

SUPREME COURT OF QUEENSLAND

CITATION: *Amricama Pty Ltd v Red Carpet Real Estate* [2014] QSC 267

PARTIES: **AMRICAMA PTY LTD**
(Applicant)

v

RED CARPET REAL ESTATE PTY LTD
(Respondent)

FILE NO/S: 9027 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 20 October 2014

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: LANDLORD AND TENANT – RENT – PROVISIONS AS TO RENT IN AGREEMENT FOR LEASE OR LEASE – DETERMINATION OF RENTAL – where Respondent exercised option under lease – where parties disagreed about rent to be paid under renewed lease – where s 27A of the *Retail Shop Leases Act 1994* (Qld) allows for determination of market rent before an option to renew – where s 28 of the *Retail Shop Leases Act 1994* (Qld) provides for the current market rent to be determined by a specialist retail valuer – where the valuer agreed upon by the parties in mediation as part of QCAT proceedings was not a specialist retail valuer – where the lease did not provide for the rent to be determined in a particular way – where the Respondent refuses to provide a lease in registrable form – whether s27A of the *Retail Shop Leases Act 1994* (Qld) applies – whether the provisions of s27A of the *Retail Shop Leases Act 1994* (Qld) can be waived by the parties.

Land Title Act 1994

Retail Shop Leases Bill 1994

Retail Shop Leases Act 1994

Valuers Registration Act 1992

Ballymaloe Pty Ltd v Retail Shop Leases Tribunal [2004] 1 Qd R 600

Beckford Nominees Pty Ltd v Shell Co of Australia Ltd (1987) 73 ALR 373

Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209

Keen v Holland [1984] 1 WLR 251

Metropolitan Health Service Board v Australian Nursing Federation (2003) 176 ALR 46

Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2011] 2 Qd R 114

COUNSEL: M Steele for the Applicant
M Ambrose and S McNeill for the Respondent

SOLICITORS: Ramsden Lawyers for the Applicant
Short Punch & Greatorix for the Respondent

[1] Amricama leases a retail shop from Red Carpet. That lease is subject to the provisions of the *Retail Shop Leases Act 1994*

[2] The lease provided Amricama with an option to renew for a further five years from 1 May 2014. It exercised that option. The disagreement between the parties concerns the rent to be paid under the renewed lease.

[3] The lease also provided that:

“5.4 Option Rental

The annual rental payable for the first year of any extended term shall be that sum as may be mutually agreed upon between the parties or failing such agreement within fourteen (14) days from the date of commencement of the relevant year (notwithstanding the acceptance of rental by the lessor at the rate provided during any preceding rental period) that sum being determined as follows:-

The amount representing the current market annual rental for the first year of the relevant extended term as determined by an expert being a Valuer (who is both a practising real estate agent and a member of the Australian Institute of Valuers) ... The Valuer shall be deemed to be acting as an expert and not as an arbitrator”

- [4] Section 27A of the *Retail Shop Leases Act* 1994 allows for a determination of market rent before an option to renew is exercised:

“27A Lessee may require early determination of current market rent

- (1) This section applies if a retail shop lease provides for an option on the lessee’s part to renew or extend the lease at the current market rent of the leased shop.
 - (1A) However, this section does not apply if—
 - (a) the lessee is a major lessee; and
 - (b) before the lessee entered into the lease the lessee gave the lessor a written notice stating that the lessee received appropriate financial and legal advice about the lease; and
 - (c) the lease provides for the timing and basis for each review of the lease.
- (2) Unless the current market rent has already been agreed between the lessor and lessee, the lessee may, by written notice given to the lessor in the early determination period, ask for the current market rent to be determined.
- (3) Sections 28(2) and (3) and 29 apply to the determination.
- (4) The current market rent must be determined as at the date the request is made under subsection (2).
- (5) The rent payable under the renewal or extension is the current market rent determined under this section.
- (6) Despite any other provision of this Act or the lease, the last day on which the option mentioned in subsection (1) may be exercised is the earlier of the following—
 - (a) 21 days after the lessee receives written notice of the current market rent determined under this section;
 - (b) the day the lease ends.
- (7) In this section—

early determination period means—

 - (a) for a lease of not more than 1 year, the period—

- (i) starting 3 months before the option expiry day; and
 - (ii) ending 1 month before the option expiry day; or
- (b) for a lease of more than 1 year, the period—
- (i) starting 6 months before the option expiry day; and
 - (ii) ending 3 months before the option expiry day.

option expiry day means the last day on which the option to renew or extend the lease may, under the lease, be exercised.”

[5] Section 28 of the Act provides:

“28 Rent review on basis of current market rent

- (1) This section applies if—
 - (a) rent under a retail shop lease is to be reviewed on the basis of the current market rent of the leased shop; and
 - (b) the lessor and lessee can not agree on the current market rent within 1 month after the review date.
- (2) The current market rent is to be determined by a specialist retail valuer agreed by the lessor and lessee, or failing agreement, nominated by the chief executive.
- (3) The valuer may carry out the determination only if the valuer is independent of the interests of the lessor and lessee.”

[6] A “specialist retail valuer” is defined as being a person whose name is recorded on the list of specialist retail valuers kept under the *Valuers Registration Act 1992*.

[7] On 12 June 2013 Amricama wrote to Red Carpet requesting “an early determination for a fair market rental under the terms and conditions of the lease ... This will enable us to decide on rental affordability and business viability before exercising our option to renew for a further term”.

- [8] The parties were unable to agree on the rental payable for the first year of any extended term. In October 2013, Amricama filed a notice of dispute in the Queensland Civil and Administrative Tribunal seeking early determination of the rent payable under the further option. In that application, Amricama sought a number of remedies, including an appointment by QCAT of an acceptable valuer. Whether QCAT had the power to do that is not a matter which need be considered. In any event, the procedures used by QCAT are such that a mediation would first take place before any determination might be made.
- [9] Section 97 of the *Retail Shop Leases Act 1994* gives a mediator jurisdiction to mediate retail tenancy disputes except, among other things, a dispute about the amount of rent payable under a retail shop lease. But a mediator does have jurisdiction to mediate about “the procedure for the determination of rent payable under a retail shop lease”¹..
- [10] In November 2013, the applicant and the respondent engaged in negotiations about the conduct of the matter at QCAT and agreed upon a course of action. The agreement involved both parties agreeing to use the services of Mr Graeme Smith from CBRE to carry out the rental determination. Red Carpet knew that Graeme Smith was not a specialist retail valuer at that time.
- [11] Mr Smith provided his report in March 2014 and, four days later, Amricama exercised the option to renew. Red Carpet concedes that the option to renew was exercised.

¹ *Retail Shop Leases Act 1994*, s 97(3)(a).

[12] One month later, Amricama's solicitors sought confirmation from Red Carpet's solicitors that Red Carpet had received Amricama's notice exercising its option under the lease. That email was responded to, in part, in the following way:

“We have obtained our client's instructions on your below email and advise that we are currently in the process of preparing the necessary documentation which will be forwarded in due course. ...”

[13] In July 2014, Red Carpet's solicitors wrote to Amricama's solicitors and said, among other things:

“It has come to our attention that the valuer that has prepared the determination of market rental ('determination') is not a specialist retail valuer within the definition provided by the *Retail Shop Leases Act 1994 (Qld)* ('the Act'). Accordingly, we are instructed that our client disputes the rental amount under the determination on that basis.

A specialist retail valuer within the definition provided by the Act must be engaged to prepare a determination of market rental in accordance with the Act.”

[14] Amricama seeks declarations that:

- (a) it validly exercised the option to renew, and
- (b) the rent payable by Amricama to Red Carpet for the first year of the further term is \$160,000 plus recoverable outgoings and GST.

[15] Amricama also seeks an order that Red Carpet deliver up a lease in registrable form containing a provision for rent in accordance with the determination of Mr Smith.

[16] Red Carpet has refused to provide a lease in registrable form containing the rental figure which Amricama says has been agreed. Amricama's reply to Red Carpet's refusal to provide the lease in registrable form is that Red Carpet had, through its conduct, waived its entitlement to, or alternatively elected not to insist upon, the appointment of a specialist retail valuer within the definition provided by the Act.

Amricama submits that Red Carpet is bound by the terms of the settlement agreement which was entered into. The opposing contention from Red Carpet is that the determination, not having been conducted by a specialist retail valuer, is void.

[17] Red Carpet also relies upon other provisions of the Act:

“18 Act’s provisions implied in leases

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.

19 Contracting out of Act prohibited

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.

20 Act prevails over inconsistent leases

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.”

[18] Before assessment of the availability of an estoppel or waiver can be considered, it is first necessary to construe the relevant provisions of the Act in order to understand what obligations it imposes.

Application of s 27A

[19] This section applies if:

- (a) a retail shop lease contains an option to renew or extend,
- (b) the current market rent has not been agreed, and
- (c) the lessee, by written notice given during the “early determination period”, asks for the current market rent to be determined.

[20] Mr Steele, who appeared for the applicant, argued that s 27A did not apply because Amricama had withdrawn its application to QCAT when the parties agreed to appoint Mr Smith to carry out the valuation. It was also submitted that s 27A(2) only applies if the parties have not earlier agreed upon the rent. Amricama relied upon the provisions of cl 5.4 of the lease to submit that there was no requirement that the rent be determined in a particular way. It was also argued, without much vigour, that the agreement to appoint Mr Smith amounted to a variation of the lease.

[21] The error in those submissions is that each of them overlooks the machinery provisions of s 27A and that its provisions, because of one or more of sections 18, 19 or 20 of the Act, override cl 5.4 of the lease. Once each of the elements set out above is satisfied then s 27A is engaged. It follows, then, because of s 27(3), that s 28(2) and (3) of the *Retail Shop Leases Act 1994* apply to the determination and, so, the current market rent fell to be determined by a specialist retail valuer. As Mr Smith was not a specialist retail valuer his valuation was not a determination of the “current market rent” referred to in s 27A and Amricama could not rely on it for the purposes of the renewed lease.

Can the provisions of s 27A be waived?

[22] Whether a right or entitlement under a statute can be waived or, whether a person can be estopped from relying a statutory right, depends upon:

- (a) the nature of that right or entitlement, and
- (b) whether an estoppel would nullify the statutory provision.²

² *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209 at 216.

[23] The nature of the right afforded to a person by the Act can be determined, first, by examining the objects of the Act. Section 3 of the *Retail Shop Leases Act 1994* provides that “the object of this Act is to promote efficiency and equity in the conduct of certain retail businesses in Queensland”. Section 4 provides that that object is to be achieved through, among other things, “mandatory minimum standards for retail shop leases”.

[24] In the period immediately before the enactment of the *Retail Shop Leases Act 1994*, an inquiry was undertaken with respect to the issues of, among other things, market power in lessor/lessee relations. In the explanatory note for the Retail Shop Leases Bill 1994, the conclusion of the review of the legislation that there was an imbalance in the market power was regarded as justifying continued government intervention in retail tenancy matters. The note says, in part:

“... It is proposed that the legislation should continue to promote efficiency and equity in retail tenancy regulation through the establishment of minimum mandatory leasing standards and the maintenance of a low cost dispute resolution process.”

[25] Another matter which must be taken into account when considering the status of the requirements of s 27A is the presence in the Act of a prohibition against “contracting out”. That prohibition is contained in s 19 of the Act. In *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd*,³ it was held that a prohibition against contracting out was “a strong indication” that the Act conferred rights which “it is in the public interest to maintain and thus cannot be eroded by estoppel”.⁴ This conclusion was consistent with other decisions such as *Keen v Holland*⁵ and *Beckford Nominees Pty Ltd v Shellco of Australia Ltd*.⁶

³ [2011] 2 Qd R 114.

⁴ Ibid at 133.

⁵ [1984] 1 WLR 251.

⁶ (1987) 73 ALR 373.

[26] A similar conclusion was reached by French J in *Metropolitan Health Service Board v Australian Nursing Federation*⁷ where his Honour considered that the principles of estoppel and waiver did not apply where the relevant legislation precluded contracting out of the terms of that legislation. He said:

“[21] The application of principles of estoppel and waiver to the enforcement of statutory rights depends upon their consistency with the terms and purpose of the statute creating the rights: Spencer, Bower and Turner, *The Law Relating to Estoppel* by Representation, 3rd ed, 1977, Butterworths at [142]. The general principle is that the availability of contractual variations, estoppel or waiver of a statutory right depends upon whether it is a private right only, or has also a public character in the sense that the general welfare of the community, or the interests of the class of persons whom it is the object of the law to protect, require it to be upheld against those common law and equitable doctrines. That principle is reflected in the judgment in *Commonwealth v Verwayen* (1990) 170 CLR 394; 95 ALR 321 at CLR 456 per Dawson J, with whose analysis of the law and facts Deane J generally agreed, and (at CLR 486) per Gaudron J. Mason CJ, although dissenting in the result in that case for reasons not relevant to the present point, acknowledged that some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred. Some rights, however, could be conferred for reasons of public policy so as to preclude contracting out or abandonment by the individual concerned: at CLR 404. At CLR 405; ALR 327–8 his Honour said:

‘On the footing that the right to plead the statute as a defence is a right conferred by statute, the respondent’s contention that the right is capable of waiver hinges on the scope and policy of the particular statute ... The issue is not whether the relevant provisions are beneficial to the public, but whether they are ‘dictated by public policy’ and enacted ‘not for the benefit of any individuals or body of individuals, but for considerations of state’ ... Although in one sense, all statutes give effect to some public policy ... the critical question is whether the benefit is personal or private or whether it rests upon public policy of expediency ...’

His Honour concluded in that case, consistently with the position taken by the other justices, that it was possible to

⁷ (2003) 176 ALR 46.

contract out of a statutory provision imposing a time bar or to deprive it of effect by other means such as waiver: at CLR 406. Consistently with that conclusion the considerations that would preclude parties from contracting out of a statutory right would also preclude its effective barring or extinguishment by operation of estoppels based upon representations or extinguishment by waiver.”⁸

[27] The provisions of s 28 of the *Retail Shop Leases Act* 1994 were considered in *Ballymaloe Pty Ltd v Retail Shop Leases Tribunal*.⁹ In that case, Helman J dealt with an argument that the mandatory provisions in s 28(3) were able to be waived. He said:

“[19] The ordinary and natural meaning of the words of s 28(3) shows that the valuer’s independence of the interests of lessor and lessee is mandatory: the words ‘only if’ indicate that. It is not necessary to go further than that in deciding that issue, but, as submitted on behalf of Ballymaloe, there are other indications in the Act that reinforce that conclusion: s 19 which prohibits contracting out of the Act; s 20, which provides that the Act prevails over inconsistent leases; and s 36, which provides that certain rent review provisions of leases are void, including a requirement that the determination of the current market rent of the leased shop be made other than in accordance with the Act (para (c)). There is no proper basis, I think, for conclusion that the parties to a retail shop lease can, by agreement, circumvent the requirement of s 28(3), nor, I think, can reliance be placed on waiver or estoppel in justifying failure to comply with the requirement; the provision is clear and admits of no exceptions. It follows that the Tribunal was in error in determining the dispute against Ballymaloe on the ground of waiver of objection.”¹⁰

[28] The provisions of s 28(2) require that the relevant current market rent “is to be” determined by a specialist retail valuer. I respectfully agree with the decision of Helman J in *Ballymaloe* and apply that reasoning to s 28(2). The ordinary and natural meaning of the words in that subsection is that they are mandatory.

⁸ Ibid at 54.

⁹ [2004] 1 Qd R 600.

¹⁰ Ibid at 607.

[29] Section 27A sets out a regime under which the market rental can be the subject of an early determination in order that a lessee may decide whether or not to exercise an option to renew. The mechanical provisions are provided for in s 28. The Act prevents, through s 19, parties from contracting out of those provisions. In the light of the authorities referred to above, the conclusion is inescapable that the respondent cannot be estopped, nor can it be said to have waived its rights under this Act. For the reasons given above, then, the assessment made by Mr Smith does not accord with the requirements of the *Retail Shop Leases Act 1994* and so has no effect. Before a lease document can be capable of registration it requires, among other things, that the amount of rent be included in the document.¹¹ As the rental has not been determined, then the respondent cannot deliver up a lease in registrable form.

[30] The application must be dismissed.

¹¹ *Land Title Act 1994*, s 65(1)(c).