

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Li Ali Pty Ltd v The Pine Kitchen Pty Ltd* [2019] QCAT
34

PARTIES: **LI ALI PTY LTD**
(applicant)
v
THE PINE KITCHEN PTY LTD
(respondent)

APPLICATION NO/S: RSL117-17

MATTER TYPE: Retail shop leases matter

DELIVERED ON: 18 February 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Kanowski (Presiding)
Member Judge
Member McBryde

ORDERS: **The Pine Kitchen Pty Ltd must pay Li Ali Pty Ltd
\$28,141.60 by 4:00pm on 18 March 2019.**

CATCHWORDS: LANDLORD AND TENANT – RENT – BREACH OF
COVENANT TO PAY – ACTION TO RECOVER RENT
OR DAMAGES – ACTION TO RECOVER RENT –
where delay in fit out and so tenant not trading – where
rent not paid – whether delay the fault of landlord –
whether arrears of rent recoverable – whether landlord
entitled to security bond

Retail Shop Leases Act 1994 (Qld), s 83

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

APPEARANCES:

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

REASONS FOR DECISION

Introduction

- [1] On 26 October 2016 Li Ali Pty Ltd as lessor and The Pine Kitchen Pty Ltd as lessee signed an agreement for lease. The agreement related to premises to be used for a restaurant in South Brisbane. There was to be a five year lease, with an option to renew for a further five years.
- [2] The fitout of the premises was delayed. It appears that the fitout was never completed, and that The Pine Kitchen Pty Ltd never started trading at the premises. The parties fell into dispute over whether there should be extended rent relief due to the delayed fitout. It is apparent that the parties treated the lease as at an end from about early May 2017. It is undisputed that no rent was ever paid by The Pine Kitchen Pty Ltd.
- [3] On 2 August 2017 Li Ali Pty Ltd filed a notice of dispute in QCAT. It sought orders for:
 - (a) payment by The Pine Kitchen Pty Ltd of the security bond required under the agreement, in the amount of \$21,106.25; and
 - (b) payment by The Pine Kitchen Pty Ltd of rent arrears of \$28,141.60 for the period 10 January 2017 to 9 May 2017.
- [4] The period of rent arrears claimed by Li Ali Pty Ltd runs from 10 January 2017, which is when Li Ali Pty Ltd contends that rent became payable under the contract between the parties.

The QCAT proceeding

- [5] Li Ali Pty Ltd has been an active participant in the proceeding: attending a mediation, compulsory conference and directions hearing, and filing evidence and submissions at various stages as required. Li Ali Pty Ltd has mostly been represented by Ms Sally Lam, a manager for the company, as the director, Mr Li Wei Zhang, has limited English.
- [6] The participation of The Pine Kitchen Pty Ltd has been less extensive. Its director, Mr Steve Darwich, attended the mediation and compulsory conference, but there was no appearance for the company at the directions hearing on 4 September 2018. The Pine Kitchen Pty Ltd did file a response to the notice of dispute, on 20 February 2018, but it has failed to comply with a direction made on 4 September 2018 to file statements.
- [7] On 27 November 2018 the Tribunal directed that the dispute between the parties would be determined on the papers.
- [8] Neither party is legally represented, The Pine Kitchen Pty Ltd has not filed statements, and the matter is being heard on the papers. As a result, there are gaps and uncertainties in the evidence. However, we consider that we have sufficient information on which to proceed.
- [9] For the sake of completeness, we should note that the Tribunal earlier decided, as a preliminary question, that QCAT has jurisdiction to deal with the rent arrears dispute

in this case.¹ A question had been raised about whether the Tribunal has jurisdiction because the agreement for lease was signed before amendments were made to the *Retail Shop Leases Act 1994 (Qld)* ('Retail Shop Leases Act') giving the Tribunal wider jurisdiction.

The agreement between the parties

- [10] Li Ali Pty Ltd has provided a copy of an agreement for lease which, on its face, was signed on 26 October 2016 by Mr Zhang for Li Ali Pty Ltd and by Mr Darwich for The Pine Kitchen Pty Ltd. In the absence of any allegation or evidence to the contrary from The Pine Kitchen Pty Ltd, we accept that this is a true copy of the agreement signed by the parties.
- [11] The relevant effect of the agreement was that there would be a 10 week rent-free fitout period running from the 'handover date', and that a lease would in due course be signed by the parties to run from the day after the end of the fitout period. 'Handover date' is defined in the agreement as the date on which the landlord gives the premises to the tenant to carry out the fitout works.
- [12] The intended lease document was set out in Schedule 4 to the agreement, with a few items left to be inserted. These included the start date. This would have been because the agreement specified an 'estimated handover date', which was 18 October 2016, rather than a fixed handover date. We note that 18 October 2016 was actually some days earlier than the date on which the agreement was signed. However, 18 October 2016 has been treated by Li Ali Pty Ltd at least as the actual handover date. In the absence of any evidence to the contrary, we find that the actual handover date was 18 October 2016.
- [13] It follows that the fit out period ran for 10 weeks from 18 October 2016, and the start date for the lease was therefore 27 December 2016. The start date is significant because it is from that date that rent becomes payable under the lease.
- [14] In the agreement for lease, the expression 'commencing date' is used, but we are satisfied that it is intended to have the same meaning as 'start date' which is the expression used in the lease document.
- [15] We have no evidence that the lease itself was ever signed. However, clause 5.2 in the agreement for lease says that, subject to the condition in clause 8 being satisfied, the landlord and tenant are deemed to have entered into the lease on the commencing date even if the lease is not signed. The reference to clause 8 is somewhat puzzling because clause 8 deals with how the goods and service tax is to be treated under the lease, rather than with some condition that might have a more obvious role in triggering the commencement of the lease. However, to the extent that clause 8 does impose some relevant condition, we have no reason to suppose that it was not satisfied. Accordingly, we find that the start date for the lease was 27 December 2016 and that rent became payable from that date.

¹ *Li Ali Pty Ltd v The Pine Kitchen Pty Ltd* [2018] QCAT 401.

Does The Pine Kitchen Pty Ltd owe arrears of rent?

- [16] Photographs provided by Li Ali Pty Ltd suggest that the fitout was started but did not progress very far. It appears that an existing ceiling may have been removed, but if any other works were done they seem to have been only preparatory in nature.
- [17] The response filed in QCAT by The Pine Kitchen Pty Ltd gives a somewhat abbreviated version of events, but we understand the key contentions of relevance to be:
- (a) on 2 November 2016 the builder whom The Pine Kitchen Pty Ltd had engaged to do the fitout submitted hydraulic plans to the Brisbane City Council;
 - (b) the Council needed some details about the lessor;
 - (c) the builder contacted Colliers (the letting agent) and ‘GDL Group’² on 4 November 2016 but neither were able to assist with the details;
 - (d) the builder tried again, and GDL Group provided the contact details of the lawyers for Li Ali Pty Ltd, Pan and Partners, on 7 November 2016;
 - (e) on 8 November 2016 the builder contacted Pan and Partners;
 - (f) Ms Lam then contacted the builder, who explained what was needed;
 - (g) the builder then had to chase up Ms Lam for the information;³
 - (h) on 16 November 2016 the builder asked for the location of keys to the premises;⁴
 - (i) on 5 December 2016 the builder was finally advised where the keys could be collected;
 - (j) on 6 December 2016 the builder went to the site for the first time and ‘immediately’ saw that the tenancy was unsuitable for a restaurant because the ceiling was too low to allow for ‘normal extraction’;
 - (k) this meant that the mechanical works would have to be completely redesigned and Council approval obtained for that redesign;
 - (l) this would cause a further delay of 50 days because of the processing times involved;
 - (m) there were then various delays on the part of ‘the landlord’s representative’ in obtaining the tenant’s details from the builder, even though these details had been supplied previously;
 - (n) on 22 December 2016 the builder explained to Ms Lam that further Council approval was needed, and that the Christmas period meant in any event that works could not commence until the new year;

² Why this entity was involved is not explained in the response.

³ It is not clear from the response whether the information was then provided.

⁴ We assume that The Pine Kitchen Pty Ltd is saying this request was made to Ms Lam.

- (o) after further communication delays caused by Li Ali Pty Ltd, by February 2017 Mr Zhang finally ‘seemed to accept the reasons for all of the delays’ and offered a two-week rent-free period;
 - (p) The Pine Kitchen Pty Ltd rejected this offer as totally inadequate ‘given all of the delays caused by the landlord’s poor communication’;
 - (q) subsequent discussions between the parties ensued, though these were delayed for a time while Mr Zhang was out of Australia;
 - (r) agreement was not reached;
 - (s) on 9 March 2017 Mr Darwich engaged a lawyer; and
 - (t) on 4 May 2017 ‘landlord advised my lawyer that he was re-listing the tenancy’.
- [18] Li Ali Pty Ltd has provided a printout of an email from Pan and Partners to Mr Darwich, said to have been sent on 15 February 2017. The effect of the email is that Pan and Partners contend that Li Ali Pty Ltd’s details were disclosed in the lease documents so there should not have been any problem in the builder contacting Li Ali Pty Ltd; Pan and Partners had received a request for contact details from Olivia Johnstone⁵ on 7 November 2016; and on 16 November 2016 Pan and Partners provided details to Ms Johnstone.
- [19] Ms Lam, in her statement filed in QCAT on 27 September 2018, acknowledges that there was a problem in that the key was handed over late. She adds: ‘It cannot be just on one party’s fault that is what we think’. Ms Lam goes on to say that for this reason, Li Ali Pty Ltd extended the rent-free period for two weeks from 27 December 2016. On that basis, Li Ali Pty Ltd claims rent only from 10 January 2017.
- [20] Li Ali Pty Ltd has provided invoices for rent for four monthly periods, running in total from 10 January 2017 to 9 May 2017. Each invoice is in the sum of \$7,035.40, making a total of \$28,141.60. There is no suggestion by The Pine Kitchen Pty Ltd that it has paid this rent, and we find that it has not. The amount of \$28,141.60 is sought by Li Ali Pty Ltd in this proceeding for rent arrears.
- [21] On the basis of the available evidence, we infer that Li Ali Pty Ltd regards the agreement as having come to an end by 10 May 2017. We are not aware of any termination process initiated by either party, but it can be inferred at least that there had been mutual abandonment of the agreement as from 10 May 2017.
- [22] This does not, however, affect the rights of the parties as they had accrued up to that point.
- [23] Li Ali Pty Ltd’s position is that rent became payable on 10 January 2017. As discussed above, this takes into account a two-week rent-free period, because of the delays in the provision of keys, that Li Ali Pty Ltd allowed after the end of the 10 week rent-free fitout period. The position of The Pine Kitchen Pty Ltd seems to be that a longer rent-free period – presumably running up to 9 May 2017 – should apply on the basis that it was unable to commence trading because of delays caused by Li Ali Pty Ltd.

⁵ We assume Ms Johnstone was, or represented, the builder, and was seeking contact details for Li Ali Pty Ltd.

Perhaps this argument could be framed in terms of a claim for compensation for loss caused by the lessor substantially restricting the lessee's access to the premises, under section 43(1)(a) of the Retail Shop Leases Act. It might be framed in other ways. However, we have no reason to conclude that the two-week concession made by Li Ali Pty Ltd was inappropriate. The main cause of the delay in fitting out the premises was the unanticipated need to redesign the fitout and seek Council approval because of the height of the ceilings. We do not consider that this was the fault of Li Ali Pty Ltd. Rather, it was for The Pine Kitchen Pty Ltd to satisfy itself, before it signed the agreement for lease, that the premises were suitable for its purposes. On The Pine Kitchen Pty Ltd's own case, its builder did not visit the site until after the agreement for lease was signed. When the builder visited, it was immediately apparent to the builder that a redesign was needed.

- [24] The Pine Kitchen Pty Ltd cannot rely on its own failure to carry out reasonable checks prior to signing the agreement to avoid its responsibility under the agreement. The liability for The Pine Kitchen Pty Ltd to pay rent was not dependent on it having completed the fitout in the 10 week period or on its having started to trade.
- [25] Accordingly, we find that there is no basis established for relieving The Pine Kitchen Pty Ltd of its responsibility to pay rent for the period 10 January 2017 to 9 May 2017. We will order that The Pine Kitchen Pty Ltd pay the amount of the unpaid rent to Li Ali Pty Ltd. We will allow the usual period of a month for payment.

Should The Pine Kitchen Pty Ltd pay Li Ali Pty Ltd the amount of the security bond?

- [26] This aspect of the claim, as expressed by Li Ali Pty Ltd in the notice of dispute, is expressed as 'Pay Security Bond by breach the contract \$21,106.25 inc GST'.
- [27] Under the agreement for lease, The Pine Kitchen Pty Ltd was required to provide a bank guarantee in the amount of \$21,106.25, which was described as the security deposit. Clause 12 of the agreement for lease says that the bank guarantee will be held 'by the Landlord as security for the obligations of the Tenant under this Agreement and the Lease'. Similarly, clause 20.2 of the lease document provides:

If the Tenant is in default the Landlord may call on the Security Deposit in full or partial satisfaction of any loss or damage suffered by the Landlord in connection with the Tenant's default.

- [28] It is undisputed that on 9 November 2016 a bank guarantee was created at the request of The Pine Kitchen Pty Ltd in the required amount.
- [29] Li Ali Pty Ltd says that The Pine Kitchen Pty Ltd emailed a copy but never provided the original. The Pine Kitchen Pty Ltd has not addressed the matter of the guarantee in its response. We have no reason to doubt the evidence of Li Ali Pty Ltd that it was not given the original guarantee by The Pine Kitchen Pty Ltd, and indeed that is consistent with later events. We find that The Pine Kitchen Pty Ltd did not provide the original bank guarantee to Li Ali Pty Ltd. We consider that this was in breach of The Pine Kitchen Pty Ltd's contractual obligation: a requirement to provide a bank guarantee must be taken to be a requirement to provide the original bank guarantee, because the bank cannot be expected to honour a mere copy.

- [30] In the notice of dispute, Li Ali Pty Ltd indicated that it ‘can’t withdraw’ the security deposit money.
- [31] In her statement, Ms Lam says that in July 2018 ‘we’ went to the bank to seek payment under the guarantee. After some vacillation by the bank, in August 2018 the bank advised that it would not honour the guarantee because it had cancelled the guarantee in August 2017. Li Ali Pty Ltd has provided a number of emails confirming this. It appears that the bank cancelled the guarantee on the strength of a letter from lawyers to Mr Darwich dated 22 August 2017 advising that the lease was not proceeding and was at an end. It is not evident from the lawyers’ letter whom they acted for, but according to Ms Lam the client was The Pine Kitchen Pty Ltd. We have no reason to doubt this. It seems, therefore, that the bank cancelled the guarantee in error. Unsurprisingly, the guarantee had been expressed to be operative until notification was received from Li Ali Pty Ltd that either the guarantee was no longer required or that Li Ali Pty Ltd required payment of the sum guaranteed.
- [32] As we have mentioned, Li Ali Pty Ltd asks for an order: ‘Pay Security Bond by breach the contract \$21,106.25 inc GST’. We take this to mean that Li Ali Pty Ltd seeks an order that The Pine Kitchen Pty Ltd pay Li Ali Pty Ltd the sum of \$21,106.25.
- [33] QCAT has broad powers to make orders that it considers just to resolve a retail tenancy dispute.⁶
- [34] When one has regard to the provisions about the security deposit in the agreement for lease and the lease document, discussed earlier, it is apparent that the security deposit money is not payable to Li Ali Pty Ltd simply because there has been a breach of contract by The Pine Kitchen Pty Ltd. The security deposit money is intended to be available to compensate Li Ali Pty Ltd, wholly or partially, for loss or damage it has suffered on account of a breach. Accordingly, it would not be just for the Tribunal to require payment of the security deposit money, in addition to the amount for the rent arrears, unless some additional loss or damage is established.
- [35] It is quite conceivable that Li Ali Pty Ltd has suffered other loss. For example, Li Ali Pty Ltd may have incurred costs in cleaning out the premises. It may have taken time to sign up a new tenant, and perhaps only a lower rent could be obtained. However, there is no evidence of any such effects. It may be that Ms Lam was adverting to wider loss in her statement filed in QCAT on 27 September 2018 where she said: ‘So, we claim the security bond for our loss of 5 years contract’. If we were satisfied that Li Ali Pty Ltd must have suffered additional loss of at least \$21,106.25, it would be open to us to award that amount on top of the sum of \$28,141.60. However, we are not in a position to be so satisfied. In the absence of adequate evidence of additional loss, we do not award any amount to Li Ali Pty Ltd in respect of the security bond.

Conclusion

- [36] Li Ali Pty Ltd has established an entitlement to payment of four months’ worth of unpaid rent, in the amount of \$28,141.60, and we will order that The Pine Kitchen Pty Ltd pay Li Ali Pty Ltd that amount. However, Li Ali Pty Ltd has not established entitlement to any additional award.

⁶ Retail Shop Leases Act, s 83.