[2004] RSLT 23

THE RETAIL SHOP LEASES ACT

In the matters of

Dispute No 72/04

MICHAEL VELIJKO NISNER and MERRY SINATRA SOH NISNER

- Claimants

- and –

YUAN CHIEH PTY LIMITED

- Respondent

Decision on jurisdiction and inclusion of a person as a party

Given in Brisbane on 12 November 2004

Mr & Mrs Nisner ("the claimants") formerly ran an ice-cream shop at a suburban shopping centre in Brisbane. In 2002 they lodged a Notice of Dispute against their landlord ("the respondent") claiming, *inter alia*, that a neighbouring baker's shop ("the franchisee") was promoting its wares by "spruiking" that was so loud and so constant that it prevented them from trading profitably. The claimants contended that it was the landlord's duty to abate the nuisance. On 12 November 2002 the Tribunal ordered by consent:

> *"The level of spruiking shall be limited to a reasonable audible tone and the [landlord] shall ensure the enforcement of such level"*

The tenants now allege that the landlord has failed to obey that order, and that in consequence they lost considerable income, Mr Nisner's health deteriorated and they were forced to close their business. They claim compensation in the amount of $100,000.

A directions hearing took place on 2 November 2004. Mr Nisner appeared in person for the claimants. The respondent was represented by its solicitor Mr Haly, and Mr Hockaday, solicitor, appeared by leave for Bakers Delight Holding Limited, franchisor of the baker's shop in question ("the franchisor").

I informed Mr Nisner that the Tribunal has no power to award compensation for personal injury, whereupon he abandoned that head of claim.

The respondent now seeks an order that the franchisor be made a party to the dispute, pursuant to s 70A of the *Retail Shop Leases Act 1994* ("the Act"). That section, inserted in 2000, enables the Tribunal to make a person other than a landlord or tenant party to a retail tenancy dispute if that person's *"presence is necessary to allow the tribunal to adjudicate effectively and completely on the dispute".*

The basis of the present application is that, if the respondent is held liable to the claimants the respondent will then claim indemnity from the franchisor. Any such claim would be based on a separate lease between the respondent and the franchisor, on the basis that any breach of the order made in 2002 is wholly or partly the fault of the franchisor, in failing to exercise proper control over its franchisee.

Mr Hockaday, for the franchisor, supports the application for joinder, on the basis that his client has such a contingent interest in the dispute between claimants and respondent that it is entitled to be a party. He also foreshadowed that the franchisor, at some later stage, may seek to join its franchisee. He had yet to ascertain whether there is a sub-tenancy between his client and the franchisee.

Mr Nisner neither opposed nor supported the application to join the franchisor.

The Act

The definition of *"retail tenancy dispute"* in s 5 of the Act simply requires that the dispute be *"under or about a retail shop lease, or about the use or occupation of a leased shop".* Eligibility to participate in a retail tenancy dispute is not defined in Part 8 of the Act, which deals with dispute resolution.

As noted above, s 70A was inserted in 2000, evincing a clear acceptance by the legislature that, in some cases, it may be necessary or desirable for the Tribunal to have direct jurisdiction over persons other than the signatories of the subject lease. However, the only legislative guidance for the exercise of the discretion is that, in the opinion of the Tribunal, the addition of a party (or parties) is necessary to enable it "*to adjudicate effectively and completely on the dispute".*

The ambit of s 70A has scarcely been explored in the Tribunal, and so far as I am aware there is no higher authority directly in point. A paper[1] setting out the Government's policy with respect to the amending Bill of 2000 and tabled in Parliament states in somewhat Delphic terms:

> *"4.5 Dispute Resolution Processes*
>
> *4.5.1 Draw in other parties*
>
> *It is considered that dispute resolution would be facilitated by allowing additional parties considered critical to the resolution of a dispute to be effectively drawn into the proceedings. The proposal is to allow parties to the dispute to make a formal request to the tribunal to include an additional party. The tribunal would then determine whether or not it was appropriate for that person to be joined in the proceedings to justly resolve the dispute. This process would allow the tribunal to hear arguments from both sides before making a determination on whether to join other parties to the dispute. The tribunal could also determine at that point which party should bear any costs associated with the additional party being joined to the proceedings."*

It was an object of the amending Bill *"to improve [the] operational efficiency"* of the Act.[2] It was passed without further amendment and neither the Explanatory Note nor the second reading speech takes the matter further.

A simple case for the application of s 70A, as I apprehend it, would be one in which only one of two or more lessors (or lessees) is named in the originating process, or

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1 Retail Shop Leases Act Policy Review Paper 1999.

2 Explanatory Notes to the *Retail Shop Leases Amendment Bill* 2000.

"Notice of Dispute". Another case might be one in which a landlord's agent, in a "frolic of his own" ignores or frustrates his principal's duty to comply with an order of the Tribunal. On the other hand, it would probably be futile to join a co-party or "third party" where it is plain that no order within the Tribunal's charter could be made against that person. That would be the position, in my opinion, if the applicant for joinder failed to show a sufficient *nexus* between a proposed claim against the party-to-be-added and the original action, that is the retail tenancy dispute *between the claimant and respondent already on the record.*

The Issues

Be that as it may be, should a section 70A order be made here, with respect to the franchisor? (I leave aside any consideration of joining the franchisee; no such application has yet been made, and no relevant and sufficient material has been placed before me.)

Essentially the respondent seeks to lodge a claim against the franchisor, contingent upon the success (or failure) of the claimant's existing action against the respondent. These questions then arise:

(1) Is there a sufficient *nexus* between the existing claim and the proposed claim by the respondent against the franchisor?

(2) If "Yes" to question (1), would the proposed claim be one which this Tribunal could entertain? In other words would it be a "retail tenancy dispute" within the meaning of the Act?

The Nexus Question

In s 5 of the Act "retail tenancy dispute" means "any dispute under *or about* a retail shop lease, or *about the use and occupation* of a leased shop under a retail shop lease …". (Italics added.) In my view the words italicized take the definition beyond the concept of a dispute *under* the relevant lease, such as a question about the true construction of covenants or terms in a lease document.

In my opinion an action by the respondent against the franchisor alleging, in substance, that the franchisor, in some way or ways to be specified, is responsible for any breach of the order made against the respondent in 2002 would bear a sufficiently close relationship to the claimant's lease to warrant a finding that the proposed claim is "about" that lease, or "about the use and occupation" of the shop formerly leased by the claimants.

The Second Question

The Tribunal has no jurisdiction to make indemnity orders according to the general law of contract or tort, or any rules of court. Any order against the franchisor would have to be based, if possible, on the Tribunal's statutory jurisdiction in retail

tenancy disputes. Any claim against the franchisor would necessarily be based, in turn, on a dispute under or about a retail shop lease between the respondent and the franchisor. Would the franchisor's alleged responsibility for a breach of the consent order against the respondent be a matter connected with the franchisor's own lease agreement (if any) with the respondent? Further, is it competent to commence proceedings in the Tribunal on a claim that is merely contingent?

I refrain from expressing any concluded view on the questions posed in the immediately preceding paragraph. Clearly they require careful consideration by the parties and by the Tribunal, and in so far as they are questions of fact, they cannot be decided by a Chairman sitting alone.

However, subject to those caveats and reservations, I consider that there is a sufficient basis for a purely procedural order including the franchisor as a party to the existing dispute between the claimants and the respondent. I shall order accordingly. At least this will give the franchisor an opportunity to answer the respondent's allegations against it - a better opportunity than an attendance notice.

It follows that the respondent must provide the franchisor with a clear and adequately particularized statement of its proposed claim. I direct that this be done by means of a notice similar to an ordinary Notice of Dispute.

ORDERS:

1. That the franchisor, Bakers Delight Holdings Limited be included as a party to this proceeding.

2. That the respondent prepare and lodge a particularized statement of its claim against the franchisor in the Registry of the Tribunal within seven (7) clear days of the communication of these orders to the respondent.

3. That the respondent serve a copy of these orders and a copy of the aforesaid statement of claim upon the franchisor and the claimants not later than three (3) clear business days after that statement is lodged in the Registry.

4. That any question of costs be reserved.

5. That a further directions hearing be held at **9.30am** on **Wednesday 1 December 2004**.

Anne Forbes
Chairman