SUPREME COURT OF QUEENSLAND

CITATION:	*Rannadia P/L & Ors v The Sheik Holdings P/L* [2006] QCA 366
PARTIES:	**RANNADIA PTY LTD** ACN 086 680 551 (first appellant/first applicant) **RAAD MOHAMMED SALIM AL-BAHRANI** (second appellant/second applicant) **NINA BELLA AL-BAHRANI** (third appellant/third applicant) **v** **THE SHEIK HOLDINGS PTY LTD** ACN 010 424 503 AS TRUSTEE FOR A BARAKAT NO 2 TRUST (respondent/respondent)
FILE NO/S:	Appeal No 4540 of 2006 DC No 4074 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2006
JUDGES:	Jerrard, Keane and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal dismissed** **2. Applicants to pay the respondent's costs to be assessed on the standard basis**
CATCHWORDS:	INTERPRETATION - GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS - GIVING EFFECT TO MANIFEST INTENTION - applicants were lessee and guarantors under lease of shop premises - respondent acquired freehold reversion of premises from original lessor - lease provided for acceleration of lessee's liability for rent, and for lessor to recover from lessee all costs and expenses of and incidental to the leasing of the premises to a new tenant in the event of early termination of the lease by reason of lessee's default - lease terminated by reason of lessee's default - premises leased to new lessee - new lessee provided with rent free period and assistance with fit out of premises - interpretation of lease - respondent successfully brought proceedings in Magistrates Court - respondent substantially successful on appeal to the

District Court - whether leave should be granted

District Court of Queensland Act 1967 (Qld), s 118(3)

O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359, cited
AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170, cited

COUNSEL: L Boccabella for the applicants
J W Peden for the respondent

SOLICITORS: A J Torbey & Associates for the applicants
Hopgood Ganim Lawyers for the respondent

[1] **JERRARD JA**: In this application I have read the reasons for judgment of Keane JA, and respectfully agree with His Honour's reasons and the orders he proposes. I add that the applicants' argument, apart from the deficiencies identified by Keane JA, made the possibly incorrect assumption that had the lease expired in accordance with its terms, and not been breached by the applicants, Eagle Boys would then have become the respondent's new lessees, with the same fit-out costs and rent free period. That may all have happened; but equally Eagle Boys may have already taken a tenancy in the same general area with a different landlord, by the time the applicants' lease had expired. The respondent may then have found a new lessee at a lesser or higher cost to itself.

[2] **KEANE JA:** The applicants were the lessee and guarantors under a lease of shop premises in Fortitude Valley, Brisbane. The lease was for five years from 1 May 2000 to 30 April 2005. The respondent acquired the freehold reversion of the premises from the original lessor on 1 December 2003. The lease was terminated in early March 2004 by reason of the lessee's default.

[3] The premises were then leased to a new lessee ("Eagle Boys") for five years from 10 March 2004. Eagle Boys enjoyed a rent free period to 30 June 2004 although there was no provision in the lease for this rent free period. Furthermore, the respondent paid $32,500 to Eagle Boys by way of an incentive to assist Eagle Boys in fitting out the premises for the purposes of Eagle Boys' business.

[4] The respondent brought proceedings in the Magistrates Court to recover from the applicants moneys owing under the lease which had been terminated. That lease provided for the acceleration of the lessee's liability for rent in the event of the early termination of the lease by reason of the lessee's default. The respondent was substantially successful, both in the Magistrates Court in October 2005, and on appeal to the District Court in May 2006.

[5] The applicants now seek to appeal to this Court from the decision of the District Court. Such an appeal lies only by leave pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld). It is convenient to proceed immediately to consider whether the applicants' prospects of success on appeal are such as to warrant the grant of leave to appeal.

[6] The applicants' principal contention is that there should have been deducted from the amount due to the respondent the value of the rent free period allowed to Eagle Boys and the money paid to Eagle Boys by way of assistance in the fit out of the premises. The applicants assert that, with these adjustments, there should be a monetary judgment in their favour. The idea that the disallowance of claims by the respondent could result in a judgment in favour of the applicants is distinctly ambitious; but the real issue is whether the respondent was entitled to recover from the applicants the two amounts to which reference has been made.

[7] It is important to note that the applicants have expressly disclaimed any argument that an appeal should be resolved in their favour by the operation of equitable principles of penalties in relation to the acceleration of the rent owing under the lease.[1]

[8] As a result, the issues which the applicants seek to agitate turn on the proper construction of the lease, and, in particular, cl 13.9 and cl 13.10 of the lease. Those clauses are relevantly in the following terms:

> "**13.9 Damages on Termination**
> Should the Lessor terminate the Lease … **the Lessor shall be entitled to recover from the Lessee the difference between the aggregate of the Annual Rent and other moneys payable by the Lessee hereunder for the unexpired residue of the term plus all costs and expenses which the Lessor may incur of and incidental to the leasing of the premises to a new tenant**, including, but without limiting the generality of the foregoing, any leasing commission payable by the Lessor in respect of a new lease **and the costs of any repairs or alterations to the Premises which the Lessor may in its discretion consider necessary to enable the Premises to be leased to a new tenant** less any amount the Lessor is able to obtain or could in the Lessor's opinion reasonably be expected to obtain by observing the provisions of cl 13.10.
> **13.10 Mitigate Damages**
> In the event of the Lessee vacating or abandoning the Premises, whether with or without the Lessor's consent, **the Lessor shall be obliged to take reasonable steps** to mitigate its damages and to **endeavour to lease the Premises at a reasonable rent and on reasonable terms**, but only to a Lessee who is of sound financial standing … The Lessor's entitlement to damages shall be assessed on the basis that the Lessor should have observed the obligation to mitigate damages contained in this clause …" (emphasis added)

[9] The applicants' argument is, in substance, that the lessor is not entitled to recover from the applicants any amount which is not reduced by the sums in question because these sums would have been paid away by the respondent even if the lease with the first applicant had not been breached by the applicant. The applicants argue that the respondent would have allowed Eagle Boys a rent free period and contributed to the alteration of the premises to accommodate Eagle Boys' business even if the lease had not been terminated as a result of the lessee's breach. For this reason, it is argued by the applicants that the sums in question were not "costs and

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[1] Cf *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 369; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.

expenses … of and incidental to the leasing of the Premises to a new tenant …" within the terms of cl 13.9.

[10] There are a number of difficulties in the applicants' argument. The first is that the circumstance that the expenses in question might have been incurred at the expiration of the lease in accordance with its terms does not begin to address the question whether the expenses were "incidental" to the leasing of the premises to the new tenant. Whether the expenses incurred by the respondent were incidental to the leasing of the premises to a new tenant is a matter of fact relating to the connection between the expense and effecting the new leasing. And, more significantly, the use of the words "and incidental to" in the phrase "costs and expenses of and incidental to the leasing of the premises" is clearly apt to expand, not to restrict, the costs and expenses for which the lessee is liable.

[11] Secondly, the applicants' argument is based on the notion that the respondent's entitlements against them are limited to the recovery of moneys sufficient to put it in the position it would have enjoyed had the lease not been terminated as a result of the lessee's breach. This argument involves a fundamental failure to appreciate that, once it is accepted that the lease operates according to its terms, the measure of the respondent's entitlement to monetary recovery from the applicants (whether that entitlement be described as "damages" or "debt") is to be ascertained by reference to the terms of the contract between the parties.

[12] The applicants referred to the evidence of Mr Macrae, a specialist retail valuer, to the effect that it was his opinion that it was "inappropriate for the present landlord to claim the incentives of 4 months rent free of $20,000, and the incentive payment of $32,500". The basis for that opinion was said to be that:

> "[t]he effect of vacating the premises … by Rannadia Pty Ltd would have been to bring forward leasing and other incentive payments that would have been incurred in any event on the expiry of the lease on 30 April 2005."

[13] Mr Macrae's opinion reflects the error of law in the applicants' argument. If the relevant measure of recovery by the lessor is that authorised by cl 13.9 and cl 13.10 (and on the assumption that the acceleration of liability for rent effected by cl 13.9 is not unenforceable as a penalty), then it is beside the point that the respondent would have incurred the expenses in question if the lease had run its course. Those contractual provisions applied, in terms, whether or not the expenses in question would have been incurred if the lease had run its course. To argue as the applicants do is to deny the respondent the benefit of the contractual promises made by the applicants in cl 13.9 and cl 13.10 of the lease.

[14] The applicants argue that the lessor's contribution to Eagle Boys' alteration of the premises does not amount to "the cost of any repairs or alterations to the premises which the Lessor may in its discretion consider necessary to enable the premises to be leased to a new tenant" within the terms of cl 13.9. There are two bases on which this argument is put forward. The first is that the work which was done on the Eagle Boys' fit out was not truly "repairs or alterations to the premises". But the applicants accept that the work was done "to convert a retail shell into a pizza shop". It was clearly open to the respondent "in its discretion" to regard this work as constituting "alterations" and to regard these alterations to the premises as

necessary to enable the premises to be leased to a tenant who wished to use the premises as a pizza shop.

[15] The second basis for this argument is that Eagle Boys did the work at its discretion rather than being directed by the respondent as to the work to be done. Once again, this is beside the point. The respondent's entitlement under cl 13.9 of the lease was not dependent upon the respondent actually carrying out or supervising the work. It was sufficient to establish the respondent's entitlement to recover the cost of alterations incurred by it that the expenditure was actually the whole or part of the cost of repairs which the respondent, in its discretion, considered necessary to enable the premises to be leased to Eagle Boys. There is no suggestion that the $32,500 sum paid to Eagle Boys was not accepted and used to defray the costs of alterations which Eagle Boys required to be done in order to take a lease of the premises.

[16] For these reasons, I consider that the strength of the applicants' arguments on the principal issues which they wish to agitate is not such as to warrant the grant of leave to appeal.

[17] The applicants also make brief complaint about a discounting of rent to reflect different car parking arrangements and aspects of the orders for costs made by the District Court. These are not matters which involve any significant impact on the outcome for which the applicants contend. As counsel for the applicants acknowledged in the course of argument, these matters would not, of themselves, warrant a grant of leave to appeal.

Conclusion and orders

[18] The application for leave to appeal should be dismissed.

[19] The applicants must pay the respondent's costs to be assessed on the standard basis.

[20] **HOLMES JA:** I agree with Keane JA's reasons and with the orders he proposes.