



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	McEvoy Food Company Pty Limited v Miziner and Finch [2016] NSWCATCD 99
Hearing dates:	17 November 2016
Date of orders:	17 November 2016
Decision date:	29 December 2016
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	1. The respondents are not entitled to withhold consent to the assignment of lease to WOW Music Pty Ltd.
Catchwords:	Consent to Assignment of Lease, ss39 and 41 of Retail Leases Act 1994
Legislation Cited:	Retail Leases Act 1994
Cases Cited:	Harbourside Catering Pty Ltd v TMG Developments Pty Ltd [2007] NSWSC 1375 Lockrey v Historic Houses Trust of New South Wales (2012) NSWCA 249
Category:	Principal judgment
Parties:	McEvoy Food Company Pty Limited (Applicant) Michael Miziner and Rachael Anne Finch (Respondents)
Representation:	Counsel: Mr L Byrne (Respondent) Solicitors: Stephen Wawn & Associates (Applicant) Abrahams & Associates (Respondents)
File Number(s):	COM 16/34098
Publication restriction:	Nil

REASONS FOR DECISION

- 1 This is a retail dispute regarding consent to an assignment of lease. The applicant is McEvoy Food Company Pty Ltd (the applicant) who is the lessee under a lease from the respondents Mr Michael Miziner and Ms Rachael Finch (the respondents) in

respect of premises at 88 McEvoy Street, Alexandria (the Lease).

- 2 The applicant has requested the respondents to consent to a proposed assignment of the Lease to WoW Music Pty Ltd (the proposed assignee) (the proposed assignment).
- 3 The dispute came on for hearing before me on Thursday 17 November 2016. Mr A Vainauskas of Stephen Wawn & Associates represented the applicant and Mr L Byrne of Counsel, instructed by Abrahams & Associates, represented the respondents.
- 4 The parties prepared a joint statement of agreed facts and issues. The agreed issues in dispute are:
 - (a) Does the proposed assignee have financial resources that are inferior to the applicant?
 - (b) Does the proposed assignee have retailing skills that are inferior to the applicant?
- 5 Has the applicant complied with clause 10.3 of the Lease and s 41A of the *Retail Leases Act 1994* (RLA) by providing the respondents with such information as the respondents reasonably require concerning the financial standing and business experience of the proposed assignee?
 - (a) Does the proposed assignee propose to change the use to which the leased premises are put?
 - (b) Are the respondents prevented from withholding consent to the proposed assignment on the basis that they are deemed to have consented to the proposed assignment pursuant to clause 10.5 of the Lease and s 41(d) of the RLA and does this issue properly arise?
 - (c) Have the respondents withheld consent to the proposed assignment without due grounds?
 - (d) If the respondents have withheld consent of the proposed assignment without due grounds:
 - (i) did such withholding of consent constitute a breach of the terms of the Lease? and
 - (ii) to what extent did such breach cause the applicant to suffer damage?
- 6 The parties agree that clause 10.4 of the Lease and s 41(b) of the RLA do not apply in respect of the matters raised in these proceedings.

The agreed facts

- 7 In or about April 2016 the applicant entered into negotiations with the proposed assignee for the sale of the business being conducted at the leased premises.
- 8 On 28 April 2016 the applicant's director, Mr Angus Crane, wrote to the agent of the respondents, Mr Felix Lev from SQM Real Estate, advising that the applicant had negotiated the sale of its business and requesting the respondents' consent to the assignment of the Lease to the proposed assignee (who was not named in such request) and enquiring as to what information the respondents would need to consider the request.

- 9 On 11 May 2016 the respondents received a brochure containing the name and some information regarding the proposed assignee. The brochure stated that the proposed assignee planned to 'relocate operations' of 'WoW Music' to the leased premises.
- 10 On 12 May 2016 Mr Felix Lev, at the request of the respondents' solicitor, wrote to the applicant's solicitor requesting information regarding the financial standing and business experience of the proposed assignee.
- 11 On 12 May 2016 Stephen Wawn & Associates, the applicant's solicitor wrote to the respondents' then solicitor, Paffas Lawyers, stating that the respondents' request for information was 'not reasonable' and they were 'in the process of making enquiries with the proposed assignee to complete an assignor's disclosure statement which will include all information reasonably required by the respondents under the lease'.
- 12 On 13 May 2016 the respondents through their then solicitor sent a letter to the applicant's solicitor stating:
- 'Our client doesn't consent to the proposed assignment as the proposed assignee proposes to change the use... We also note that your client does not provide us sufficient information concerning the financial standing and business experience of the proposed assignee'.
- 13 On 16 May 2016 the applicant's solicitor wrote to the respondents' then solicitor advising that the proposed use by the proposed assignee was not a change of use and therefore not a basis for withholding consent to the assignment.
- 14 On 20 May 2016 the respondents' then solicitor maintained their position in a letter to the applicant's solicitor that there was a proposed change of use and the letter further enclosed a notice of breach of covenant under section 129 of the *Conveyancing Act* 1919 advising that the applicant was in breach of clause 6.1.2 of the Lease as the applicant had closed its business and was not open at the times usual for a business conducted by the applicant.
- 15 On 1 June 2016 the applicant, through its solicitor, requested from the respondents, through their solicitor, consent to the assignment of the Lease to the proposed assignee and enclosed the following information:
- (a) the name of the proposed assignee and its two directors;
 - (b) information in relation to the financial resources of the proposed assignee, including financial statements and tax returns;
 - (c) information in relation to the financial resources of the two directors of the proposed assignee;
 - (d) statements that:
 - (i) the business experience of the proposed assignee included various businesses such as Mr Chips, Ocean Master, Ocean Fillets, WoW Music and Baby Barramundi; and
 - (ii) the proposed use of the leased premises by the proposed assignee was as a 'seafood café'. Late on the same day this was amended to 'commercial kitchen with retail shop' (being the use provided for in the Lease).
- 16 On 24 June 2016 the respondents through their then solicitor again denied consent to

the proposed assignment on the basis that 'our client does not agree to the proposed assignment on the basis of but not limited to:

- (a) the financial standing of the proposed assignee; and
- (b) the proposed assignee's intended use of the premises results in a change of the use to which the property is put. '

- 17 On 26 June 2016 the applicant's solicitor sent a letter to the respondents' then solicitor enclosing financial information regarding the proposed assignee. Set out in the letter the proposed assignee is noted as having assets that are four times that of the applicant and its net position after deduction of liabilities is eight times more favourable and indicates that the applicant considered that the financial resources of the proposed assignee as disclosed were in fact not inferior to those of the applicant.
- 18 On 6 July 2016 the respondents through their solicitor again disputed the financial standing of the proposed assignee as being not inferior to the applicant and that the proposed use of the leased premises was not a change and that the business experience of the proposed assignee and its directors were again not inferior to that of the applicant.
- 19 On 17 July 2006 the applicant and the proposed assignee entered into a contract for the sale of the business providing for the transfer of the applicant's equipment at the leased premises and the assignment of the Lease.
- 20 Clause 38 of the business contract states that either party may rescind if the applicant has not served consent of both the respondents and the respondents' mortgagee of the proposed assignment by 20 November 2016, being within 20 weeks of entering into the contract.
- 21 On 19 July 2016 the applicant's solicitor responded to the respondents' then solicitor enclosing further information in respect of the proposed assignee and including a resume for the proposed assignee's director's experience including Mr Chips, Ocean Master, Moderne Café and Baby Barramundi and Barra Seafood Café.
- 22 On 21 July 2016 the respondents' then solicitor sent a letter to the applicant's solicitor stating that the respondents were themselves making enquiries with the landlord of the Baby Barramundi business.
- 23 On 25 July 2016 the applicant applied to the NSW Small Business Commissioner for mediation of the Lease dispute. The mediation was not successful and the certificate under s 68 of the RLA has been provided.
- 24 On 12 August 2016 the respondents' then solicitor wrote to the nominated person regarding Baby Barramundi, Mr Jack Christie, seeking further information of the experience of the proposed assignee and its directors at Baby Barramundi. No response has been received to that inquiry.
- 25 On 12 August 2016 the respondents' then solicitor sent a letter to the applicant's solicitor with an offer that the respondents would consent to the proposed assignment on the following conditions:

- (a) the proposed assignee agreed in writing that the WoW music business or any other non-food related business would not trade at the leased premises;
- (b) the operation of WoW music or any non-food related business would be a breach of the Lease entitling the respondents to terminate the Lease;
- (c) the proposed assignee would change the proposed tenant entity name (being the proposed assignee) so as to not refer to WoW music in any way; and
- (d) the proposed assignee agreed to increase the bond under the Lease from three months to six months.

26 The ability of a lessee to assign a lease and of the lessor to withhold consent is governed by the RLA. Sections 39 and 41 of the RLA state:

s 39 Grounds on which consent to assignment can be withheld

(1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):

- (a) if the proposed assignee proposes to change the use to which the shop is put,
- (b) if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor,
- (c) if the lessee has not complied with s41 (Procedure for obtaining consent to assignment),
- (d) not relevant.

s 41 Procedure for obtaining consent to assignment:

A retail shop lease is taken to include the following provisions:

(a) A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee. The lessee may provide the lessor with a copy of the statement of writing that contains information that is contained in or required to complete the prescribed form that has been provided to the proposed assignee. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.

(b)-(c) Not relevant.

(d) The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if:

- (i) the lessee has complied with paragraphs (a) and (b), and
- (ii) The lessor has not, within 28 days (or another period prescribed instead by the regulations) after the request was made or after the lessee complied with those paragraphs, whichever is the later, given notice in writing to the lessee either consenting or withholding consent.

Submissions on behalf of the applicant

27 Mr Vainauskas on behalf of the applicant submitted that the applicant was entitled to receive the consent of the respondents, or alternatively the respondents were not entitled to withhold consent, on the basis that the applicant had complied with its obligations under s 41(a) by providing the information requested and that the further

requests made for and behalf of the respondents were not reasonable within the terms of s 41(a).

- 28 In this regard, Mr Vainauskas says that the information provided to the respondents was sufficient for the respondents to make an objective assessment. The information set out the retailing experience of the directors of the proposed assignee which showed that they had worked within family operated companies since the 1970s though of course the two directors were second generation in relation to the family businesses. Further, the financial standing of the applicant, the current lessee, was precarious, in particular, because two of the original directors at the time that the Lease was entered into, Diana Thomson and Damien Naughton, had left the business and were no longer directors of the applicant. The remaining director, Mr Angus Crane, was the sole director.
- 29 The significant retailing and catering abilities of the applicant were held by the former directors Diana Thomson and Damien Naughton. Currently the applicant was not trading at all. The financial statement disclosed a significant shortfall in the assets of the applicant and this should be compared to the more substantial assets disclosed by the directors of the proposed assignee.
- 30 Mr Vainauskas submitted that whilst there was an initial contemplation by the proposed assignee to a change of use, this no longer was the case and the proposed assignee as well as the applicant had consistently confirmed to the respondents that there would be no change of use and that the proposed assignee would comply with all the terms of the Lease.
- 31 A further submission was made that, as a result of the correspondence and the most recent letter of 12 August 2016 from the former solicitor of the respondents that consent would be granted subject to the applicant obtaining from the proposed assignee certain undertakings and an increase in the bond, this was a deemed consent pursuant to s 41(b) of the RLA.

Submissions on behalf of the respondents

- 32 Mr Byrnes on behalf of the respondents submitted that the respondents have the right to withhold consent if the retailing skills of the proposed assignee were inferior to that of the applicant, that the applicant had failed to provide information reasonably required as to the financial standing and business experience of the proposed assignee and that the financial resources of the proposed assignee were inferior to that of the applicant.
- 33 In relation to the retailing skills of the proposed assignee as being inferior to that of the applicant, Mr Byrne relied on statements and representations made at the time of commencement of the Lease when the applicant started its business. At that time the applicant relied on the significant retailing and culinary experience of its former directors Diana Thomson and Damien Naughton. Mr Byrnes submitted that on any objective comparison, the retailing skills of the former directors were far superior to any retailing skills suggested on behalf of the proposed assignee.

- 34 Mr Byrne pointed out that in fact there were no references provided in relation to the retailing experience of the proposed assignee and there were no relevant qualifications evidenced and that the only specific details were in relation to an on-line music business which was of limited relevance to the permitted use under the Lease.
- 35 In these circumstances, Mr Byrne submitted on behalf of the respondents that on the balance of probabilities it is clear that the proposed assignee had inferior retailing skills to that of the applicant and that this on its own was sufficient to allow the respondents to withhold consent.
- 36 Mr Byrne also submitted that the applicant had failed to provide relevant information reasonably required by the respondents as to the financial status and business experience of the proposed assignee and in particular the fact that no references as to retailing skills or financial capacity of the proposed assignee and its directors were provided.
- 37 Mr Byrne did not seek to make his case on the basis that the proposed assignee was to change the use of the premises and in essence the submission on behalf of the respondents was that the business experience of the proposed assignee, which the Tribunal takes in fact to be a reference to the retail experience, was inferior to that of the applicant and in the alternative the applicant had not provided all the relevant information as requested.

Resolution by the Tribunal

- 38 Mr Vainauskas referred the Tribunal to a series of cases relating to the ability of a landlord to withhold consent. A significant number of these cases were decided within the first 6 to 8 years of the operation of the RLA and they are instructive.
- 39 Significantly the decision of Palmer J in *Harbourside Catering Pty Ltd v TMG Developments Pty Limited* [2007] NSWSC 1375 is most helpful. His Honour stated at paragraphs 40 to 42 the following:

40. I am unable to accept Mr Lever's submission that the "retailing skills" of an assignee for the purposes of s39(1)(b) RLA means skill in retailing regardless of the area of retailing activity in which the assignee has acquired those skills. The section is intended as a protection for both lessors and lessees. The lessees are not prevented from realising the goodwill of a business by selling that business and assigning the lease by the lessor's capricious withholding of consent to the assignment. Likewise, lessors are not compelled to accept as a tenant by assignment those who are not likely to trade at least as well as the outgoing lessee. For that reason, the section requires a comparison between the retailing skills of the existing lessee and those of the prospective lessee. Like must be compared with like if any basis for assessment is to be sensibly available, both to the lessor and to those who may have to review the lessor's decision under the Retail Leases Act.

41. The fact that a proposed assignee has skills in operating a business which is completely different in character from the business of the assignor provides no readily apparent and sensible means of comparison between the retailing skills of the assignor and those of the assignee and, therefore, no sensible means of assessing whether the assignee, as new tenant, will be at least as satisfactory as the former tenant.

42. A comparison of retailing skills for the purposes of s39(1)(b) RLA does not require that the businesses of the assignor and the assignee be identical. However, they must be similar enough to permit ready comparison of the retailing skills involved. Whether the similarity is close enough in degree to permit ready comparison for the purposes of

the section is a question of fact and impression in each particular case.

- 40 Further assistance to the Tribunal can be obtained from the decision of the Court of Appeal in *Lockrey v Historic Houses Trust of New South Wales* (2012) NSWCA 249. Barrett JA gave the leading judgment. At paragraphs 48 and following, his Honour held:

48. '... the permitted ambit of a requirement imposed by the lessor is that the information sought concerning financial standing be "reasonably" required in the sense of having some rational bearing on an objective assessment of relevant matters concerning the financial standing of the proposed assignee as that standing is material to the lease and the financial obligations it entails. An assessment of what is "reasonably" required will proceed in the way indicated by the following observation of Latham CJ in *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 116:

The word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case'. The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction.

49. Beyond that, two different views emerged in the course of submissions as to the ambit of the information that a lessor "may reasonably require" within the meaning of ... s41(a). When considering a lease that is not regulated by the Retail Leases Act but contains (either expressly or by operation of s133B(1)(a) of the Conveyancing Act) a proviso that the lessor will not unreasonably withhold consent to an assignment, the commercial desirability of the assignee is taken into account in deciding whether consent has been unreasonably withheld. In deciding that question, it is legitimate to take into account matters that bear upon the likelihood that the proposed assignee will be able to pay the rent and perform the other covenants that the lease imposes on the lessee for the balance of the term.

50. However, it may be that for a lease that is regulated by the Act the ambit of the information that the lessor can "reasonably require" within s41(a) is more limited. It may be that the limited grounds upon which a lessor was entitled to withhold consent to an assignment have the effect that the only information that a lessor may "reasonably require concerning the financial standing and business experience of the proposed assignee" is information that will enable the lessor to decide whether the proposed assignee has financial resources or business experience or retailing or restauranting skills inferior to those of the lessee.

51 The difference between these two approaches to the ambit of the information that the lessor could reasonably require would show up in a situation where the existing lessee was a person of only marginal financial standing and indifferent retailing skills. If the second view of the ambit of the information that the lessor could reasonably require were correct, the lessor would not be able to use the opportunity of an assignment being requested to obtain a tenant that was superior to the tenant to whom the lessor was currently leasing the premises. Counsel for Mr Lockrey argued that the Act was beneficial legislation designed to protect tenants of retail premises, and that that purpose of the Act favoured the second of the two possible constructions. It is not necessary in this case to choose between these alternatives.

- 41 Barrett JA identified there were two approaches. Again it may not be necessary to make the choice between these two approaches. Accordingly following his Honour, it is necessary for the Tribunal to compare the retailing skills of the proposed assignee to that of the retailing skills of the lessee, namely the applicant. Mr Byrne has made the point that those retailing skills do not compare given the retailing and restaurant ability of the former directors. There can be no debate about that. Those nominated directors certainly had significant retailing and restaurant ability, however those directors are no longer working in the business, having resigned. Further, the applicant is now not open to business and is not trading and, as the Tribunal was advised, has not traded for some 6 months. In fact, one could take the view that there are currently no retailing

- skills being demonstrated by the applicant as there is in fact no retailing. Consequently, as there are no retailing skills for comparison, any retailing ability by the proposed assignee must be greater than that currently being demonstrated by the applicant.
- 42 Whilst Barrett JA in *Lockrey* feared that by taking the second alternative, that being the ability of the lessor to refuse consent to the assignment of a lease based on the limited information only, and not being able to request a more comprehensive range of information would often result in the lessor gaining an assignee of inferior retailing skills to that of the current lessee. However, that is not the case in this situation as the respondents would gain an assignee with greater retailing skills than currently being demonstrated by the applicant.
- 43 The facts in this case highlight the question of what is the appropriate time for comparison of the retailing skills. The view of the Tribunal is that the comparison should be made of the relevant skills at the time of the assignment, not at the commencement of the Lease. If the retailing skills of the lessee had to be compared at the time of entry into the lease with the retailing skills of the proposed assignee at the time of the proposed assignment, then of course those retailing skills would be greater than the proposed assignee. But that seems to be an artificial way of looking at the situation given that currently there are no retailing skills demonstrated by the applicant. Why should a lessee be held to account to an earlier time when the retailing skills were there but have now are no longer there? Businesses change over time for the better or for the worse.
- 44 Further, in connection with the financial standing of the proposed assignee and its directors, the comparison provided by the applicant's solicitor, Stephen Wawn and Associates in a table form to the lawyers for the respondents quite adequately demonstrates that the financial resources are superior to that of the applicant and its sole director. It is noted that the financial information is not verified by an accountant and the tax returns are not signed. Whilst this is unhelpful, it is not fatal to the question of adjudging on an objective view which party has the greater financial capacity.
- 45 Again, the time of comparison is relevant. It should, as I stated in paragraph 43 above, be at the time of the proposed assignment not at commencement of the Lease. In fact, the position of the respondents on the temporal question was that for the financial comparison they accepted that the relevant time was at the time of the assignment but for retailing skills it was at the time of the lease commencement for the lessee. Such a dual position taken by the respondents regarding timing is in the view of the Tribunal inconsistent..
- 46 The Tribunal notes that no references were provided regarding both retail experience and financial capacity of the proposed assignee and its directors. Again, this was unhelpful on the part of the applicant/ assignee. It is usual for references to be provided. However, in the current circumstances there were sufficient other benchmarks, such as the disparity in retailing experience of the current lessee, the applicant and the proposed assignee and the deterioration of the financial position of

the applicant that the lack of references was not determinative.

- 47 It was submitted by Mr Vainauskas on behalf of the applicant that the letter of 12 August 2016 from the respondents then lawyers (recited in paragraph 25 above) constituted a deemed consent to assignment under s 41(1)(b). While given the view the Tribunal has arrived at, it is not necessary to consider this, on first reading of the correspondence I am not persuaded that it would constitute a deemed consent. Certainly the wording and intent is along the lines of a counter offer, which if accepted, would produce the requisite consent. Any delay in timing of the consent as required to engage the operation of the deemed consent under s 41(1) must be seen in the context of the concern by the respondents regarding the change in the proposed use of the premises. It may be that the proposed assignee poorly explained its intention regarding use, which I took as not to run two active businesses from the premises to which the respondents objected, but rather to use the office above the restaurant as an office to store files and records from a closed business of music as well as use the office actively for the restaurant business. In this regard an office is an office and the use of such would not be inconsistent with the general use of the premises as restaurant with an office. The applicant indicated that there was no change of use required. The case was properly run by the respondents then that there was no change of use and s 39(1) was not applicable.
- 48 Consequently, the Tribunal holds that the respondents are not entitled to withhold consent to the assignment of the Lease to the proposed assignee.
- 49 If the applicant wishes to seek damages pursuant to s 72(1)(a) of the RLA, then it shall apply to have this application relisted on 14 days' notice.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

29 December 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 15 February 2017