RETAIL SHOP LEASES – MISREPRESENTATIONS –
where Retail Shop Leases Tribunal found applicant had made
material pre-lease misrepresentations to the first respondent -
where applicant alleges the Tribunal incorrectly made
findings on allegations of misrepresentations not properly
expressed in the proceedings - where applicant alleges
Tribunal did not have power to make findings about
representations of the occurrence of a future event – whether
denial of natural justice or lack of jurisdiction

Judicial Review Act 1991, s 43
Retail Shop Leases Act 1994, s 83(1), s 88(1)

Demagogue Pty Ltd v Ramensky (1992) 110 ALR 608
Wheeler Grace & Pierucci Pty Ltd v Wright (1989) ATPR
40-940

COUNSEL: P F Mylne for the applicant
C J Crawford for the respondent

SOLICITORS: Arcuri Lawyers for the applicant
Cronin Shearer Lawyers for the respondent

- [1] In October 2009 the Retail Shop Leases Tribunal heard a claim between Hollywells Homewares Pty Ltd, which had been a tenant in a shopping centre at Hope Island, and GO & MJT Nominees Pty Ltd, the owners of the shopping centre. The centre was still under construction in December 2007 when Ms Ursula Skippen, the principal of Hollywells, began negotiations with Mr Geoffrey Sara, a real estate agent representing GO, to lease a shop in the new development.
- [2] An agreement for lease was signed in March 2008, and the lease itself in 28 June 2008. Hollywells' business failed, and it quit the premises in June 2009. In the Tribunal proceedings it claimed the failure sprang from its reliance on pre-lease representations from Mr Sara which, it alleged, were false and misleading, and sought compensation. GO counterclaimed for lost rent, and some expenses.
- [3] On 10 November 2009 the Tribunal gave its decision, which largely upheld Hollywells claim. GO has applied to this court for review of that decision under s 43 of the *Judicial Review Act 1991*.
- [4] The central issue involves the Tribunal's findings about pre-lease representations concerning one of two proposed entrances to the shopping centre.
- [5] It is accepted that, during the negotiations, Mr Sara gave Ms Skippen a document which included some floor plans of the new shopping centre complex showing the location of various buildings and internal roads and, importantly, vehicle entrances and exits to the centre. The plans illustrated a vehicle entry from an adjoining road toward the northeast of the site which led into a road taking vehicles past a building designated 'A' to another entrance/exit from Hope Island Road at the northwest of the site.
- [6] The entrance/exit at the northwest corner never opened. In April 2009 Hollywells filed a notice of dispute in the Retail Shop Leases Registry alleging that GO's agent, Mr Sara, had represented that there would two entry points for the Centre from Hope Island Road and, as a consequence, Hollywells' shop would have the benefit of traffic passing back and forth between the two. The notice asserted that Hollywells' business had been badly affected by the '*... lack of proper traffic flow through the centre*'¹. A retail expert called by Hollywells supported that assertion, and the Tribunal's acceptance of his evidence is not challenged. Mr Sara was not, himself, called.

¹ Ex 1, p 95: Statement of Ursula Skippen, paragraph 14D.

[7] GO's application focuses, rather, upon particular findings the Tribunal made concerning the northwest corner entry and the representations touching it. Those findings, GO says, went beyond the evidence to an extent that GO was wrongly denied the opportunity to respond, with the result that the Tribunal's decision cannot stand.

[8] The findings appear in paragraph 32 of the Tribunal's decision:

32. **At no time did the Respondent tell the Claimant that the western entrance depended on government approval. We find that the agent Sara, and the site map supplied by him, materially misrepresented to the Claimant that the western entrance would be open from the commencement of its business.** The Claimant had no reason to question the veracity of what the site map and Sara conveyed to Ms Skippen. In our view the failure to mention the need for official approval was a critical omission. We are satisfied that **the Respondent should have qualified its representation about the western entrance. In the absence of any such qualification, we find that the Respondent's representations on that point were misleading within the meaning of s 43(2).** We find, further, that the Claimant reasonably expected to receive accurate and complete information in that regard, relying, as it did, upon the existence of the western entrance to give it necessary exposure to customers. (*emphasis added*)

[9] The reference to s 43 in this passage is to a provision in the *Retail Shop Leases Act* 1994 which relevantly provides that a lessor is liable to pay a lessee reasonable compensation for loss or damage suffered by the lessee if the lessee entered into the lease on the basis of a false or misleading statement, or misrepresentation, made by the lessor or any person acting under the lessor's authority.

[10] To succeed, GO must establish that the Tribunal's hearing and its decision involved a denial of natural justice, or that it lacked jurisdiction or exceeded its jurisdiction: *Retail Shop Leases Act*, s 88(1). Its application is to be addressed in accordance with Part 5 of the *Judicial Review Act*².

[11] GO says the findings that:

(a) its agent materially misrepresented to the director of Hollywells that the western entrance of the shopping centre would be open from the commencement of business, and

(b) that GO or its agent failed to tell the director of Hollywells that the opening of the western entrance of the shopping centre depended upon government approval

were not part of Hollywells' case in the proceedings which, so far as it relied upon alleged misrepresentations, was limited to written representations contained in some annexures to Ms Skippen's first, undated statement in evidence before the Tribunal, and oral representations, a list of which was tendered as an exhibit in the Tribunal

² *Ballymaloe Pty Ltd v Retail Shop Leases Tribunal* [2004] 1 Qd R 600; *Jomal Pty Ltd v CCT* [2009] QSC 3

proceedings; and that, because those things did not include allegations on the lines of those findings, GO has been denied procedural fairness.

- [12] The submission does not survive scrutiny. First, from the outset Hollywells' case plainly flagged that the non-opening of the northwest entry was at the heart of its complaint. Secondly, even if the allegations of misrepresentation relied upon by Hollywells were not couched in the precise terms of the findings, it was plain from the documents exchanged during the proceeding and the evidence adduced at the hearing that Ms Skippen claimed that she had reasonably understood what was shown to her as a representation of the layout of the shopping centre, then obviously under construction, in which she was being encouraged to lease premises. Thirdly, Hollywells was entitled to point to the nature of the representation and to submit, as it did, that Mr Sara's silence about the possibility that the northwest entrance would not open in a timely way was itself a form of misrepresentation.
- [13] Hollywells first document in the proceedings, its *Notice of Dispute* in the Retail Shop Leases Tribunal, plainly and specifically alleged a representation that there would be two entry points to the centre from Hope Island Road and that the exit point would be located so that car traffic would be directed through the entire Centre (as depicted on Centre plans). Then, the Notice asserts that these representations were consistent with plans shown to Ms Skippen – as they were. It is implicit in these allegations, but compelling and unavoidable, that Hollywells was asserting that the representations related to the intended layout of the centre when the premises it was interested in leasing were ready for occupation.
- [14] Any uncertainty concerning the nature of Hollywells' claims about the representations should, in any event, have been dispelled by Ms Skippen's statement, filed in the Tribunal in July 2009, in which she says that from the date Hollywells began trading the representations upon which she had relied had not been met, and refers specifically to the northwest entrance/exit. That cannot, in context, be anything other than an assertion that it had been represented to her that the entrance would be open.
- [15] At the commencement of the hearing before the Tribunal a document was presented by Counsel for GO containing what were said to be 13 alleged oral and written representations, which the parties agreed had been made before Hollywells entered into the lease. One of them, number 8 on the document,³ is '*That the Centre will have two entry points of (sic) Hope Island Road*'. Again, it is plain in the context of Ms Skippen's pre-hearing statements that she alleged that this representation was intended to refer to the time Hollywells took up a lease – which, logically in the context of a centre still under construction – would be the time construction was completed.
- [16] GO's claim that Ms Skippen had never alleged that she had not been told that the opening of the northwest entrance/exit was subject to GO obtaining government approval is similarly unsustainable. Her supplementary statement, filed in response to one from Mr Harland, the centre manager, alleges that that GO had never held

³ Ex 1, p 532.

that approval despite that entrance/exit appearing in the plans. It is, again, impossible to read this as anything but a complaint that she had not been told that its opening was uncertain, or might be delayed through the need for approval.

- [17] GO also contends that, if representations about the northwest entrance/exit were made by Mr Sara, they concerned matters which were to happen in the future; that their non fulfilment does not of itself establish that the representor did not intend to perform the representation when it was made; and, that there is no power under the *Retail Shop Leases Act* 1994 permitting the Tribunal to make a finding that a representation as to a matter which is to happen in the future is capable of constituting a misrepresentation leading to a legitimate claim for compensation under s 43 of the Act.
- [18] While it is true that the *Retail Shop Leases Act* does not contain a provision like s 51A of the *Trade Practices Act* (Cth), which states that where a corporation makes a representation with respect to any future matter (including the doing of or the refusing to do any act) and the corporation does not have reasonable grounds for making any representation, the representation shall be taken to be misleading, that is no basis for holding that s 43(2)(a) is limited in its application to statements as to past or present facts.
- [19] Even if that is so, however, the Tribunal found that GO's agent, Mr Sara, misrepresented the true position when he failed to mention the need for official approval or the possibility that the northwest entrance/exit might not be open when Hollywells began trading. For the reasons already explored, on any view of the evidence that finding was open.
- [20] Allegations of misrepresentations of this kind are hardly novel in the commercial arena. A failure to comment or a failure to clarify comments or predictions or promises has been clearly held to be a form of representation caught by s 52: *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940, per Lee J at 50,251. In *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608, Gummow J (with whom Black CJ agreed) observed at 617-8 that where a failure to speak is relied upon, the question must be whether in the particular circumstance the silence constitutes or is part of misleading or deceptive conduct; and '*...the question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive*'.
- [21] Ultimately, I did not understand GO to demur from that conclusion. Rather, its case contracted to an argument that the findings contained in paragraph 32 of the Tribunal's decision should not have been made because Hollywells had failed to properly allege and particularise the case it advanced⁴.
- [22] GO ultimately proceeded only on grounds 1, 2(a), 2(b) and 2(d) of its originating application. The first three address the proposition that the Tribunal should have

⁴ Appeal hearing transcript 26 February 2010, T 1-22.30.

informed the parties of certain matters before coming to its decision and, in particular, that it might rely upon an implied representation that the western entrance of the shopping centre would be open from the commencement of the respondent's business, or the failure of GO's agent to tell Ms Skippen that the opening of the western entrance depended upon government approval.

- [23] For reasons already explored the Tribunal was entitled to find that Ms Skippen, reasonably relying upon the plan Mr Sara showed her, had no reason to think other than that the construction of the northwest entrance was part of the work being undertaken at the time negotiations for the lease were going on; that a possible delay in the opening of that entrance was on any view material to her decision to enter into the lease; and, that Mr Sara failed to tell her that the western entrance was subject to government approval which had not been obtained. In the face of the clear assertions made in Ms Skippen's statements and the plain focus, during the hearing, upon the representations and the circumstances touching the northwest entrance, it would have been surprising for the Tribunal to have ignored the matter.
- [24] It is also said, in paragraph 2(d) of GO's application, that the Tribunal failed to give reasons why GO was not entitled to rent after 1 June 2009. Those reasons appear, however, in paragraph 47 of the Tribunal's decision, which addressed GO's counterclaim for arrears of rent. The Tribunal found that GO made a misleading representation which Hollywells relied upon when entering into the lease.
- [25] Under s 83(1) of the *Retail Shop Leases Act* the Tribunal has a wide authority to make orders it considers just. Although not expressed in these precise terms, the Tribunal's decision appears to be uncontentiously intended to give effect to Hollywells' right to rescind the lease in reliance upon the misleading representation but, also, to allow GO to recover rent for the period in which Hollywells was actually in possession.
- [26] The application is dismissed. I will hear further submissions about costs.