

# DISTRICT COURT OF QUEENSLAND

CITATION: *Tuskbury Pty Ltd v Mt Isaac Pty Ltd* [2021] QDC 57

PARTIES: **TUSKBURY PTY LTD ACN 068 701 753**  
(applicant)

v

**MT ISAAC PTY LTD ACN 005 169 255**  
(respondent)

FILE NO/S: 49/21

DIVISION: Civil

PROCEEDING: Application

DELIVERED EX TEMPORE ON: 31 March 2021

DELIVERED AT: Maroochydore

HEARING DATE: 31 March 2021

JUDGE: Cash QC DCJ

ORDERS: **1. The application is dismissed.**  
**2. The applicant must pay the respondent's costs of the application.**

CATCHWORDS: INJUNCTIONS – JURISDICTIONAL ISSUE – BALANCE OF CONVENIENCE GENERALLY – Where the applicant seeks an injunction to prevent actual threatened or apprehended nuisance or trespass to a leased shop premises – whether the relief sought falls within the jurisdiction of the District Court – whether in any case the balance of convenience favours the relief sought.

LEGISLATION: *District Court Act* 1967 (Qld), s 68, s 68(1)(b)(xiii), s 69. *Retail Shop Leases Act* 1994 (Qld), s 21E.

CASES: *Startune Pty Ltd v Ultra-Tune Systems (Aust.) Pty Ltd* [1991] 1 Qd R 192.

COUNSEL: J Lee for the applicant  
K E Downes QC with A Schriiffer for the respondent

SOLICITORS: Tony Sowden for the applicant  
Wilson Ryan Grose for the respondent

[1] HIS HONOUR: These proceedings were commenced by originating application by Tuskbury Pty Ltd with Mt Isaac Pty Ltd as the respondent. The relief sought in the originating application is expressed in terms of a declaration and injunctions. It has been listed with some urgency, and, for understandable reasons, there has been some

movement. The orders sought today differ to some extent from those identified in the originating application.

- [2] The dispute arises in the following way. The applicant leases business premises from the respondent. The premises are located in a resort complex in Hastings Street at Noosa called Netanya Noosa. The lease has existed since 2006 and has been renewed periodically pursuant to an option. The applicant uses the premises to operate a business; that business is concerned with the retail of ladies' clothing. In April 2018, the applicant gave notice of its intention to exercise the option to renew the lease for three years. At the moment, the applicant has the option to further renew the lease. If it does, the next relevant lease period will be the three years from July 2021 to July 2024. The option must be exercised between six months and three months before the lease is presently due to expire, that is, it must be exercised by 13 April 2021.
- [3] The applicant fears the respondent is about to embark upon a substantial renovation of the resort. It is concerned this will have a detrimental impact upon its business. The applicant asserts the respondent has failed to properly and reasonably inform it of the nature and extent of the renovations, and that the renovation will result in trespass to or nuisance to the land. It is against this background that the applicant today applies for orders that would extend the time within which it can exercise the option to renew, and to require the applicant and the respondent to make arrangements for mediation, with liberty to apply.
- [4] It is important to observe at the beginning that the District Court is a Court of inferior and limited jurisdiction. It has the power to hear and determine only those matters within the jurisdiction conferred by statute. For present purposes, that jurisdiction is to be found, if at all, in section 68 of the *District Court Act* 1967 (Qld). The present application does not seek any relief in terms that would explicitly be within section 68, though, in written submissions, the applicant relied upon section 68(1)(b)(xiii). This sections grants power to the Court to restrain, whether by injunction or otherwise, any actual threatened or apprehended trespass or nuisance to land where the value of that land does not exceed the monetary limit of the District Court.
- [5] It is to be noted, as well, that section 69 of the *District Court Act* grants the Court the power to grant relief and remedy of the kind sought in the application, but only where there is a proceeding engaging the jurisdiction of the Court and it is relevant and appropriate for the purpose of exercising that jurisdiction to grant the interim relief sought<sup>1</sup>. In relation to the reliance by the applicant upon section 68(1)(b)(xiii), that would permit the Court to make orders in the nature of restraint where there is a threatened or apprehended trespass or nuisance to land. The difficulty with that argument, in this case, is that while the respondent is the owner of lot 2 – the premises leased to the applicant – it is not the entity who is going to undertake the proposed renovations.
- [6] On the evidence before me, the appropriate respondent to any attempt to restrain a trespass or nuisance caused by the renovation would be the body corporate and not the present respondent. As well, it is to be noted that, in the event the option to extend the lease is not exercised and the lease expired, there could be no trespass by the respondent as it would be entitled to take possession of the premises. There is otherwise no basis on which it might be though the respondent would cause a

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<sup>1</sup> *Startune Pty Ltd v Ultra-Tune Systems (Aust.) Pty Ltd* [1991] 1 Qd R 192, 197.

trespass or nuisance to the land and as such there is no basis for an order restraining the present respondent. But another difficulty is that the orders proposed are not, in fact, in the nature of a restraint of that kind. Instead, they are orders seeking an extension of time within which to exercise the option to renew, and for there to be mediation. Even if there were some threat or apprehension of trespass or nuisance, there is, in my view, no connection between that and the actual orders sought today.

- [7] As to whether the jurisdiction of the Court is otherwise engaged, I have had regard to the draft statement of claim exhibited to the applicant's affidavit material. The statement of claim, as presently drafted, pleads misrepresentation by the respondent contrary to the *Australia Consumer Law* ('ACL'). This misrepresentation is said to be a representation by the respondent that the renovations would not adversely affect the applicant's business. As a consequence, the applicant claims damages being a loss in the value of stock and/or a loss of opportunity to sell the business. The statement of claim also pleads a breach of the quiet enjoyment clause of the lease, which is said to give rise to statutory compensation pursuant to the *Retail Shop Leases Act 1994* (Qld) ('RSLA').
- [8] A claim for damages pursuant to the ACL and a claim for statutory compensation under the RSLA would be proceedings within the jurisdiction of the District Court, providing the amount claimed is within the money limit. I note, in that regard, the director of the applicant deposes that it will abandon any claim to damages in excess of that limit. But even assuming this claim is filed, such that there are proceedings within the jurisdiction of the District Court, there remains a question as to whether the interim orders sought by the applicant are relevant to, and appropriate for, the purpose of exercising that jurisdiction. I do not think that they are.
- [9] The orders sought are, as I have said, for an extension of time within which to exercise the option and for there to be mediation. These are scarcely relevant to a claim for misleading and deceptive conduct or for compensation as a result of a breach of the lease. The restraint sought by the applicant would permit it to delay making a decision about the option. In the order, as it is framed, there is no particular time limit upon that delay. The restraint would be for a seemingly indefinite period. Again, it is difficult to see how such an order is relevant to and appropriate for the exercise of a jurisdiction which might be invoked upon a claim for damages for breach of one statute or another.
- [10] Today, in oral submissions made in reply, the applicant referred to section 68(1)(b)(xiii) of the *District Court Act*. This is a provision extending the jurisdiction of the District Court to the determination of any question of construction arising under a deed, will or other written instrument. In my view, though, the present material does not raise any serious question as to the construction of any agreement between the parties. This could not provide a basis for invoking the jurisdiction of the Court. Even if it were, the applicant would face the difficulty of there being little connection between the orders sought and the basis of the jurisdiction to determine a question of construction.
- [11] In my view, the applicant has not shown that the District Court has the jurisdiction to make the orders sought. Even if it had, I would not think that orders of the kind asked for by the applicant should be made. Injunctive relief of this sort is only appropriate where it is favoured by a consideration of the balance of convenience. The adequacy of damages as a relief would be a relevant consideration, and they would, on the material before me, be a sufficient remedy in this dispute.

- [12] As well, as to the possible exercise of the option to renew the lease, it is to be noted that section 21E of the RSLA provides a mechanism for this process. If the applicant exercises the option to renew the lease, the respondent would be required to provide a disclosure statement within seven days. The disclosure statement would be required to contain information relevant to the proposed renovations. The applicant would then have a further 14 days to withdraw its renewal notice. That is a factor which, in my view, tells against granting injunctive relief of the kind sought.
- [13] For these reasons, the application is dismissed, and the applicant must pay the respondent's costs of the application.