

[2009] RSLT 016

THE RETAIL SHOP LEASES TRIBUNAL

In the matter of

Dispute No. 2007/0121

**YUTING LIU AND YAN MA TRADING AS HEALTHY
ORIENTAL FOOD**

Claimants

- and -

**VILLAGE CENTRE AT KELVIN GROVE PTY LTD
ACN 105 138 467**

Respondent

Before:-

KF Watson (Chair)
E Robertson (Member)
R Hourigan (Member)

Appearances:

Claimant: Mr Yuting Liu appeared initially for the Claimants and then himself and Mr K Law (Advocate).

Respondent: Mr C Johnstone of Counsel instructed by Redmond Van de Graaff Solicitors for the Respondent.

**MAJORITY DECISION
ROSLYN HOURIGAN AND ELEANOR ROBERTSON (MEMBERS)**

Given on 12th day of March 2009

The Notice of Dispute

1. This is an application by Yuting Liu and Yan Ma who are claiming compensation from Village Centre at Kelvin Grove Pty Ltd for alleged misstatements or misrepresentation of one Jason Grant who, at all material times (see Exhibit 15), was the Development Manager of the retail aspect of the Kelvin Grove Urban Village project which was the project, that is the shopping centre, in which the Claimants took their lease the subject of this dispute. Mr Liu and Ms Ma say they entered into the lease in reliance on these alleged representations.

2. On 11 December 2007 the Claimants filed a Notice of Dispute in the Retail Shop Leases Registry claiming compensation of \$248,000. This claim was later amended in the Statement of Claim to \$291,972, and again in Mr Liu's Final Submission to "\$229,844 + two months labour for shop fitting".

Orders sought by Claimant

- (a) A Declaration that the lease agreement is void ab initio, or alternatively, compensation in an amount equal to any further liability that the Lessees may have under the Lease Agreement;
 - (b) Such further or other orders as the Tribunal considers appropriate;
 - (c) Costs.
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3. The Claimants' claim has been treated as a claim pursuant to s.43 of the *Retail Shop Leases Act 1994*.

Orders sought by Respondent

4. (a) That the Claimant's claim is dismissed;
- (b) That the Claimant pay to the respondent the amount of \$40,901.39 by way of rent arrears or such other amount as the Tribunal deems fit;
- (c) That the Claimant sign any and all documentation necessary to remove the registration of the Claimant's lease from the title of the

- Respondent's land within seven days of a request to do so;
- (d) Such further or other orders that the Tribunal considers appropriate;
 - (e) Costs.

False or misleading statements or misrepresentations relied upon

- 5. In the Statement of Claim, Mr Liu and Ms Ma claim that Mr Grant made representations with the knowledge and intent that the Lessees would rely upon the same in executing the lease:
 - (a) The Written Representations;
 - (b) The Location Representations;
 - (c) The No competition Representation;
 - (d) The Shop 9 Representation
 - (e) The Potential Turnover Representation
 - (f) The Type of Residents Representations;
 - (g) The Car Parking Representation; and
 - (h) The Percentage Sale Representation

- 6. In Exhibit 2, Mr Liu lists the main factors which influenced their decision to lease Shop R9:
 - (a) that Jason told us that the centre was in a busy area with many potential customers and close to the theatre and the university.
 - (b) the information contained in the promotional material;
 - (c) that Jason had told us that we would be the only Asian food store in the centre;
 - (d) that Jason had told us that other stores in the Centre would turn over \$5 million dollars every year and that our store would make me "a rich man";
 - (e) that Jason told us that Shop 9 was in a very busy location and that many customers would be forced to walk past it;
 - (f) that Jason had said (and the information in the promotional materials had also stated) that the residents of the building would be rich with high spending capacity; and
 - (g) that Jason had said that 70% of the units had already been sold.

The Written Representations

7. On or about October 17, Mr Liu met with Mr Grant. Mr Liu was responding to an advertising campaign calling for expressions of interest from retail operators for the Kelvin Grove Urban Village Project. Mr Liu and Mr Grant met on a number of occasions at the construction site. Mr Grant provided Mr Liu with promotional material on the Kelvin Grove Urban Village Project, took him on a tour of the construction site, and also the neighbourhood, including La Boite Theatre. In the Statement of Claim (paragraph 15 Page 2) Mr Liu states that “Based on what Jason had said and also what was in the promotional material, I became interested in leasing a shop in the Centre. Attached to Mr Liu’s Statement (Exhibit 2) are copies of the promotional material:

- (a) YL-01 which included a plan of the centre, showing among other features, the waste handling area and compactor, lifts, and the ramp from the retail floor to the carpark below;
- (b) YI-02 - an open marketing letter “A Unique Retail Success Story in the Making” signed by Mr Grant
- (c) YL-03 – A demographic report prepared by Core Economics, with disclaimer on Page 3 that states, *“The Report has been prepared to provide an estimate of expenditure that retailers locating within the Village Centre will have the potential to access from the surrounding trade areas. Further on, the disclaimer states “the report contains a series of Projections and forecasts that have been prepared on the basis of the best available information. Due to the dynamic nature of many of these issues and the number of variables involved, Core Economics can give no guarantee that these projects and forecasts will be realised.”*

Did the Claimants Rely on the Written Representations to enter the Lease?

8. Under cross examination (see page 66 of the transcript of Day 1) Mr Liu said he had read the Core Economics Report “roughly” and Mr Grant’s letter “carefully”. Mr Liu also acknowledged that the Report

stated that Core Economics could give no guarantee that these projections and forecasts would be realised. He conceded that the projection for the residential occupancy was over the next four years (see page 68 and 69).

9. Mr Liu did not provide any evidence to justify their claim that any of the written representations were false or misleading.
10. Jason Grant denied that he made any written misstatements or misrepresentations. (See Page 4 of Exhibit 15). The Respondent argued that the projections provided to Mr Liu and Ms Ma were a demographic report by Core Economics and not the Respondent.
11. The Claimant did not satisfy the Tribunal that the written statements were misrepresentations; that they were made by the Respondent, and they had relied on them to enter the lease.

The Location Representations

12. In the Statement of Claim (Paragraph 8 on Page 2) the Claimant states they relied on oral representations made by Mr Grant namely, that the Village Centre was located in a very busy area, the nearby university would provide a high number of customers to the Village Centre, and the nearby La Boite Theatre would provide a high number of customers to the Village Centre.

Did the Claimants Rely on the Location Representations to enter the Lease?

13. Mr Liu visited the construction site on a number of occasions prior to entering into the lease; he was given promotional material which included a plan of the centre and demographic report. (See paragraph 7 above.) Mr Grant took Mr Liu on a tour of the construction site and to the neighbouring La Boite Theatre.

14. Mr Grant states that he did not make the statements referred to as “Location Representations”. He did tell Mr Liu that the QUT and Creative Industry student populations were in close proximity to the Village Centre. (Refer Paragraph 17 of Exhibit 15).
15. Mr Liu did not provide any evidence to prove that any of the location representations were false or misleading, and that they had relied on them to enter the lease.

The No Competition Representation

16. In the Statement of Claim, it was alleged that Mr Grant on several occasions made the oral representation that the Lessees would be the only store in the Village Centre to sell sushi and Asian food. Mr Liu said that on or about October 2007 he became aware that a restaurant called “Little Lilly Sushi and Thai” would be moving into the Centre, and had he known there was going to be a second restaurant in the Centre providing direct competition, he would not have entered into the lease. (Refer paragraphs 77 and 78 of Exhibit 2).
17. The Claimant vacated the premises of Shop 9 on or about November 30, 2007. (Refer Page 7 of Exhibit 13). The new restaurant did not commence trading until around February 2008, at least two months after the Claimant vacated Shop 9.

Did the Claimants rely on the No Competition Representation to enter the Lease

18. In his statement (paragraph 41 of Exhibit 15) Mr Grant denied telling Mr Liu that they would have the only store selling sushi and Asian food. On receipt of the Lessor Disclosure Statement and Lease, the claimants’ solicitor wrote to the Lessor’s solicitors and requested exclusive use. Their response was *“the request for exclusive use is not agreed. We are instructed that at this stage our client is not proposing any similar use to your client’s within the centre however no exclusivity will be agreed to.”* (Refer JG12 and JG 13 attached to Exhibit 15). Under

Clause 11.8 of the lease the lessee acknowledges no promise, Representation, warranty or undertaking has been given by or on behalf of the landlord.

19. Given the above, the Claimant cannot justify the argument that they relied on a false or misleading statement regarding exclusivity to enter the lease, and therefore had grounds to break the lease and vacate the centre.

The Shop 9 Representation

20. The Claimant alleged that they relied on a number of false or misleading statements made by Mr Grant including;

- (a) Shop 9 was located in a good position and a very busy position in the Village Centre;
- (b) that all the 450 residents in the building would pass by the shop when they used a nearby elevator to access the car park;
- (c) that any customers using the car park would pass by the Shop when they used a nearby elevator to access the car park;
- (d) that a Doctor's surgery was to be located nearby Shop 9.

21. Mr Liu said it was not the case that any customers using the car park pass by Shop 9 and in fact most customers who use the car park access it via a ramp, which does not take them past their shop.

22. He also claimed that he was not made aware that the Waste Handling Area was behind his shop, and alleged that customers complained about the smell and flies, which impacted on sales. (Paragraphs 29 to 31 of Statement of Claim.)

Did the Claimants rely on the Shop 9 Representations to enter the Lease

23. Mr Grant denied making the false or misleading statements referred to in paragraph 19 above. (Refer Paragraphs 41(b) (c) and (d) on Page 10 of Exhibit 15). Respondent's Counsel asked Mr Grant if he had told

Mr Liu that “Shop 9 was in a good spot”. (See Page 72 of the transcript for Day 2). Mr Grant said, “I do not recall using those words”. We accepted his response as just another way of saying, “No, I did not say that Shop R9 was in a good spot.” (See Page 72 of the transcript for Day 2.)

24. Mr Liu had been provided with a plan of the centre showing lift locations, the ramp to the car park, and waste handling facilities, as well as the Core Economics Report. Mr Liu agreed that there was only one lift from the carpark to the shopping level, and that anybody using the lift would come out looking at his shop. He agreed that he had received a map showing the location of lifts servicing the residential tower, had looked at the map “roughly” but was not “very interested at that time.(Refer page 81 and 82 of Day 1 transcript.)
25. Mr Liu should have been aware of the location of the waste handling area, lifts and ramp to the car park, as they were shown on the plan of the centre in the promotional material given to him at the first meeting.
26. It was not the lessor’s intention that Shop 9 be a restaurant. Jason Grant sent an email to Mr Liu on October 26, 2005 advising that Shop 9 would form part of the produce market. He queried whether Mr Liu could offer his product as a produce line, and advised that “what you are doing at Kenmore is very different to what we are looking for at Kelvin Grove.” (JG04 attached to Exhibit 15).
27. On January 5, 2006, Mr Liu and Ms Ma signed an Expression of Interest to Lease Tenancy No R 9 with the following usage clause: *“Sale of Asian Produce including sushi, spring rolls, dumplings, Asian drinks, salads, rice noodles, Asian fruit salad, steamed buns, soup and coffee and tea. Some dining within premises but primary focus on produce sales.”* (Refer JG09 attached to Exhibit 15). The usage was amended in the lease document, at the request of the Claimant’s

solicitors under instruction from their clients, by inserting a comma between “rice” and “noodles”. (Refer JG12 attached to Exhibit 15).

28. From the correspondence, which passed between Mr Grant and Mr Liu, the usage clause of the Expression of Interest and the Lease, the claimants were aware that it was not the lessor’s intention that Shop 9 be a restaurant. It was to be a produce store and form part of the produce market.
29. Even if a representation was made that it was in a good location, in the Members’ experience with retail premises, Shop R9 was a suitable location, being near the only lift from the retail level to the carpark, and in close proximity to the supermarket, butcher, and fruit shop, for the usage the lessor envisaged. Whilst the lessor agreed to allow Mr Liu and Ms Ma to have some tables and chairs in the shop, the lease required the emphasis to be on “produce”. In this instance, we believe “produce” would be prepared food like sushi, spring rolls, and dumplings, and dry food such as rice, noodles, Asian teas and beverages and the like, which customers could take home for consumption as is, or for further preparation.
30. Mr Liu had ample opportunity and time to carry out research on the Centre and the premises. Given that the Claimant had visited the construction site several times, been given a guided tour of the centre, as well as receiving the aforementioned promotional material, we are not satisfied on the balance of probabilities that the Shop 9 misrepresentations were made or, if made, were the basis upon which the Claimant entered into the lease.

The Potential Turnover Representation

31. In the Statement of Claim it is alleged that Mr Grant made representations regarding the potential turnover of Shop R 9 and the proposed book/coffee shop. (See page 3 of Statement of Claim.)

Did the Claimant rely on the Potential Turnover Representation

32. Mr Grant denied making any of the alleged representations regarding potential turnover. (Refer pages 10 and 11 of Exhibit 15). Mr Liu did not convince the Tribunal that these representations were made, or if they were made, that they were relied on to enter the lease.

The Type of Residents Representations

33. In the Statement of Claim, Mr Liu alleges that Mr Grant made oral representations regarding the residents who would occupy the residential tower.

Did the Claimant rely on the Type of Residents Representation

34. Mr Grant denied making any representations in relation to residents. He stated the Core Economics Report had a projection of 450 residents when the development was fully occupied, and demographic information in relation to income, etc. of potential residents.

35. Mr Liu had been provided with the Core Economics Report and did not argue that the statistics were false or misleading.

36. Mr Liu did not provide evidence to convince the Tribunal that any false or misleading residents' representations were made.

The Car Parking Representation

37. In the Statement of Claim it is alleged Mr Grant made an oral representation that there would be a free car park for customers. (Refer page 3 of Statement.)

Did the Claimant rely on the Car Parking Representation

38. Mr Grant stated that he told Mr Liu that the Supermarket covenant required parking controls to prevent uncontrolled parking from the large local student population deterring centre customers. (Page 4 of exhibit 15.) In response to a request from the Claimant's solicitor for the lease

to include a clause to provide the Claimant with free car parking, the Lessor's solicitor advised that it was proposed to provide retailers with a ticket validation machine to validate their own parking chits. The plan of the carpark given to the Claimant shows a representation of a ticketing machine and barrier gate at the vehicular entry to the car park.

39. The claimant did not satisfy the Tribunal that a false or misleading statement was made about the carpark.

The Percentage Sale Representation

40. In the Statement of Claim, it is alleged Mr Grant told Mr Liu that 70% of the residential units had already been sold (Refer Page 3 of Statement.)

Did the Claimants rely on the Percentage Sale Representation

41. Mr Grant denied making this representation and said he told Mr Liu that approximately 120 of the 213 units had been contracted for sale. (Refer Page 11 of Exhibit 15.) This equates to 57%. The Claimant did not provide any evidence in relation to the number of units sold at the time the alleged statement was made.
42. The Claimant did not satisfy the Tribunal that a false or misleading representation was made in relation to the percentage of units sold.

Lessee Disclosure Statement

43. The Claimant signed a Lessee Disclosure Statement, dated February 14, 2008, which stated the only representation relied on was the Offer to Lease.

The Hearing

44. This was a protracted Hearing, which commenced on May 27, 2008 and continued through May 28, 2008 until mid morning on May 29, 2008 when it was adjourned at 10.04 a.m. as Mr Liu was unable to attend due to illness.

45. The Hearing resumed on July 17, 2008 and continued through July 18, 2008 when it was adjourned at 2.53 p.m.
46. Whilst English is a second language for Mr Liu, he holds a Ph.D. in Engineering and has worked at Australian and New Zealand Universities and research facilities. He agreed he knew the value of research. He is highly educated but it appears he did not consider it necessary to do his own research on the centre, or do any more than sign the lease and other documentation, without reading or understanding the contents. (Refer Page 6 of the transcript for Day 2.)
47. Throughout the hearing, Mr Liu had problems with recall. He could not remember emails sent between himself and Mr Grant (See pages 71-77 of Day 1 transcript.) He could not recall receiving an email from Mr Grant attaching a letter sent to the Claimant's solicitor in response to requests for amendments to the Lessor Disclosure statement and Lease document. (Refer JG13). Mr Liu could not remember receiving specific advice from his solicitor in relation to the lease and lessor disclosure statement. (See pages 115-120 of the transcript of Day 1 and pages 2-5 of the transcript of Day 2.)
48. Mr Liu could not recall the actual amounts received for equipment, which was auctioned when they vacated the shop. (Se page 27 of the transcript for Day 2.)
49. We found the evidence of the various witnesses more credible than that of Mr Liu who had a very poor recall of several significant issues. He did not consider it necessary to read and understand the lease before signing it, and had made little effort to carry out fundamental research, which one would expect of an experienced businessman about to invest a considerable amount of money in a shop in a new centre.

The Decision in relation to the Claimant

50. Having full regard to the evidence dealt with during the Hearing, our decision is that the Claimant did not enter into the lease on the basis of any false or misleading statement or misrepresentation for the purposes of Section 43(2)(a) of the *Retail Shop Leases Act* and the respondent is not liable to pay compensation. The claim is dismissed.

Costs

51. Both parties sought costs. The Tribunal is of the opinion that neither party is entitled to costs under Section 91(c) of the *Retail Shop Leases Act* and each party to the dispute must bear the party's own costs.

Arrears claimed by Respondent

52. The question of arrears, although claimed by the Respondent, was not the subject of any submissions. If the Respondent wishes to pursue this matter, they may apply to the Tribunal.

Orders

53. That the Claim is dismissed.

54. That the Claimant sign any and all documentation necessary to remove the registration of the Claimant's lease from the title of the Respondent's land within seven days of a request to do so;

SIGNED: _____

Roslyn Hourigan

Member, Retail Shop Lease Tribunal

SIGNED _____

Eleanor Robertson

Member, Retail Shop Lease Tribunal

THE RETAIL SHOP LEASES TRIBUNAL

In the matter of

Dispute No. 2007/0121

**YUTING LIU AND YAN MA TRADING AS HEALTHY
ORIENTAL FOOD**

Claimants

- and -

**VILLAGE CENTRE AT KELVIN GROVE PTY LTD
ACN 105 138 467**

Respondent

Before:-

KF Watson (Chair)
E Robertson (Member)
R Hourigan (Member)

Appearances:

Claimant: Mr Yuting Liu appeared initially for the Claimants and then himself and Mr K Law (Advocate).

Respondent: Mr C Johnstone of Counsel instructed by Redmond Van de Graaff Solicitors for the Respondent.

**DISSENTING REASONS FOR DECISION
BY KF WATSON (CHAIR)**

Given on 13th day of March 2009

The Notice of Dispute

6. On 11 December 2007 the Claimants filed a Notice of Dispute in the Retail Shop Leases Registry claiming compensation. The Claimants' claim has been treated as a claim pursuant to s.43 of the *Retail Shop Leases Act* 1994 and specifically as a claim that the Respondent pay to the Claimants reasonable compensation for loss or damage suffered by the Claimants because they entered into a lease (set out as Annexure "YL-04" to Exhibit 2) on the basis of false or misleading statements or misrepresentations made by the Respondent or any person acting under the Respondent's authority.

7. In this case the Claimants point to what they say are misstatements or misrepresentations of one Jason Grant who, at all material times (see Exhibit 15), was the development manager of the retail aspect of the Kelvin Grove Urban Village project which was the project, that is the shopping centre, in which the Claimants took their lease the subject of this dispute.

False or misleading statements or misrepresentations relied upon

8. There were a number of alleged false or misleading statements relied upon by the Claimants in these proceedings set out in Exhibit 2. Apart from one matter which I will deal with shortly in these reasons, I am not satisfied on the balance of probabilities that the statements or misrepresentations were made or, if made, were the basis upon which the Claimants entered into the lease the subject of the dispute. In particular, with respect to the waste handling area, in my opinion, that matter was so obvious from the brochure given to Mr Liu by Mr Grant (see Exhibit 8) that its proximity or the nature of it could not have formed any falsity or misrepresentation on the part of the Respondent. Similarly, on the question of exclusivity, it could not be said that any false or misleading statement or representation was made by the Respondent on this aspect. Although the Respondent stated that at the time the Claimants were entering into the lease that no other sushi establishment was going to trade, this was qualified with the words "We are instructed

that at this stage our client is not proposing any similar use to your client's within the centre however no exclusivity will be agreed to" (see part of Annexure "GJ-13" to Exhibit 15). Given those circumstances, it is impossible for the Claimants to argue that there was a false or misleading statement as to exclusivity of use.

Location of shop

9. One of the Claimants (Mr Liu) gave evidence in the proceedings. His evidence was to the effect that Mr Grant had told the Claimants that the proposed shop was in a "very good location" (see paragraph 21 of Exhibit 2 and paragraph 38 of the same Exhibit; see also pages 80-81 of the transcript of Day 1). Mr Grant in his evidence initially stated that he did not make any such statement (see paragraph 41(b) of Exhibit 15). However, in his evidence on Day 2 at page 72, the following exchange took place in examination in chief between the Respondent's Counsel and himself:-

"Mr Johnstone: At paragraph 11 which is quite lengthy, on what is I think the third page, Mr Liu attributed to you certain things. I am trying to work out what they are. I suppose I'll ask this generally, the suggestion is, I'll ask this generally, did you in the course of conversation in Kenmore, which I think is referred to as the second or at the third meeting, tell Mr Liu that shop 9 was in a good spot?"

Mr Grant: I do not recall using those words."

10. Having regard to the unequivocal denial in Exhibit 15 (as pointed out above), this is a surprising answer. Indeed, in his evidence Mr Grant stressed that the Claimants' business was "produce based" (see page 101 of Day 4's transcript). But when one looks at Annexure "JG-08" to Exhibit 15 and, in particular, the menu it can be seen that it was obvious that the emphasis of the Claimants' trade was take-away consumable food and not raw produce in the sense of sacks of rice or packets of noodles. In my opinion, the emphasis by Mr Grant upon Asian produce was to assimilate the location of the store with other raw produce shops in the vicinity of the Claimants' shop, namely a fruit and vegetable shop and a butcher (see Exhibit 8).

11. In those circumstances I am, on balance, prepared to accept that the representation that the shop (R9) was in a good location was made by Mr Grant prior to the Claimants entering into their lease.

12. Having regard to Exhibit 8 and the designation of the shop (for which the lease the subject of the dispute was entered into) as “specialty services” as distinct from the fresh food/produce and restaurant/cafes areas, it cannot be said that the Respondent was putting forward this as a designated location for a take-away food shop. It is not located adjacent to other consumable food areas that either open onto Carraway Street or Musk Avenue and is not in an area which would be the subject of substantial passing pedestrian traffic as those opening onto those streets would be. In those circumstances, I am is of the opinion that the statement that the shop was in a good location was either a false or misleading statement or misrepresentation for the purposes of s.43(2)(a) of the *Retail Shops Leases Act* 1994.

Did it form the basis for the Claimants entering into the lease with the Respondent?

13. Mr Liu attests to the fact that it was a material factor in the Claimants entering into the lease. In my opinion, it need not be the only factor but it must be truly be able to be said to be a basis for entering into the lease. See *Dawsons, Ltd v Bonnin* [1922] 2 AC 413 at 432. That being the case, I am of the opinion that the misstatement or misrepresentation did form the basis for the Claimants entering into the lease. I am of the opinion that s.43(2)(a) of the Act is to be interpreted as meaning that the false or misleading statement or misrepresentation need not be the sole basis for entering into the lease. Given the wide range of circumstances which would confront intending lessees, the legislature cannot be thought to be so restrictive.

Compensation

14. I next consider what matters can be taken into account in assessing reasonable compensation to be awarded to the Claimants. I am of the opinion that the following matters can be taken into account, namely:-
- (a) fit out costs (less an amount for an amount realised on salvage) and included in this sum an amount allowed to Mr Liu for his costs in sourcing out material for the fit out. On the evidence, I assess this amount at \$77,000 as part of the reasonable compensation that should be awarded to the Claimants.
 - (b) There are other amounts such as the materials and small goods amount, rent, loan interest, advertising, bond and deposit paid, and opening promotion fund paid which also should be awarded to the Claimants but less the amount which they appear to have earned, being \$46,172, described as their turnover. I would not allow any amount for transport or depreciation.
15. Having regard to these amounts and acknowledging that the assessment of reasonable compensation is not an exact science, I am of the opinion that the sum of \$80,000 should be awarded to the Claimants.
16. As these are dissenting reasons I can make no orders to reflect them and acknowledge that the formal order of the Tribunal is that agreed on by the majority.

K.F. WATSON
Chair