[2008] RSLT 12

THE RETAIL SHOP LEASE TRIBUNAL

In the matter of

Dispute No. 2007/0107

SAN CHI TUAN PTY LTD

Claimant

- and -

HELEN DIMITRIJEVSKI AND ZIVKO DIMITRIJEVSKI

Respondents

BEFORE:

KF Watson (Chair)
D McBryde (Member)
N Judge (Member)

Appearances: Written submissions filed by Mr P Muller, Solicitor for the Claimant
Written submissions filed by Helen and Zivko Dimitrijevski for the Respondents

DECISION ON COSTS

Given in Brisbane on Wednesday, 27th day of August 2008

The issues

1. On 23 May 2008, the Tribunal gave a decision in this matter whereby it awarded the sum of $55,598.30 to be paid by the Respondents to the Claimant together with an amount for interest. By that decision it required the parties to make application through the Registry for costs if a party was so minded. The Claimant in this matter has sought costs. It has done so on two bases, namely:-

   (a) that the dispute was frivolous or vexatious (see s.91(3) of the *Retail Shop Leases Act* 1994 ("the Act")); and

   (b) an offer was made prior to the hearing of the dispute to settle it on terms which were more favourable to the Respondents than the effect of the decision given by the Tribunal on 23 May 2008. (See s.91A of the Act).

2. We deal with each of these contentions in turn.

Frivolous or vexatious nature of the dispute

3. The Claimant contends that the conduct of the Respondents is such that it so affected the dispute that it is correct to characterise the dispute as frivolous and vexatious. In support of that contention, the Claimant's solicitor draws attention to a decision of a Retail Shop Leases Tribunal in Dispute No. 41 of 2003 between *Tjin Nominees Pty Limited v BB Design Pty Limited*. In that decision, the Tribunal awarded costs and said, in part:-

   > "It seems to us that the relevant subsection here is subs.3(a), which provides that the Tribunal may make an order for costs if it is satisfied the dispute is frivolous or vexatious. Now, a dispute has two aspects. There is a party claiming relief, and the other party disputing that relief. Just as it may be frivolous/vexatious for a claimant to commence a dispute it may be equally frivolous/vexatious for the respondent to deny the claim."

4. We are not persuaded as to the correctness of this proposition. The dispute in question in s.91(3)(a) is the retail tenancy dispute. "Retail tenancy dispute" is defined as:-

   > "Any dispute under or about a retail shop lease, or about the use or occupation of the leased shop under a retail shop lease, regardless of when the lease was entered into."

5. The dispute is the claim or difference between the parties, that is the lessor and the lessee, and the dispute remains a dispute until the resolution of it. (See *Halki Shipping Corporation v Sopex Oils Ltd* [1997] 1 WLR 1268). Here, the dispute is that which is set out in the Notice of Dispute filed by the Claimant in the Registry on 29 October 2007 and registered on 31 October 2007 as augmented by the Claimant during the hearing of the dispute. It cannot rationally be contended that since the Claimant has largely succeeded, the dispute from the Claimant's perspective was frivolous or vexatious. The fact that there may be no answer to the claim made by the Claimant or an answer may be described as frivolous or vexatious or no answer in fact or in law does not characterise the dispute as frivolous or vexatious. The legislation does not permit of a parsing of the dispute into various constituents for the purposes of s.91(3)(a). To do so is to confuse the conduct of a party in relation to the dispute with the dispute itself and would do violence to the language of the paragraph. The legislature has seen fit to deal with the consequences of the conduct of a party in s.91(3)(b) of the Act. It would be wrong to import those notions into s.91(3)(a).

6. Further, because the Respondents, in large part, have not succeeded in resisting the claim made by the Claimant does not mean that their conduct in pursuing their defence and succeeding on that part upon which they did succeed characterises the dispute as frivolous or vexatious.

7. For the above reasons, we are of the opinion that the frivolous and vexatious ground as supporting the application for costs is not available to the Claimant.

Section 91A claim

8. The Claimant's solicitor forwarded a letter dated 14 March 2008 to the Respondents' solicitors, the material part of which is as follows:-

> "Our client instructs that it will accept payment of the sum of $55,000.00 all inclusive in compromise of its claim and the matters asserted by your client by way of set-off, provided that payment of this sum is made no later than 4:00pm, Monday 17 instant. This offer is open for acceptance until 12:00pm, Monday instant."

The letter is headed "Without prejudice". The offer was not accepted and, as can be seen from the Tribunal's decision of 23 May 2008, the Claimant was more successful in the amount awarded to it than the offer made. Prima facie, therefore, the elements of s.91A(1) of the Act would appear to favour the Claimant.

9. However, the Respondents in their written submissions draw attention to the fact that the letter of 14 March 2008 is headed "Without prejudice" and is not otherwise qualified so that the Tribunal is precluded from having regard to it. In making such a submission, the Respondents are on strong ground and, in effect, assert a proposition which has a long history commencing with the English decision of *Walker v Wilsher* (1889) 23 QBD 335 which was adopted by Hodgson J in *AAMI V Finance Ltd v Artis Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486 at 487 amongst other Australian decisions. The proposition being that "without prejudice" offers of settlement are not admissible even on questions of cost. The rule is not without its critics, including that of Suzanne McNicol in her work *Law of Privilege*, The Law Book Company Limited, 1992, at page 447 where she says as follows:-

> "It is submitted by the present author, however, that the reasoning of the Court of Appeal [referring to *Walker v Wilsher*]is not convincing. Without prejudice privilege ensures that the conduct of the parties in attempting to effect settlement does not affect or cloud the substantive *issues* in the case in any way. Once, however, the Court has disposed of the substantive issues in the case, the Court should be entitled to take into account the conduct or misconduct of the parties (as evidenced, inter alia, by the without prejudice correspondence) in order to determine whether there is good cause to deprive either party of costs. The principle should be no different from that applied in a criminal case where, once the issue of guilt has been determined, the Judge may take into account the previous bad or good character of the accused on the question of sentencing."

10. However, she goes on to acknowledge:-

> "Nevertheless, it appears that the rule in *Walker v Wilsher* has never been questioned having been applied generally and in respect of arbitrations in England and in Australia."

11. That being the case, ordinarily the Tribunal would be hesitant to disregard such a long line of authority.

12. However, it is to be observed that the rule is a rule directed to the admissibility of the document or documents in question. Thus it is a law or rule of evidence. This is made plain by what Dixon CJ and Webb, Kitto and Taylor JJ said in *Field v Commissioner for Railways* (1957) 99 CLR 285 at 291-292 where the following is said:-

> "The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered. This form of privilege, however is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of negotiations or what is said in the course of them as evidence by way of admission. For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner by use of the words 'without prejudice' and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words (citation omitted). *Needless to say, the privilege is a matter to be raised by objection to the admissibility of the evidence*." (emphasis added)

13. This passage, or part of it, was referred to with approval by Williams JA in *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 at 248-249. By s.72(2) of the Act, the Tribunal is not bound by the rules of evidence and may inform itself of any matter in a way it considers appropriate. In those circumstances, the Tribunal is of the opinion that it is appropriate in this case to disregard the fact of the "without prejudice" designation on the 14 March 2008 letter so as to enable it to have regard to the terms of the offer made in that letter. It does so because of the obvious policy behind the insertion of s.91A into the Act combined as it is with s.72 and the fact that legal representation is under s.71 of the Act discretionary. In other words, it does not appear consistent with the policy of the legislation to adopt a stricture which will be familiar to lawyers but most likely unfamiliar to laypersons who may well

understand the effect of the words “without prejudice” but may be ignorant of the qualification that might otherwise apply in terms of costs issues.

14. For the above reasons, the Tribunal is of the opinion that the contents of the letter of 14 March 2008 may be taken into account and that the requirements of s.91A of the Act have been met.

15. There does not appear to be any dispute with respect to the reasonableness of the quantum of the legal costs claimed by the Claimant and, accordingly, the Tribunal orders that within 14 days of today’s date the Respondents pay to the Claimant the sum of $5,732.18 by way of costs. These are the costs incurred by the Claimant following the expiry of the offer of 14 March 2008.

K.F. WATSON
Chair