

THE RETAIL SHOP LEASES ACT

In the matters of

Dispute No 94/02

JIMWAY PTY LIMITED

- Claimant

- and –

BALLYMALOE PTY LIMITED

- Respondent

Coram: A Forbes (CHAIRMAN)

DECISION ON JURISDICTION

Given in Brisbane on Monday 3 March, 2003.

The claimant was tenant of the respondent landlord under a lease in mid-2002, the lease was coming to an end, and the tenant exercised an option for a fresh term. The parties, relying on Clause 16.3.2 of the lease, appointed a Mr Greg Clarke, a Director of McGees Property Consultants, to carry out a rent review to determine the current market rent.

Both parties were well aware that Mr Clarke was a Director of McGees and that McGees was acting as leasing agent for the landlord with respect to other parts of the building in which the subject premises are located. Mr Clarke, the valuer, duly carried out the review, prepared a report and delivered and invoiced it to the parties.

According to the tenant, it was only after so doing that Mr Clarke sought to withdraw his determination, apparently because he had just become aware of McGees relationship with the landlord. Apparently, Mr Clarke has the view that his determination may be invalid under Section 28(3) of the Act.

The landlord now seeks says that it is not prepared to accept Mr Clarke's determination. I note in passing that the determination is not favourable to the landlord. Mr Clarke has apparently assured the parties that he valued the premises in good faith and unaware of McGees connection with the earlier sale of the premises to the current landlord and to its continuing to act as leasing agent for other parts of the premises.

I assume, although this remains to be seen, that in the preparation of Mr Clarke's determination, he had no contact with nor did he consult with the employee who handles the leasing activity. Since no statement from Mr Clarke is yet before the Tribunal, I do not know how he has reached the conclusion that he may not be 'independent of the interests of the lessor and the lessee' as required by Section 28. However, this remains to be seen. Should this dispute proceed, Mr Greg Clarke, the valuer, will be a relevant witness.

The tenant says that on becoming aware of Mr Clarke's attitude, the landlord suggested that the parties obtain the services of another valuer. It is not clear whether this offer was for another valuer to rubber stamp Mr Greg Clarke's determination or to perform a fresh one. However, the landlord withdrew that offer some six weeks later and immediately issued a notice to the tenant to terminate the lease.

The tenant did not agree that Mr Clarke's determination should be set aside and now seeks orders, by amendments to its Notice of Dispute, that the procedure for determining the annual rent has proceeded accorded to the lease and that Mr Greg Clarke's determination of current rent is valid and binding.

The landlord challenges the Tribunal's jurisdiction and, accordingly, at an earlier Directions Hearing, I ordered that the parties lodge outlines of their submissions and that the Tribunal reconvene this morning.

The landlord contends that in order to decide its jurisdiction, the Tribunal must look to the true character of the dispute and not to the relief sought. It submits that the substance of the dispute is, and I summarise:

- (a) Whether a lease exists and,
- (b) The amount of rent payable under a lease.

As to jurisdiction and the amount of rent, the Tribunal's jurisdiction does not extend to adjudicating on the amount of rent payable under a lease, but it is expressly given power to hear a dispute about 'the procedure for the determination of rent payable under a Retail Shop Lease'. That's Section 109 subsection (3) sub-subsection (a).

The lease that bound the parties at the time McGees specialist retail valuer was retained specified the procedure to be followed on a rent review in the absence of an agreement, and I refer to Clause 16.3.2. The parties activated this clause and they now ask the Tribunal to adjudicate on the validity of the procedure that was carried out, and I note that there is no challenge to the efficacy of what I might call the original lease.

The questions that arise on this aspect of this dispute seem to me to include whether the specialist retail valuer was in fact independent of the parties and whether in law he can withdraw his determination once made in good faith, or whether he is *functus officio*, having completed his determination, delivered it and invoiced parties for his services.

In short, I find that the Tribunal is not asked to determine the amount of rent payable.

I find that the Tribunal has jurisdiction to adjudicate whether the procedure in the lease for determining the annual rent on a current market basis has been followed by the parties.

Does a lease exist? The landlord contends that no lease exists, or at least no lease that is within the purview of this Tribunal. I understand that submission to mean that the landlord denies that the tenant validly exercised an option to take a new lease, so that therefore there is no lease about which a dispute can arise.

There are disputed matters of fact bound up in this contention which a Tribunal panel of three is apt to determine, but, apart from that, it is common ground that there was a valid original lease, the binding terms of which neither party has so far questioned.

The tenant apparently continues to enjoy an exclusive right to occupy the premises and one assumes he's paying rent. The notice to terminate is not based on non-payment of rent.

The definition of lease for the purposes of the Act includes a Licence and a Tenancy at Will, and I note Section 14.8 of the lease, which is referred to in the landlord's notice to terminate, which provides that there is a holding over if the lease expires and if the lessee is, with the consent of the lessor, remaining in occupation of the premises after the lessee shall be deemed to hold the demised premises as tenant from month to month.

That seems to me sufficient to give this Tribunal jurisdiction to deal with that aspect of the dispute.

I turn now to the point that I take has been made by the landlord, and that is whether the Tribunal has jurisdiction to determine whether a lease exists. Subject to Section 94 of the Act, the Tribunal has exclusive jurisdiction in Retail Tenancy Disputes. The Tribunal was set up to promote efficiency and equity in retail business and a low cost dispute resolution mechanism.

Can it seriously be suggested that the Tribunal has no jurisdiction to determine whether a tenancy exists? Since the original Act was passed, variously constituted Tribunals have decided without any appeal disputes canvassing such issues as whether a lease was evidenced by a part performance; whether a binding lease was constituted by a letter of intent; whether the traditional four elements constituting a lease were present and whether a tenant validly exercised an option to renew a lease.

At random, they're just four issues that, in the past, have been on

many occasions determined by the Tribunals. De-identified reports of these matters may be found in the Tribunal Registry or supplied by a request made to the Registry, and of course those reports may also be found on line.

I find that the Tribunal has jurisdiction to deal with the dispute and I'll proceed to make directions leading to a hearing. I think in my earlier comments, I have dealt with the Section 63 and 64 points concerning the lease expiring more than four months before the Notice of Dispute was lodged in December, 2002, but I point out to the parties that the tenant has already amended its Notice of Dispute.

The landlord, in its notice to terminate, has raised the issue of the valid exercise of the option to renew and therefore, the tenant just might wish to consider a further amendment on those points. I leave it to the tenant.

A Forbes,
Chairman.