

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Gibbons-Munch & Anor v RAM Property Nominees Pty Ltd as Trustee* [2018] QCAT 450

PARTIES: **ROSLYN GIBBONS-MUNCH**
BJARNE MUNCH
(applicants)
v
RAM PROPERTY NOMINEES PTY LTD AS
TRUSTEE
(respondent)

APPLICATION NO/S: RSL221-18

MATTER TYPE: Retail shop leases matter

DELIVERED ON: 11 December 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Kanowski

ORDERS: **Until a final decision is made in the retail shop lease proceeding filed by Roslyn Gibbons-Munch and Bjarne Munch in the Tribunal on 22 November 2018, or until further order, or until any future termination of the lease, RAM Property Nominees Pty Ltd as Trustee must return possession of the premises described as Shop 3.4, Yeronga Village, 421-429 Fairfield Road Yeronga to Roslyn Gibbons-Munch and Bjarne Munch pursuant to the lease commencing 15 July 2016.**

CATCHWORDS: LANDLORD AND TENANT – TERMINATION OF THE TENANCY – PROVISIONS GIVING RIGHT TO TERMINATE IN NAMED CIRCUMSTANCES – OTHER CASES – where lessor terminated lease for late payment of rent – whether arguable case that termination not valid

Property Law Act 1974 (Qld), s 124
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 59

REPRESENTATION:

Applicant: N Daunt of Robert Bax & Associates Solicitors and Notary Public

Respondent: D E F Chesterman instructed by Corrs Chambers
Westgarth Lawyers

APPEARANCES:

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act').

REASONS FOR DECISION

Introduction

- [1] The applicants have run a café business at Yeronga Village shopping centre for some 16 years. The most recent lease was signed in 2016, to run from 15 July 2016 for three years, with an option to renew. The current lessor is the respondent.
- [2] On 5 November 2018 the respondent's solicitors wrote to the applicants attaching a notice to remedy breach of covenant. The alleged breach was non-payment of 'rent, outgoings and other amounts payable under the lease' in the sum of \$6,769.32.
- [3] On 13 November 2018 the respondent locked the applicants out on the basis that they had not remedied the breach. This was a termination (or purported termination) of the lease.
- [4] The applicants promptly sought legal representation. On 16 November 2018 the applicants' solicitors wrote to the respondent's solicitors contesting the validity of the notice and demanding that the respondent permit the applicants to resume occupation by 19 November 2018.
- [5] No resolution was reached, so on 22 November 2018 the applicants filed in QCAT a notice of dispute under the *Retail Shop Leases Act 1994 (Qld)*. On the same day, the applicants filed in QCAT an application for interim orders. The orders sought were that until the dispute has been decided, the respondent must return possession of the premises to the applicants, and such other orders as QCAT sees fit.
- [6] The present decision is on the application for interim orders. The next step in the substantive proceeding itself is a mediation conference on 19 December 2018.
- [7] Affidavits and submissions have been filed by the lawyers for both parties. The applicants' affidavit material consists of an affidavit by Ms Gibbons-Munch dated 22 November 2018. The respondent's affidavit material consists of an affidavit by Douglas Rapson, associate director of the respondent, dated 3 December 2018, and an affidavit by Martin Byers, solicitor, dated 4 December 2018.

Relevant legislation and considerations

- [8] QCAT may grant an interim injunction in a proceeding if it is just and convenient to do so.¹ In granting an injunction, QCAT may require an undertaking as to costs or damages.²

¹ QCAT Act, s 59(1).

² *Ibid*, s 59(6)(a).

- [9] Mr Chesterman submits, in effect, and I accept, that relevant questions are:
- (a) have the applicants shown that there is a serious question to be tried?
 - (b) have the applicants shown that they are likely to suffer injuries for which damages will not be an adequate remedy?
 - (c) does the balance of convenience favour the grant or refusal of an injunction?

Have the applicants shown that there is a serious question to be tried?

- [10] It is not appropriate for me to make any final determination of the merits of the respective cases, but it is of course necessary to make an assessment of whether the applicants have an arguable case.
- [11] There are several challenges to the notice to remedy. However, for present purposes it is sufficient to consider only one. If that challenge was decided in the applicants' favour at the substantive hearing, the likely outcome would be a determination that the lease was not validly terminated.
- [12] That challenge relates to whether the alleged breach was properly particularised in the notice to remedy.
- [13] The termination (or purported termination) of the lease on 13 November 2018 appears to have been pursuant to clause 13.5 of the lease. The lessor's right to terminate under that clause is expressed to be subject to the lessor giving notice as required under section 124 of the *Property Law Act 1974* (Qld) ('Property Law Act'). Section 124 restricts a lessor's right to terminate a lease. It involves the giving of a notice, in 'the approved form', which amongst other things specifies the particular breach complained of. The respondent used the approved form, Form 7, for its notice on 5 November 2018. The notice contended that there had been a breach of the applicants' covenant to pay rent, outgoings and other amounts payable under the lease. It required the applicants to remedy the breach by paying the sum of \$6,769.32 '... the particulars of which are set out in the copy of the Aged Delinquencies Report attached ...'.
- [14] At the foot of the Form 7 was a note (apparently a standard, pre-printed note):
- ... If arrears of rent or other periodic payments are being claimed it should be made clear the amounts involved and the periods to which they relate (eg base rent March 1996 - \$x).
- [15] Despite that note, the notice did not specify the period/s to which the amount related. Nor, in my view, did the Aged Delinquencies Report 'make clear' the period/s in question. Perhaps the period/s could be inferred from the data presented in the report, and probably some surrounding circumstances, but that is different from making something 'clear'.
- [16] It is therefore arguable, in my view, that the notice to remedy did not meet the requirements of section 124 of the Property Law Act, and that, therefore, termination was not open under clause 13.5.
- [17] There is a serious question to be tried, on this issue at least.

Have the applicants shown that they are likely to suffer injuries for which damages will not be an adequate remedy?

- [18] Ms Gibbons-Munch in her affidavit says that the termination has left her unemployed.
- [19] If the eventual outcome of the substantive proceeding is a finding that the lease was wrongly terminated by the respondent, presumably an order could be made at that point for the respondent to allow reoccupation by the applicants (if the premises were still available), and compensation could be ordered through an award of damages. However, by then, many months may have passed and it could be difficult or impossible for the applicants to resurrect their business. The prospects of continuing the business would be better if the period of interruption was shorter.
- [20] The primary interest of the applicants appears to be the continuation of their business. Damages would provide a remedy for the loss of the business, but I am not satisfied that it could fairly be described as an adequate remedy for the loss of an established business that would have built up a reputation and following in its local area.

Does the balance of convenience favour the grant or refusal of an injunction?

- [21] The affidavit material indicates that the applicants have a history over many months of paying rent late. However, it appears that payments were up to date as at the end of October 2018. It also appears that the November 2018 rent has also been paid, though up to two weeks late.
- [22] Mr Chesterman submits that granting an injunction would be to the substantial financial detriment of the respondent because the respondent will not have the opportunity to let out the shop to another tenant.
- [23] This argument would be stronger if there were ongoing and significant arrears of rent.
- [24] Mr Chesterman also submits that the applicants have not carried out improvements to their shop that they had foreshadowed. The respondent can have no assurance, he submits, that rent will be paid on time if the applicants are permitted to resume occupation.
- [25] In my view, the balance of convenience favours the grant of an interim injunction. I do not see a need for an undertaking as to costs or damages. This should not be taken as condoning the late payment of rent. If the applicants do not meet their ongoing lease obligations, a further opportunity may well arise for the respondent to terminate the lease.

Conclusion

- [26] Accordingly, I will order an interim injunction to operate until the substantive matter is determined, or a further order is made by QCAT, or the lease is terminated on the basis of some later breach.