

Leasing Newsletter

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In this issue

World's Best landlord or just another Sarker? 1

Landlords beware: ACCC nukes the Duke 4

World's Best landlord or just another Sarker?

On 15 April 2010, the New South Wales Court of Appeal handed down its decision in the case of *World Best Holdings Limited v Sarker* [2010] NSWCA 24. The decision marks what could be the end of almost six years of litigation in this dispute.

The case highlights practical points for landlords and tenants and their lawyers on the issues of lease termination and interpretation.

Factual matrix

On 1 July 2003, the landlord, World Best Holdings Limited (**World Best**), granted the tenant, Mr Abdul Sarker, a lease of shop 48B in Minto Mall Shopping Centre, Minto, NSW.

The lease stated that the permitted use was to be "Asian supermarket" or "Asian grocery shop". It also granted the tenant exclusivity, meaning that the landlord would not permit any other retailer to operate an Asian grocery shop.

Earlier (17 June 2002), the landlord granted Dhaka Corporation (**Dhaka**) a lease of shop 50A in the Minto Mall Shopping Centre, which Dhaka called "India Imports". The permitted uses under the lease included:

retail sale of Indian grocery and spices, Islander, Fijian specialty foods and spices, Halal meat and poultry, Indian Garments, Asian vegetables [sic], pre-cooked Indian foods, phone cards and rental Indian videos (no other language, Indian only).

The landlord had granted Dhaka exclusivity over the above uses.

What does it mean to be "Asian"?

When Mr Sarker began selling Indian groceries and Halal meats (among other things), Dhaka wrote to the landlord to complain. The landlord insisted on Mr Sarker not selling those products. Mr Sarker said that he was within his rights to do so as the products fell within the "Asian supermarket" use.

The landlord's reply was that Indian groceries were not "Asian". It asserted that although India is situated on the Asian continent the ordinary Australian use of the term "Asian" refers to Chinese, Japanese, Vietnamese, Thai, etc.

The matter was fought out in the Administrative Decisions Tribunal. The Tribunal noted that the earlier lease granted to Dhaka should have been at the forefront of World Best's mind when granting the lease to Mr Sarker and that a prudent landlord would have defined "Asian" as not including Indian.

However, considering that the term "Asian" was not so defined, the Tribunal said that Indian groceries fell within the permitted use. The NSW Court of Appeal agreed with this.

Landlord's purported termination

Before the Tribunal proceedings, the landlord sent a notice to Mr Sarker claiming that by insisting on selling Indian groceries, he repudiated the lease (demonstrating that he did not intend to comply with it). The argument at that stage from the landlord's perspective was that selling Indian groceries was a breach of the lease (although the Tribunal and Court of Appeal later rejected the argument). The notice stated that due to the tenant's repudiation, the landlord terminated the lease.

Handy trick for landlords wanting to avoid section 129(1) of the *Conveyancing Act*

The Court of Appeal made some comments about the way in which the landlord terminated the lease. If the tenant had actually repudiated the lease, the landlord's termination would have been rather clever.

Where **breach of lease** is the ground of termination and provisions of the lease expressly provide for the landlord to terminate for breach, section 129(1) of the *Conveyancing Act 1919* (NSW) must be complied with. This section can be irritating for landlords. It essentially provides that if they want to terminate the lease, they must do the following:

- send a notice to the tenant which specifies the particular breach and requires the tenant to remedy it or pay compensation for it, and
- wait for a "reasonable" period of time for the tenant to remedy the breach or pay the compensation.

There are two practical problems with this for landlords. First, who is to say what is "reasonable"? If the court determines that the amount of time the landlord waited was actually unreasonable, the landlord may be sued for damages for wrongful termination and trespass and may need to give possession of the premises back to the tenant. Secondly, the process under section 129(1) takes time and sometimes landlords just want the tenants to leave as soon as possible.

However, the grounds of termination relied on by the landlord in the notice was **repudiation**, not breach. These two grounds are quite separate. The landlord could potentially have relied on either of the

two grounds (or so it thought) but chose to rely solely on repudiation. If the tenant had actually repudiated the lease, the landlord would have been able to avoid section 129(1) and terminate the lease straightaway.

It is advantageous for landlords or managing agents wishing to remove tenants from premises quickly if the tenant had repudiated the lease. If it is suspected that a repudiation occurred, legal advice should be obtained to confirm whether this is the case. There is no room for error when it comes to termination – if the grounds of termination are not in fact present (as was the case for World Best), then the terminating party will be held liable.

Comments on lease interpretation

The NSW Court of Appeal made some helpful comments about how to interpret a lease.

The starting point for any lease is that it is just an ordinary contract and should be interpreted as such.

Parties' subsequent conduct

In the *Sarker* case, the NSW Court of Appeal specifically commented on the effect of what the parties say or do after the contract was entered into (this is called "subsequent conduct"). The issue was, when and how can one use the landlord's or tenant's subsequent conduct to determine the meaning of the provisions of the lease? This is an issue which causes some confusion among practitioners and which the Administrative Decisions Tribunal got wrong.

The Tribunal – both at first instance and on appeal – noted that Mr Sarker selling Indian groceries straightaway after entering into the lease suggests (as it does) that he honestly believed that the lease allowed him to do so. The Tribunal relied on this, in part, in determining that "Asian groceries" should include Indian groceries.

The Court of Appeal rightly said that the Tribunal's reasoning was faulty. It restated the principle that generally, subsequent conduct is irrelevant, relying on the 2008 High Court case of *Agricultural and Rural Finance Pty Limited v Gardiner*.

It went on to explain that although subsequent conduct might sometimes shed light on the parties' actual intentions, aspirations or expectations at the time of entering into the lease, these matters are irrelevant and must be disregarded when interpreting a lease. The proper question is not "what did the parties actually intend to do", it is "what does the lease actually mean". Lease interpretation, therefore, requires practitioners to reconstruct the parties' intentions **as expressed in the lease.**

Surrounding circumstances

A second useful point raised by the Court of Appeal concerned “surrounding circumstances”, ie the circumstances surrounding the entry into the lease by the parties.

The “parol evidence rule” provides that where a formal, written lease is executed, any oral representations or representations contained in documents not expressly incorporated into the lease cannot be used in interpreting it. This would knock out some surrounding circumstances.

However, other more general surrounding circumstances – such as pre-contractual negotiations or facts known to both parties – may be used. Say, hypothetically, that World Best and Mr Sarker were aware before the lease was entered into that there was an Indian grocer nearby the premises and the parties were mindful of not encroaching on that business by introducing competition. This could arguably be given weight in interpreting the phrase “Asian groceries”. However, the Tribunal found that the question of competition with the established Indian grocer did not arise in the negotiations between World Best and Mr Sarker.

Result of the litigation

After almost six years of litigation, Mr Sarker must have been delighted to win the appeal. The Court of Appeal upheld his award of \$72,233.79 in reliance damages (loss of profits due to being locked out by the landlord) and awarded him costs. The landlord may attempt to appeal to the High Court although we would not expect the Court to grant leave to appeal.

Landlords beware: ACCC nukes the Duke

Landlords, managing agents and their employees risk being sued by the Australian Competition and Consumer Commission (ACCC) if they engage in serious unconscionable conduct.

The owners of shopping centre landlord Dukemaster Pty Limited (**Dukemaster**) would have been shocked when their company was sued by the ACCC over the company’s private dealings with its tenants.

The ACCC applied to the Federal Court for injunctions, declarations, damages and costs against Dukemaster. The Court made all of these orders. The tenants, who were awarded \$275,456 in damages, were not parties to the proceedings.

The general manager of Dukemaster, Ms Wong, was also sued (personally) by the ACCC as a person "involved in [Dukemaster's] contravention" of the Act. The Court ordered her personally to pay damages.

This is not the first time that the ACCC has sued a landlord because of its private dealings with tenants. In 1999 it took action against a landlord for unconscionable conduct (in the *CG Berbatis Holdings* cases).

Dukemaster's unconscionable conduct

Dukemaster was landlord of a number of shops in the Paramount Centre, 108 Bourke Street, Melbourne. Within the Paramount Centre was an international food court. The ACCC litigation was focused on Dukemaster's dealings with tenants of four stalls in the food court: Mrs Shin, Mr Tan and Mrs Lai, Gomax Pty Limited (**Gomax**) and Mr Mei. The tenants had little or no ability to speak or read English.

Dealings with Mrs Shin

Mrs Shin, a Korean lady, operated the "Korean Lunchbox" takeaway shop. The annual rental was \$41,600. The lease contained an option to renew, which Mrs Shin attempted to exercise. Ms Wong, as general manager of Dukemaster, wrote to Mrs Shin in English, requiring her to sign a "renewed" lease. This lease was in fact a new, harsher lease which effectively caused Mrs Shin to lose many of her rights. Due to Mrs Shin's lack of English skills she was unaware of this.

The rental for the new lease was \$48,000, which Ms Wong said was "very reasonable and below market price".

When renewal time came up again, Mrs Wong pressured Mrs Shin to sign a new lease with an exorbitant rental of \$90,000, again stating that the rental was "very reasonable and below market price" (this was clearly a lie). Mrs Shin cried when her daughter read Mrs Wong's letter to her. She felt she had no choice but to accept the new lease because the takeaway shop was her livelihood and she was scared that if she did not accept the new rent, she would be evicted.

Dealings with other tenants

Mrs Lai and Mr Tan, a married couple, operated a Chinese take away shop called "East on Paramount".

Their initial annual rental was a reasonable \$55,000. When the leases neared expiry, Ms Wong told the tenants that their rent would be increased to \$72,000 per annum, saying that this price was very reasonable and below market price (another lie).

When time for renewal came around again, Ms Wong pressured the couple into agreeing to a rental of \$90,000. Mr Tan engaged an

independent rental valuer to determine the market value of the rent, which was found to be a mere \$40,500.

Ms Wong's behaviour was similar for Gomax and Mr Mei, who operated "Boxcar Café" and "Baiso Japanese Café". She put considerable pressure on them to sign harsh new leases with rentals well above market price (\$96,000 and \$88,000 respectively, determined to be 45% above the market price for the properties).

Federal Court's findings

The Federal Court found that Dukemaster, through Mrs Wong:

- engaged in unconscionable conduct contrary to section 51AC of the Act
- engaged in misleading or deceptive conduct contrary to section 52 of the Act, and
- made false or misleading representation contrary to section 53(e) of the Act.

The Court found that as the tenants had little or no English skills, did not have legal advisers and did not know the market value of the leases, they were reliant on Mrs Wong to represent the content of the leases fairly. As she abused her position of power in blatantly lying to them and deceiving them, the court was empowered to intervene.

Basic summary of Trade Practices Act unconscionability

Sections 51AB, 51AC, 52 and 53 apply:

- where the landlord or managing agent is a corporation
- where the tenant is a corporation, or
- where the conduct occurred by letter or telephone conversation.

Sections 51AB and 51AC prohibit a person from acting unfairly or immorally in trying to gain an advantage for themselves to the detriment of the tenant. It usually involves an abuse of power. Section 52 prohibits conduct which could mislead or deceive the tenant. Section 53 prohibits false or misleading representations being made to tenants.

The court can do many things where there has been a contravention of one of those sections. It can award generous damages to the tenant. It can prevent the landlord from evicting the tenant or order that the tenant regain possession of the premises.

Employees of landlords or managing agents may be the subject of damages orders where they assisted their corporate employer in the unfair conduct.

Guidance for landlords, managing agents and employees

Landlords and managing agents (and their employees) must deal with tenants fairly. If they do not, they will be at risk of having court action brought against them. The action against Dukemaster was under the *Trade Practices Act* but action could also have been brought under the *Fair Trading Act 1987* (NSW) (sections 42, 43 and 44) and the *Retail Leases Act 1994* (NSW) (section 62).

Employees, especially those dealing with a large number of tenants, may consider asking their employer for an indemnity or for insurance covering personal liability.

Guidance for tenants

There are advantages in making a complaint to the ACCC with respect to serious unconscionable conduct. The ACCC is very experienced in leasing disputes. It will first investigate the matter, which in itself puts pressure on the landlord / agent to back down. If the ACCC takes court action against the landlord / agent (although this happens in a very small proportion of cases), the tenant does not need to go to court as a party to the proceedings but receives the benefits of any orders (eg damages, injunctions, etc).

Even if the ACCC does not take up the complaint, tenants may of course institute action against the landlord / agent. Trade Practices actions are heard in the courts. If the lease is a retail lease, this is heard in the Administrative Decisions Tribunal, which is less formal, quicker and cheaper than a court.

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