[2007] RSLT 17

RETAIL SHOP LEASE TRIBUNAL

In the matter of

Dispute No 2007/0027

BOOTY HANDMADE TREASURES PTY LTD
- Claimant

- and -

JP MORGAN TRUST AUSTRALIA LTD

- Respondent

Coram: A. FORBES (CHAIR)

INTERIM DECISION ON JURISDICTION

Given in Brisbane on Tuesday 13 November 2007

This is an application by the Respondent J P Morgan Trust Australia Limited ("JPM") to strike out these proceedings for want of any reasonable prospects of success. In short, the Respondent submits it cannot be held responsible for the losses alleged, because, if they occurred, they were not caused by the Respondent, or by any one on its behalf.

This dispute relates to a lease of Shop 11A in the Colmslie Plaza, Morningside, which the Respondent granted to the Claimant on 10 August 2006. The Notice of Dispute, as originally framed, alleged (1) false or misleading statements or misrepresentations and (2) unconscionable conduct. However, the latter claim has been abandoned, and in my view, rightly so. Therefore, I need consider only the claim (as particularised) that the Claimant lessee Booty Handmade Treasures Pty Ltd ("Booty") "… entered into the lease on the basis of false or misleading statements … or … misrepresentations made by a person or persons acting under the authority of [the lessor]".

According to Booty, the offending statements were made by Jeffrey Litte, of Ray White Retail (Queensland) Pty Ltd, a real estate agent employed by JPM's agent, Colmslie Project Pty Ltd ("Colmslie"), when the subject lease was negotiated.

Colmslie's presence in this case is explained by Clause 19.1 (6) (and several related provisions) of a Development Agreement made between JPM and Colmslie on 26 April 2005. Clause 19.1 (6) provides:

> *In relation to any tenancies shown as vacant in the Tenancy Schedule, until the date of practical completion [Colmslie] must use all reasonable endeavours to lease those tenancies … ".*

For that purpose, Colmslie was permitted, indeed required, to "nominate and engage [a] leasing agent with [JPM's] prior consent":Clause 19.2(6)(d)

JPM says that when Litte dealt with the Claimant company, Litte was agent for Colmslie, and not for JPM, and has filed unsworn statements by S C Armstrong and J J Litte to that effect.

Booty, on the other hand, says that, according to Litte, JPM took an active interest in his (Litte's) dealings with Booty at all material times.[1] Here, then, we have a conflict of evidence that seems to call for oral evidence and cross-examination, on oath.

However, JPM submits that this application can and should be determined as a pure question of law, without any necessity for a trial. In that regard it relies on several authorities, including a decision of the High Court in ***Sweeney v Boyland Nominees Pty Ltd***[2] for the proposition that Colmslie, was an independent contractor, not the

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1 Unsworn statement of Charles Robinson, 3 November 2007, paras 6 and 10.

2 (2006) 227 ALR 46; [2006] HCA 19.

agent of JPM for present purposes. ***Sweeney*** was not concerned with a contract of agency, but with a question of vicarious liability in tort – liability for the negligence of a refrigerator repairer. More to the point, the court in ***Sweeney*** referred with approval to ***Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd***[3]***,*** in which a man who was not an employee of the defendant, and who had no authority to accept offers on its behalf, was found to be the defendant's agent, as he had express authority to canvass offers by prospective clients of the defendant.

It is trite law that an agreement which in fact and in law is a lease cannot be deprived of that character merely by describing it as a licence. Labels such as "licence", "independent contractor", "agent", "representative" *etcetera* may require careful examination, in the light of evidence and all relevant circumstances, to see whether they should be accepted at face value.[4] This applies *a fortiori* when one is considering an agreement, such as the present Development Agreement, to which the person against whom the semantic argument is made is not a party. Conceivably – although I certainly have not formed any view on this point – an appropriate agreement may give a "developer" two hats to wear – an independent contractor's hat as builder, and an agent's hat, for the purpose of canvassing offers to take up tenancies when the building is near completion.

Be that as it may, my view is that this case cannot properly be terminated, at this stage, on legal grounds isolated from sworn evidence, cross-examination, and argument reviewing the evidence and all relevant circumstances at the conclusion of a trial. The relevant law is inextricably bound up with issues of fact and credit that can only be determined by a tribunal of three members.

Of course the Claimant must do more than persuade the tribunal, if it can, that Colmslie, assisted by Litte, was an agent for the Respondent, in relation to the Claimant, at all material times. It must also show, if it can, that the alleged representations were in fact made, that (if so) the Claimant reasonably relied upon them, and that as a result, the Claimant sustained in an amount duly established by the Claimant. I need hardly add that on all these matters, I presently have no views.

The application to strike out is refused. In the absence of agreement, the matter should proceed to trial.

A Forbes
Chair

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3 (1931) 46 CLR 41.

4 See for example, the comments of Finn J in ***South Sydney District Rugby League Football Club Ltd v News Ltd & Ors*** (2000) 177 ALR 611 at 645-646.