[2004] RSLT 24

THE RETAIL SHOP LEASES ACT

In the matter of

Dispute No 73/03

SAFARI DOWNUNDER PTY LIMITED
(T/A Trend Homewares and The Fudgery)
- Claimants

- and –

FXI PTY LIMITED (Helensvale Plaza Shopping Centre)

- Respondent

DECISION (Re Adjournment)

Given in Brisbane on 27 May, 2004.

On 15 August 2003 the tenant filed a notice of dispute claiming compensation, asserting that the landlord's re-development of the subject shopping centre was significantly disrupting the tenant's trade. The dispute was referred to mediation, and on 18 September 2003 the parties made an agreement in writing ["the settlement"] in full and final satisfaction of all matters in dispute between them.

In essence the settlement provides that the lease shall expire eight months earlier than the lease originally provided; that the tenant will remove its stock and fittings and make certain repairs by the revised expiry date, namely, 31 January 2004, and permits the landlord to show prospective new tenants over the premises. In return the landlord waives a rent review and undertakes to refund the security bond on the revised expiry date. It is further provided that either party may apply to have the agreement made an order of the tribunal.

However, the tenant now alleges that despite its compliance in all respects with the settlement the landlord has not repaid the security bond. The tenant asks the tribunal to enforce the agreement in that respect; the landlord opposes this claim.

At a directions hearing on 8 March 2004 the landlord's solicitor foreshadowed that his client would soon begin action in the Magistrates Court and would then apply to have the matter transferred to that forum. Nevertheless, May 27 and 28 - that is today and tomorrow - were appointed for a full hearing before this tribunal.

By letter dated 17 May 2004, one week before the hearing, and more than two months after the directions hearing of 8 March, the landlord's solicitor informed the tribunal that he had sent a Claim and Statement of Claim for filing in the Magistrates Court at Southport, seeking rent owing under the lease. He outlined several reasons why the proceedings in the tribunal should be adjourned pending a hearing in the Magistrates Court.

In response to that letter I held a directions hearing by telephone at the earliest possible date, 21 May 2004. The tenant then asserted, and the landlord admitted, that all rent payable up to the revised expiry date had been paid. It follows that the amount claimed (or to be claimed) in the Magistrate Court relates to rent for the period between 31 January 2004 (the revised expiry date) and the original expiry date in the lease. Obviously that claim implies that for some reason yet to be fully explained the settlement is of no legal effect. I directed the parties to lodge outlines of their submissions so that the landlord's application for adjournment could be further considered this morning.

In essence the landlord contends that:

1. It cannot seek the alleged arrears of rent in this forum, in view of the provisions of s 109(1)(b)(i) of the *Retail Shop Leases Act 1994*;

2. It anticipates that the tenant will defend the Magistrates Court action by pleading the settlement;

3. In that event the landlord would contend that the settlement is void at common law because of material misrepresentations during mediation, or unenforceable by virtue of the *Trade Practices Act 1974 (Cth)* ("the TPA");

4. This tribunal has no jurisdiction under the TPA;

5. Accordingly, in this tribunal, the landlord's attack on the settlement would be limited to the common law of fraud or misrepresentation, which imposes a higher standard of proof than the TPA. (No authority for this proposition has yet been cited to the tribunal);

6. If the tribunal holds that the settlement is valid the Magistrates Court may reach a different conclusion;

7. If the tribunal orders the security bond to be returned to the tenant , the proceeds may be dissipated before the Magistrates Court claim is determined;

8. If the adjournment now sought is refused the landlord would be denied the opportunity of "running its best defence" [sic] and denied natural justice;

9. The balance of convenience favours an adjournment and the tenant's notional loss of interest on the security deposit (estimated by the landlord at about $306) could be remedied by an award of interest (presumably by the court);

10. The dispute should be dealt with in a forum which has jurisdiction under the TPA. (Here it is assumed, but so far as I am concerned not yet established, that the Magistrates Court has such jurisdiction with respect to an allegation that a contract of compromise is invalid.)

11. Apart from obtaining the settlement improperly the tenant did not leave the premises in a proper condition.

The tenant's director, who is not a legal practitioner, asks that the application for adjournment be refused. He claims that the tenant has met all its obligations under the settlement, and that the landlord is simply "stalling" repayment of the bond – an amount of $8925.

It is not my task this morning to determine whether the settlement should be enforced; that is a matter for a full tribunal. The only question today is whether the hearing should be further adjourned.

Reasons for decision

This tribunal is required - as the landlord acknowledges – to act with expedition, observing only the degree of formality and technicality necessary for a fair and proper consideration of the issues before it and to observe natural justice.

I accept the landlord's submissions numbered (1) and (4) above, but not the others. The tribunal's order is final and binding on parties to the dispute (section 87) which disposes of the landlord's submission number 6 (above). It is clear (though anomalous) that the tribunal has no power to deal with claims for rent, or claims under the TPA. But on the other hand it is expressly authorised to determine whether a settlement should be enforced or set aside: ss 83(2)(g), and (d); s 113(2)(c).

In dealing with an issue under s 83(2)(d) the tribunal should apply the common law: *Johnson Tiles Pty Ltd v Chard Roberts Constructions Pty Ltd* (1993) 15 Qd Lawyer Rep 93. Naturally a party who resists enforcement on the ground of misconduct bears the onus of proving same.

The tribunal has exclusive jurisdiction in a retail tenancy dispute properly before it: s 94(1). (Sub-section 94(2) is immaterial here.). This applies to a question of the validity of a settlement made under Part 8 of the Act. Accordingly, once such a question is before the tribunal it cannot be canvassed in another forum. In this case, therefore, neither party may test the validity of the settlement in the Magistrates Court.

Evidence of anything said at a mediation conference is generally inadmissible: s 115(1). However, this is subject to s 113(2)(c) which permits disclosure "for an inquiry or proceeding about … misconduct that happens during the dispute resolution process". In this case the landlord's response to the tenant's application clearly raises an issue of that kind. Further, according to the general law, "without prejudice" or "negotiation privilege" ceases to apply when a settlement is reached, or is alleged to have been reached. Otherwise it would be impossible to enforce any settlement that was denied or impugned by a party thereto, a state of affairs that would make a mockery of negotiation or mediation at common law or under legislation of the present kind: *Tomlin v Standard Telephones & Cables Ltd* [1969] 1WLR 1378; *Bentley v Nelson* [1963] WAR 89; *Knapp v Metropolitan Permanent Building Association* (1888) 9 NSWLR 486.

In my view, having regard to the jurisdiction expressly conferred on this tribunal, and its exclusive character, any related claim in a Magistrates Court should await the resolution of the dispute now before this tribunal. That conclusion is supported by logic as well as law, because unless and until the mediated agreement is set aside the landlord has no claim for rent after 31 January 2004.

It cannot have been the intention of Parliament that this tribunal should be paralysed by the mere fact that a respondent properly brought before it takes, or threatens to take, subsequent action in a court of law.

The application for an adjournment of the hearing is dismissed. The tribunal will proceed to examine the enforceability of the settlement, as required by the tenant's application (which was made long before Magistrates Court proceedings were adumbrated) and the landlord's response thereto.

I note that both parties have filed their material and consider that I have a duty to make orders to expedite that hearing, considering that the agreement was made

eight months ago and that it is four months since the abridged lease term expired.

I am concerned by the delay that has occurred between the initiation of the tenant's application to the tribunal and the landlord's notice of action in the Magistrates Court. I would be disposed to consider an application for any costs attributable to fact that the matter is not proceeding, as set down, today.

Anne Forbes
Chairman
Retail Shop Lease Tribunal