REFLECTIONS ON MALSONS' CASE

by

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The case of Re *Malsons Pty Ltd*[1] raises some interesting issues about the operation of various provisions of the *Retail Shop Leases Act* 1984-1990 (Qld). It is the first substantive decision in Queensland dealing with the Act.

Facts

Malsons Pty Ltd was the lessee of part of the ground floor of the Tattersall's Arcade in Brisbane and the premises were used for a pharmacy business. Malsons was not the original tenant under the lease but had taken an assignment of the lease from the original lessee, Dunkin' Delicious Pty Ltd. The original lease was granted on 16 October 1987 for a period of three years commencing on 13 October 1986. The assignment to Malsons was approved by the landlord on 19 October 1988.

The lease contained a demolition clause which, in general terms, provided that the landlord could terminate the lease by giving the lessee six months notice if the landlord required the premises for the purposes of redevelopment, refurbishment or renovation. The clause further provided that the lessee acknowledged that no compensation would be payable in these circumstances.

On 22 February 1990, the landlord gave notice to Malsons pursuant to the demolition clause. Malsons claimed that it was entitled to compensation pursuant to the provisions of s.15(1)(a)(vii) of the Act which had been introduced into the Act on 1 June 1988. In broad terms, that section implies into every retail shop lease a provision that the landlord is obliged to pay to the tenant reasonable compensation for injury suffered by the tenant if the landlord causes the tenant to vacate the retail shop for the purpose of refurbishing the whole or part of the building containing the shop.

The landlord argued that, because s.15(1)(a)(vii) of the Act was not in force at the time the original lease was entered into, the provisions of the demolition clause in the lease should prevail and no compensation should be payable to the lessee. The landlord also relied on s.5(3a) of the Act (which was introduced in the 1989 amendments to the Act) which, generally speaking, provides that any amendments to the Act do not affect rights or obligations of a landlord or tenant provided for under a retail shop lease entered into before the amendment.

Malsons argued that the assignment of the lease in October 1988 created a new lease for the purposes of the Act or alternatively, the exercise of the option in the lease created the new lease. Both of these events occurred after the introduction of s.15(1)(a)(vii) and therefore Malsons submitted that that provision was implied into the lease.

Supreme Court Decision

(a) Assignment and Option Create New Lease

The matter eventually came before Thomas J in the Queensland Supreme Court. His Honour considered the terms of s.5(5) of the Act which determines the time that a retail shop lease is entered into for the purposes of the Act. That section had also been amended in the 1989 amendments to the Act. Justice Thomas considered s.5(5) in its original and amended form, and thought that the result would not be different in any case because the relevant date of entry into

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1 [1991] 2 Qd R 61.

the retail shop lease was 1 October 1988, the date that Malsons itself entered into possession pursuant to its assignment from the original lessee. His Honour also accepted Malsons' argument that the lessee's exercise of the option contained in the lease created a "new" lease for the purposes of the Act relying on the authority of *Re Eastdoro Pty Ltd (No.2)*.[2]

Justice Thomas rejected the landlord's contention that this interpretation resulted in the legislation being retrospective. His Honour said:

> ... in the context of considering whether legislation has retrospective operation, or, more importantly, whether it intends to interfere with existing rights, it is a mistake to focus upon a document in isolation. One needs to look directly at particular parties and to consider their rights in relation to one another at a particular moment. Here the parties whose rights and obligations *inter se* need to be examined are the lessor and the present lessee. One then considers whether those rights (potential or otherwise) are affected by particular legislation which then comes into force ... In the present matter, when the 1988 Act came into force the parties to the present litigation were strangers. They had no rights or duties in relation to each other. The lessor had granted a registered lease to a third party, and that lease gave the lessor the right to terminate for reconstruction without having to pay compensation to the lessee. It also contained an option for renewal which could be exercised at a future time. Then the 1988 Act came into force. **As between those original parties** it did not interfere with existing rights because it did not clearly enough indicate an intention to do so. But it did clearly indicate an intention to engraft a remedial clause in favour of the lessee with respect to every retail shop lease that might come into existence thereafter. I have no doubt that the retail shop lease did come into existence thereafter between the present lessor and the present lessee.[3]

The landlord also contended that the Act drew a distinction between a lease "entered into" and a lease "renewed" referring to sections such as ss.5, 8, 13, 15 and 15a. In response to this Thomas J stated that whilst it was true that some distinction could be observed between the use of those terms, there was not any tight legislative policy, intention or consistency of legal concept in the plethora of provisions in the Act. Justice Thomas also discerned that the Act was not in any way inconsistent with the recognition of leases that came into force between a lessor and a lessee by way of assignment. Indeed, his Honour went as far as to say that under the legislation, a retail shop lease could be entered into by a succession of different persons at different times.

(b) Amount of Compensation

It was also submitted by the landlord that the insertion by the 1989 amendments of a further provision, namely s.15(3), had the effect of denying the lessee any right to compensation it might otherwise have had. In general terms that section provides that where the landlord and tenant have agreed as to the amount of compensation payable, the amount agreed is taken to be reasonable compensation.

The landlord argued that the demolition clause in the lease fell within that section as being an agreement for nil compensation. His Honour thought however that the clause was in no way concerned with the amount of compensation – it was an agreement destructive of the right of compensation but not an agreement as to its amount. His Honour considered that it would be possible for parties to agree upon a nil amount as to the amount of compensation payable, but did not think the clause in the present case was such a clause.

Practice Points

The Supreme Court decision has potentially wide ramifications in regard to retail shop leases for the following reasons:

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2 [1990] 1 Qd R 424.

3 *Supra* n.1 at 65.

(a) Under the Act, certain notices and statements must be given to tenants before they enter into leases. If an assignment or exercise of option creates a new lease, a strict interpretation of the Act would require a landlord to ensure that such notices are given to the relevant tenant before each assignment and the exercise of each option. Failure to do so might entitle the tenant to certain remedies including the right to terminate the lease.

(b) When drafting retail shop leases, landlords need to retain as much flexibility as they can to vary leases to take account of statutory law and case law. Certain provisions of the lease may be rendered ineffective if new statute law or case law which impacts on the provisions contained in the lease is introduced after the original lease is entered into but before the lease is assigned or renewed.

(c) Pursuant to s.15(3) of the Act, a landlord should, if possible, endeavour to reach agreement with his tenants prior to entry into retail shop leases, as to the amount of compensation payable by the landlord to the tenant in the circumstances set out in s.15(1)(a)(i) and (vii) of the Act. Whilst the court in Malsons' case suggested it would be possible for the parties to agree upon a nil amount as to the amount of compensation payable, it would probably be prudent nevertheless to negotiate a dollar figure to avoid scope for argument as to whether nil is an amount.

(d) An interesting ancillary issue which arises is whether a lease of premises which, at the time it was entered into, was not a retail shop lease (because, for example, the use to which the premises were being put by the tenant did not fall within the uses specified by the Act) becomes a retail shop lease when it is assigned to a person who alters the use of the premises to a use which falls within the Act. Certainly this interpretation would appear to be open after *Malsons'* case and a landlord would need to be careful in these circumstances before consenting to the assignment of a lease.

Retail Shop Leases Tribunal

Malsons' case subsequently came before the *Retail Shop Leases Tribunal*[4] to determine the amount of compensation payable by the landlord. Since the Supreme Court decision, it had been established that Malsons did not in fact own or operate the pharmacy business which was conducted on the premises. Malsons was lessee in name only but the business was owned and operated by Ms Gabrielle Malouf who was the daughter of a director of Malsons. Malsons based its compensation claim on the loss of the business but the landlord argued that Malsons was not entitled to any compensation in respect of the loss of the business as it was only Ms Malouf who could have suffered any loss in this regard. In response to this, Malsons argued that it had financed Ms Malouf by advancing her the capital she needed to carry on the business. Because of the termination of the lease, she was no longer able to carry on the business and unable to repay advances made to her by Malsons. On this basis it was claimed that Malsons had lost the moneys which Ms Malouf had lost and that, because Ms Malouf had no assets of any substantial nature to pay the loss, the loss flowed to Malsons.

However, it was subsequently revealed in evidence that Ms Malouf was a beneficiary of a substantial family trust and an admission was made that her interest in the trust was sufficient to meet any claim which Malsons might have against her.

When this admission was made, Malsons then changed the basis of its claim. It claimed that there was either a sublease between Malsons and Ms Malouf or an assignment of the lease from Malsons to Ms Malouf or alternatively, that Malsons acted as trustee for Ms Malouf.

In response, the landlord argued that there was no legal relationship at all between Malsons and Ms Malouf (ie, it was a family relationship which was not intended to give rise to contractual

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4 Retail Shop Leases Tribunal Dispute No.92/1990.

obligations enforceable by either party) or alternatively, the relationship was one of licensor and licensee.

The Tribunal considered each of these issues separately.

(a) No Legal Relationship

The Tribunal found that, because the sums of money involved were reasonably large and the intention was that Ms Malouf was to be set up in a business, Malsons and Ms Malouf intended that the relationship between them should be contractual and legally binding on both of them.

(b) Sublease

The Tribunal was unable to find on the facts that a sublease had been entered into. There was no evidence of what the terms of that sublease were except it was clear that any agreement between the parties was to run for the whole period of the lease. At law, a sublease for the full period of a lease amounts to an assignment of the lease, and because of this, the Tribunal decided that there was no intention to sublease.

(c) Assignment

Again, the Tribunal decided that an assignment of the lease was inconsistent with the facts. There was no evidence of an intention to assign and Malsons also faced the problem that the lease itself prohibited assignment without the landlord's consent, which, in the circumstances had not been obtained.

(d) Malsons Acting as Trustee for Ms Malouf

The Chairman directed the Tribunal that, as a matter of law, where a person purchases an asset in his own name with money provided by another person then there is a presumption that there is a resulting trust in favour of the person who provided the money. The Chairman stated that this presumption was rebuttable by evidence.

On the facts, there were two interpretations available on the evidence. The first was that Malsons bought the lease and established the pharmacy and then debited Ms Malouf's loan account. The second was that Malsons advanced money to Ms Malouf, debiting her account, and then used her money to purchase the lease and set up the pharmacy. The landlord advanced the first interpretation whilst the lessee advanced the second.

The Tribunal stated that it had difficulty in resolving the question and was only able to do so by majority decision of two members to one that Malsons did in fact hold the lease on trust for Ms Malouf and was therefore able to advance a claim for compensation on her behalf

Practice Points

There are undoubtedly a number of retail shop leases in Queensland where, for various reasons, the lease of the premises is held in the name of one entity whilst the business conducted on the premises is held in the name of another related entity. One would expect that often the landlord is not fully aware of the arrangement and has not formally consented to it. After *Malsons'* case, it is easy to see that a lessee may face some difficulty in these sorts of circumstances in claiming compensation from the landlord pursuant to the provisions of s.15(1) of the Act, particularly where the facts do not support a sublease, assignment of lease or trust relationship being in place. One would also expect that the formalities of an assignment or sublease (eg, notifying the landlord of the proposed assignment or sublease and seeking the landlord's written consent) would need to have occurred before this interpretation would be open on the facts.

Even if a sublease were to be found, the question arises as to whether s.15 would apply at all in these circumstances. Section 15 clearly states that is the landlord who must take action contemplated by that section (eg, causing the tenant to vacate the shop etc) before the section comes into play. Whilst the definition of "landlord" in the Act clearly includes persons holding lesser interests than the freehold, it would nevertheless appear that, in terms of s.15, the sublessor

would need to have taken the action referred to in that section before the sublessee would have a claim against him. If the sublessee had no claim against the sublessor, it would follow that the sublessor would not have a claim against the head lessor unless of course, the sublessor had suffered a loss in its own right in any event. The loss would probably, however, be limited to the loss of the lease rather than the loss of the business.

There may be the possibility that the sub-tenant may have a claim directly against the head lessor pursuant to the terms of s.15. However, much would depend on what the word "tenant" means in the section. There is no definition of tenant in the Act which offers any assistance. There would seem however to be a fairly strong argument that the Act only intends to regulate rights and obligations between landlords and their immediate tenants.

Procedural Matters

A number of interesting procedural matters arose in the Tribunal hearing.

(a) Section 32

The argument of Malsons that it held the lease as trustee for Ms Malouf was only raised in written submissions by Malsons and after the formal hearing was over and all evidence had been completed. The landlord objected to this. The Tribunal responded by saying that under s.32 of the Act, it was the function of the Tribunal to make such investigations as it considered necessary for the purposes of a hearing. The Tribunal held that, for the purposes of its function, it had a duty to determine a matter under a point raised at any stage in the proceedings and that the Tribunal could, if necessary, allow a party to reopen its case and to recall witnesses for examination or cross examination or for the Tribunal itself to do this. The Tribunal did in fact re-call several witnesses to hear further argument on the trust aspects of the matter.

(b) Pleadings

The Tribunal also stated that in accordance with the usual procedure before the Tribunal, no formal pleadings were required. The Tribunal stated that it was its practice to call upon the parties to exchange statements or witnesses and to make discovery if that was considered necessary. Further, the Tribunal said that it expected parties, when legally represented, to disclose both the legal and factual basis of their claims at the opening of the hearing.

(c) Costs

Under s.46 of the Act, each party to a dispute referred to a Tribunal is required to bear his own costs of the proceedings before the Tribunal.

Because Malsons' case had been reformulated a number of times throughout the hearing, the Chairman of the Tribunal stated in the course of the hearing that, if the matter had been heard before the Supreme Court, there would have been little doubt that costs would have been awarded in favour of the landlord. However, because of s.46, the Tribunal had no power to make that award in the circumstances.

It is suggested that the Act is in need of amendment to allow the Tribunal to exercise its own discretion to award costs of proceedings before the Tribunal. At present, there is nothing to prevent unmeritorious claims being brought by one party against another pursuant to the Act. Although the party against whom the claim is made may ultimately be successful, he may have to incur substantial costs in achieving that result, none of which he can recover.