

THE RETAIL SHOP LEASES ACT

Dispute 123/99

HARRY JOHN AND CHRISTINE MARY BOWN

- Claimants

- and -

WAYNE ANTHONY AND KAYE PRATT

- Respondents

DECISION

Given in Brisbane on 15 June 2000.

This dispute relates to premises at Machans Beach which is one of the several beaches to the north of Cairns. The premises are known locally as “the Machan Beach Store”, which is a mixed business and convenience store at which there is also a bowser for dispensing petrol.

The premises are the subject of a lease included in which is a residence which adjoins the retail shop premises, and other land adjoining the shop which is also owned by the lessor is the subject of a licence between the parties, on which land is a permanently located caravan. The dispute relates to the shop premises, but the relevant evidence comprehends facts relating to the adjoining residence and the land the subject of the licence.

The lease document which was executed by the lessors/lessees on 24 March 1998 provides that the commencement date for the lease was 16 March 1998, and it was for a term of five years with an option for a further term of five years.

The Notice of Dispute which was dated “7/11/99” also bears an earlier date, “14/9/99”, which was altered in favour of the later date.

The dispute relates in general terms to the stormwater drainage of the property which it is alleged is deficient and which has been the source of serious flooding in times of heavy run off, and this has caused serious flooding to the shop premises. The shop building and the residence have been standing for many years and are of wooden construction with an iron roof. The Tribunal Members visited the site and inspected the same and the other relevant premises in the presence of the parties, in order to better understand the evidence of Mrs Christine Mary Bown, one of the lessees, and of Mr Wayne Anthony Pratt, one of the lessors. These were the only persons who were called to give evidence before the Tribunal which sat in Cairns for the purpose of determining the issues relevant to the dispute.

It is fair to say that the shop premises and the adjoining residence are generally in a run down condition but remain suitable for occupation for their present purposes.

The lessees and the lessors had, through their respective solicitors, engaged in a variety of disputes concerning the lease since its inception. It is unnecessary to dwell on these. The lessees' relevant concern related originally to the condition of the guttering and downpipes on the shop and the residence, and that inadequate drainage of the storm water run off caused flooding of the shop.

From about May 1999 the lessors, who are husband and wife but who reside in Sydney, lived in the caravan on the licensed area and in the subsequent months undertook considerable repairs and structural work in respect of the shop premises. The rear of the shop premises had an attached lean-to type structure which was used as a storeroom. A cold room nearby was a separate structure. The lessors made substantial alterations to the rear of the shop premises by including the cold room and an expanded storeroom in an enlarged attachment to the rear of the shop premises. A new concrete floor was laid. At the same time the opportunity was taken to replace old guttering and down pipes. When the new structure was added at the rear, new guttering to that section was added and down pipes discharged storm water run off onto the ground and, in particular, to the vacant area of the land the subject of the licence. A storm water drain to which is attached other down pipes from the older part of the shop, the residence and a carport structure between, discharges storm water into a Council outlet to the front of the premises.

From the time of the commencement of the lease, the lessees voiced concerns about the adequacy of the storm water drainage from the premises on the property. The lessee Mrs Bown has for many years known the shop premises and worked for the previous lessee before she and her husband acquired the lease in May 1998. The adequacy of the drainage became the source of complaint and was the subject of a telephone discussion between the male lessee and the male lessor on 3 January 1999. This is evident from the lessor's letter of 18 January 1999, in which Mr Pratt refers to their earlier discussion "with respect to the drainage and water problem." Mr Pratt noted that the male lessee Mr Bown "has not been back to us with information on prices or levels as agreed" and assumed that "everything is under control for the time being or at least OK until I come up in March." It was in May 1999 that Mr and Mrs Pratt went to Cairns and remained living at the premises until about November/December 1999. It was during this period that the substantial

extension of the shop premises was built.

Machans Beach, like Cairns, is subject to tropical rain in the summer months. As will be seen, the area was the subject of heavy flood rains and cyclonic influences in the period January/February 2000.

Mrs Bown stated in evidence that, prior to the structural alterations to the premises in May/November 1999, the inadequate drainage of storm water from the shop and residence caused a part of the shop to flood in times of heavy run off. In her view, the problem was aggravated in spite of the fact that some improvements had been done to the guttering and down pipes on the original shop premises, the carport and the residence. In her view the source of the aggravated drainage problem arose because the down pipes from the new addition discharged water onto the vacant land the subject of the licence, the level of which had been altered by the lessor filling a low lying area with soil taken from the footings for the new storeroom/coldroom area. This caused in her view a very serious drainage problem and one more serious than had existed originally. She stated that in February 2000 on five occasions – 4, 11, 12, 18 and 26 February 2000 – the whole of the shop was flooded to an increased height.

February was a time of above average rainfall for the Cairns/Machans Beach area. Rainfall records for the area disclose that in February 2000, 1287 millimetres of rain were recorded at the Cairns Airport, and that on 26 February 2000, 240.2 millimetres of rain fell, and it was the wettest single day in Cairns for 20 years. It coincided with cyclone Steve, which affected that part of the coast. The February total of 1287 mm was said to be the highest February rainfall recorded for the Cairns region.

It was Mr Pratt's evidence that in the latter part of 1999 considerable improvements had been completed in respect of the retail shop premises, and that that work had relieved considerably the drainage problem which had earlier existed, and which he had acknowledged. However, he asserted that the more recent flooding, particularly in February 2000, was the result of excessive, above average run off because of cyclonic rains and that, like most other properties in Machans Beach, his property and in particular the retail shop premises suffered serious flooding. In short, his

response to the complaint is that it was a matter beyond his control and the result not of any default on the lessors' part, but of cyclonic flooding which affected the whole area.

We will comment shortly on the unsatisfactory state of the evidence before the Tribunal. That situation was aggravated somewhat by some evidence of Mrs Bown. It is common ground that the 26 February 2000 rainfall coincided with the advent of Cyclone Steve. On the other hand, the other dates referred to by Mrs Bown as being days on which excessive flood occurred are not all, according to the meteorological records, days of excessive rainfall. For instance, on the days other than 26 February, the Bureau recorded on 4 February 4mm, on 11 February 149.4mm on 12 February 38.2mm, and on 18 February 2mm. The significant variations speak for themselves. Mrs Bown asserted that on these days she was assisted by others in dealing with the flooding within the shop and that she noted these events in her diary. Upon the production of the diary to the Tribunal, the diary entries were noted. We need only say that we remain unconvinced as to whether alleged flooding on certain days, but not on others, was the result of excessive flood rain or because of some other factor. We are not persuaded by the evidence that on days other than 26 February 2000 excessive flooding occurred as described. Whilst we are satisfied that during February 2000 above average and on some days record falls occurred, and that these caused flooding to the whole area of M, we are unable to conclude whether on other occasions when water entered the shop this was caused by excessive run off or for the reasons described by Mrs Bown. Further, we should add that we are not persuaded that flooding occurred on the days other than 26 February, unless there were very heavy localised squalls not recorded at the Bureau.

Our difficulty in resolving this dispute is the result of several factors. Firstly, the evidence generally from both sides was brief and unsupported. Neither had legal representation; secondly, the evidence makes it impossible to satisfactorily find the cause of flooding to the shop premises, particularly in February 2000. We simply are unable to conclude whether such flooding as did recur was the result of the work done to the premises in May/November 1999 or was caused by extreme weather conditions; thirdly, whilst the Tribunal can rightly claim expertise in relation to certain

aspects of the retail shop leasing industry, such expertise does not extend to matters of engineering and storm water drainage; fourthly, whilst our inspection enabled us to better understand the brief evidence given by each witness, it would be inappropriate for us to form a view on the basis of such inspection, even were we qualified to do so, which we are not.

Therefore, the Tribunal can only conclude that the state of the evidence is such that a decisive conclusion is not possible, that is, we are unable to determine on the state of the evidence whether the lessees are entitled to relief under the relevant sections of the Retail Shop Leases Act.

We have anxiously considered how we should deal with the matter in the light of the above. Section 83 empowers the Tribunal to make orders which it considers to be just.

Two main issues are at the core of our present concern; firstly, the lessees' allegation that the storm water drainage provided in the course of the structural work of the premises by the lessor was the source of the problem and, secondly, the fact that February 2000 was for this area a time of excessive, indeed record rainfall which affected not only this property but many others in Machans Beach. It would be preferable for the Tribunal and for the parties if the resolution of the dispute were attempted in more "normal" rather than in abnormal circumstances. We therefore propose to adjourn the further hearing of the matter to a date to be fixed, to be brought on by either party giving one months notice to the Registrar.

Our reason for so ordering is that the two competing issues identified above make it really impossible on the current evidence for us to decide whether the lessee is entitled to relief. The course we propose will mean that the dispute file in the Registry will remain open. That will avoid the necessity for the Tribunal's jurisdiction to be enlivened again in the event that the lessees wish to proceed if the problem re-emerges in what might be termed more normal weather conditions.

We emphasise to both parties, however, the need for each to provide appropriate evidence to the Tribunal in a form which enables such evidence to be properly

evaluated if the need for such evidence arises. At the same time, we make it clear that this might be the type of case where the parties ought to seek professional assistance in preparing and presenting their cases.

The lease has as yet some time to run and, accordingly, neither side will be unduly prejudiced by our taking the course proposed.

The only order we make therefore is that the further hearing of the dispute be adjourned to a date to be fixed, to be brought on by either party giving one months notice in writing to the Registrar. At the same time we commend to the parties the good sense in their attempting to conciliate the issue. It is after all in the best interests of both that any deficiency in the drainage of the property be corrected.

Hon W J Carter, QC
Chairman.