Legal Update

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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 a few extremely 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, Asia 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. This is a refresher for practitioners, mainly, although landlords, tenants and managing agents may also find it helpful.

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.

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