

CITATION: *Burinpipat Pty Ltd t/as Chili Coco v FFTOA Pty Ltd* [2016] QCAT 100

PARTIES: Burinpipat Pty Ltd t/as Chili Coco
(Applicant)
v
FTTOA Pty Ltd
(Respondent)

APPLICATION NUMBER: RSL002-16

MATTER TYPE: Retail shop leases matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 1 March 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Application for interim order is refused.**
- 2. There is no order as to costs.**

CATCHWORDS: RETAIL SHOP LEASES – application for interim order – where lessee seeks order dispensing with pre-proceedings mediation – where lessee seeks order preventing lessor from issuing notice to remedy breach – jurisdiction of Tribunal before referral by mediator

Property Law Act 1974 (Qld)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 58, s 59, s 83, s 100, s 102
Retail Shop Leases Act 1994 (Qld), s 63, s 64, s 83, s 103

Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148
McDonald's Australia Ltd v Emaas Pty Ltd [2011] QCAT 293

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

REASONS FOR DECISION

- [1] On 8 February 2016 I refused an application by Burinpipat Pty Ltd t/a Chili Coco ('Chili') for interim orders relating to a retail shop lease dispute. These are the reasons for my decision.
- [2] On 11 January 2016 Chili filed in the Tribunal a Notice of Dispute in which Chili claims, among other things, that FFTOA Pty Ltd ('the lessor') has been claiming outgoings which are not payable by Chili under the terms of the lease. Chili also disputes the method of calculation by the lessor of recoverable charges. Chili seeks final relief in the form of orders that the lessor remove all outgoing charges '*from the invoices*';¹ that the lessor refund all outgoing charges paid by Chili; and that the lessor recalculate the consumables charges in accordance with the terms of the lease with a consequential recalculation of such charges and a refund paid to Chili. The outgoings of which Chili complains relate to Council rates and water rates.
- [3] On 22 January 2016 Chili filed in the Tribunal an application for interim orders. The background to the application is that Chili did not pay the disputed rates and electricity charges for the month of December 2015 however attended to the payment of rent and other claimed amounts. On 18 January 2016 the lessor issued a form 7 Notice to Remedy Breach ('the notice') requiring Chili to pay \$3,458.62 being arrears of rent, default interest and costs claimed by the lessor as a result of Chili's default.
- [4] In its application for interim orders, Chili seeks a declaration that the notice is void; that the Tribunal stay the issuing of any further notices by the lessor pending the conclusion of the proceedings before the Tribunal; that mediation of the dispute be dispensed with and the matter proceed to final determination at a Tribunal hearing; and that the lessor pay Chili's legal costs in the amount of \$1,650.00.
- [5] Chili refers to three notices to remedy breach in its submissions. In fact, there is a single notice that has been forwarded to three parties – Chili and the two guarantors under the lease. Chili says that the notice does not comply with the requirements of the *Property Law Act 1974* (Qld) in that it fails to specify the specific lease covenant said to have been breached; that it claims amounts knowingly and falsely mis-described in the notice; and that it claims an amount for legal costs '*that has not been duly incurred*'.

¹ Referring to tax invoice/statements issued by Colonial Real Estate Commercial for monthly rent and other charges.

- [6] Chili says that there is '*none or minimal chance of any resolution of the matter at mediation*' and that it would be more cost effective and practical to have the matter proceed directly to a Tribunal hearing.
- [7] In its submissions in response to the application for interim orders, the lessor says that the amount referred to in the notice has been paid by Chili and that the breach claimed of has now been remedied. The lessor says that there is no utility in any order relating to the notice as sought by Chili. In any event, says the lessor, the Tribunal does not have jurisdiction to determine the validity of the notice and that any such determination is within the jurisdiction of the Supreme Court by way of an application for relief against forfeiture.
- [8] At the time that the application for an interim order was determined, the retail tenancy dispute between Chili and the lessor had not been referred to the Tribunal.² An interim application may be determined by the Tribunal before referral by a mediator after mediation of a dispute.³
- [9] On an application for an interim order, the issues for consideration are whether the applicant has a good arguable case that may entitle it to the final orders sought and whether the balance of convenience favours the making of the interim order.⁴
- [10] Dealing firstly with the order sought that the mediation be dispensed with, Chili does not advance any basis upon which the Tribunal has jurisdiction to dispense with the mediation. The Tribunal's jurisdiction to resolve a retail tenancy dispute is enlivened through the application of s 63 and s 64 of the *Retail Shop Leases Act 1994* (RSL Act) although, as has been observed, it is not apparent that these sections are intended to be the only gateway to QCAT.⁵
- [11] *McDonald's Australia Ltd v Emaas Pty Ltd*⁶ involved an application to the Tribunal for injunctive relief prior to the conclusion of the pre-proceedings mediation process. Justice Alan Wilson, then President of the Tribunal, observed that '*(d)ifferent questions may arise, and different conclusions may apply, when proceedings do not involve applications to this Tribunal for relief under ss 58 and 59 of the QCAT Act.*'⁷
- [12] The application by Chili to dispense with the holding of the mediation is not one which involves a party to a retail tenancy dispute seeking to apply to the Tribunal and using for that purpose powers under the QCAT Act like injunctive relief.⁸ Nor does Chili's application insofar as it relates to the mediation seek relief within the broad jurisdiction conferred by s 103 of the RSL Act.

² *Retail Shop Leases Act 1994* (Qld) ('RSL Act'), s 63.

³ *McDonald's Australia Ltd v Emaas Pty Ltd* [2011] QCAT 293.

⁴ *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153.

⁵ *McDonald's Australia Ltd v Emaas Pty Ltd* [2011] QCAT 293, at [17].

⁶ *Ibid.*

⁷ *Ibid.*, at [30].

⁸ *Op cit* 5 at [18]

- [13] Unless the Tribunal has jurisdiction in respect of the retail shop lease dispute, there can be no basis for the making of interim orders. It is not argued on the application for interim orders that the Tribunal does not have jurisdiction in respect of Chili's notice of dispute.⁹
- [14] The conduct of the pre-proceedings mediation under the RSL Act is, with a limited exception, a procedural step which must be undertaken before a party may commence proceedings in the Tribunal. The RSL Act creates a framework to encourage the pre-proceeding resolution of disputes. That framework is consistent with the objectives of the QCAT Act to deal with matters in ways that are accessible, economical, informal, quick and just.¹⁰ If the legislature had intended a mechanism by which the mediation process could be dispensed with it could have inserted such a mechanism in the Act. That no such mechanism exists is a clear indication that the process is one which must be complied with as provided for in ss 63 and 64 of the RSL Act.
- [15] I am satisfied that the present application is distinguishable from the circumstances in *McDonald's*. The notice of dispute is not presently before the Tribunal, the mediation process not having been completed. What Chili is seeking to do is to bring what is essentially an originating application for an order dispensing with the mediation. Dispensing with the mediation is not relief within the broad jurisdiction of the Tribunal as referred to in *McDonald's*. For the reasons outlined I am of the view that the Tribunal does not have jurisdiction to order that the mediation be dispensed with.
- [16] Chili seeks a declaration that the notice to remedy issued by the lessor is invalid. The lessor says that the breach has been remedied and that it cannot take any further action under the notice. In light of the payment of the outstanding monies by Chili and the lessor's clear concession that no further action can be taken pursuant to the notice, there remains no basis to consider further the relief sought by Chili. The balance of convenience does not favour the making of the order sought. In light of my findings it is unnecessary for me to consider further whether an order in the terms sought by Chili is beyond the jurisdiction of the Tribunal as argued by the lessor.
- [17] Chili seeks an order that any future notices to remedy breach issued by the lessor are '*stayed*' until the final determination of the retail tenancy dispute by the Tribunal. The relief sought by Chili is essentially a pre-emptive injunction preventing the lessor from issuing any breach notice '*in pursuit of this matter.*' The submissions by Chili are unclear as to what '*in pursuit of this matter*' means. Chili offers no undertaking as to damages in respect of the relief sought.

⁹ RSL Act, s 103.

¹⁰ QCAT Act, s 3(b).

- [18] The Tribunal may grant an injunction, including an interim injunction, if it is just and convenient to do so.¹¹ The Tribunal may make an order for a party to a retail shop lease dispute to do, or not to do, anything.¹²
- [19] The terms of the order sought by Chili are, potentially, of an extremely wide ambit. If Chili intends to confine the scope of the injunctive relief it seeks, such an intention is unclear from its application and submissions. If, ultimately, Chili prevails in the litigation then it will no doubt seek an order for compensation. I see no basis upon which the balance of convenience favours an order that would prevent the lessor from exercising its rights in the event of an (unspecified) breach by Chili of its (unspecified) future obligations under the lease.
- [20] Chili seeks an order for the payment of its costs of the interim application. In proceedings in the Tribunal each party usually bears their own costs.¹³ Costs may be awarded against a party if the Tribunal considers the interests of justice require such an order to be made.¹⁴ Chili has been unsuccessful in its application. The lessor submits that there should be no order as to costs. It is appropriate that there is no order as to costs.

¹¹ QCAT Act, s 59.

¹² RSL Act, s 83(2)(a).

¹³ QCAT Act, s 100.

¹⁴ QCAT Act, s 102(1).