Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Xilei Pty Ltd v Harina Company Limited and Lend Lease Real Estate Investments Limited Gebara [2016] NSWCATCD 33**
Hearing dates:	29 January 2016
Decision date:	11 March 2016
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	1. The Application for Original Decision is dismissed as the applicant has no standing to bring a retail tenancy claim against the respondents.
Catchwords:	Whether a license pursuant to a franchise agreement is a lease between the franchisee and the lessor, s3 of Retail Leases Act, 1994
Legislation Cited:	Retail Leases Act, 1994
Cases Cited:	Australia Credit & Finance Pty Ltd ATF Sumo Salad, MLC Centre Trust v GPT RE Limited and QRC Limited [2011] NSW ADT 234 Ireland v Subway Systems Australia Pty Ltd and Anor (Retail Tenancies) (2012) [VCAT] 1061
Category:	Principal judgment
Parties:	Xilei Pty Ltd (applicant) Harina Company Limited (first respondent) Lend Lease Real Estate Investments Limited (second respondent)
Representation:	Counsel: Mr G Carolen (respondents) Solicitors: Self (applicant) Ashurst (respondent)
File Number(s):	COM 15/51103
Publication restriction:	Unrestricted

REASONS FOR DECISION

1 1 Xilei Pty Ltd (the applicant) lodged an Application for Original Decision on 4 September 2015 under file number COM15/51103. At the relevant time of this dispute, the applicant was a franchisee of a Michel's Patisserie shop situated at [**********]Sydney (the shop).

2 Harina Co Limited and Lend Lease Real Estate Investments Limited (**the respondents**) are the owners of the Wintergarden Building. The respondents leased the shop to Jonamill Pty Limited (**Jonamill**), the franchisor for the Michel's Patisserie chain of shops, pursuant to a lease dated 19 May 2008, registered number AE540046 (**Lease**).

3 The term of the Lease was for seven years expiring 27 April 2015 and there was no option for a further term. Jonamill held a previous lease over the shop from 28 April 2003 to 27 April 2008.

4 Clause 41 of the Lease allowed the respondents to terminate the Lease if demolition of the shop was to take place.

5 Pursuant to clause 63.2 of the Lease, Jonamill was entitled to seek the consent of the respondents to enter into a licence agreement with a franchisee for the shop.

6 In or around 2008, Jonamill sought consent from the respondents to grant a licence of the shop to the applicant pursuant to clause 63.2 of the Lease. Consent was provided to the licence on or about 1 September 2008.

7 On or around 2 September 2008, Jonamill entered into a franchise agreement with the applicant (**Franchise Agreement**).

8 The Franchise Agreement contained the following terms whereby the applicant was entitled to occupy the shop (referred to as the 'location').

> 10.4 If the franchisor takes a lease in its own name or in the name of its nominee then:
>
> 10.4.1 The franchisor will provide to the franchisee a copy of the lease at or prior to the commencement of this agreement.
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> 10.4.2 The franchisor shall use its reasonable endeavours to obtain for the franchisee the right to occupy and use the location for the establishment and conduct of the franchise business on the terms of this agreement or any alternative license agreement put forward by the franchisee or its nominee (as the case may be). The franchisee and guarantor shall do all things reasonable and necessary (including but not limited to entering into any deed of consent or guarantee which may be required by the lessor of the location (to secure the lessor's of the franchisee's occupation of the location as aforesaid.
>
> 10.4.3 The franchisee will observe and perform all of the terms and conditions of the lease as if it were the lessee named in the lease and the franchisee's guarantors will observe and perform all of the obligations of the guarantors named in the lease as if they were the guarantors named in the lease.
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> 10.4.4 [Not applicable]
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> 10.4.5 [Not applicable]
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> 10.4.6 The franchisor grants to the franchisee, or shall procure its nominee to grant the franchisee a, non-exclusive, bare personal licence to occupy the location to conduct the franchised business in accordance with this agreement during the term terminable on the expiration of this agreement or on any event entitling the franchisor or the franchisee to terminate this agreement or any event entitling the landlord or the tenant to terminate the lease.

> 10.4.7 The franchisor will not assign, surrender or otherwise deal with the lease in a manner which would affect the franchisees' right to occupy the location provided the franchisee is not in breach of this agreement (or any license agreement referred to in clause 10.4.2).
>
> 10.4.8 The licence granted or to be granted under clause 10.4.6 does not grant the franchisee possession of the location to the franchisor's or its nominee's exclusion nor does it give the franchisee any property rights in or over the location. The franchisee acknowledges that its right to occupy the location under the licence granted herein (or any licence agreement as aforesaid) shall rest in contract only.
>
> 10.4.9 The franchisor may retain keys to the location and have unlimited access to the location for the purpose of this agreement.
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> 10.4.10 The franchisee does not have any right to seek an order for possession of the location or commence proceedings for trespass or nuisance - such rights rest solely with the franchisor or its nominee.

9 Clause 10.5 of the Franchise Agreement contained provisions for the relocation of the franchise business in the event that the lease of the shop expired or was terminated for any reason other than default on the part of the franchisee.

10 There was no requirement in the Franchise Agreement for the applicant to upgrade or refurbish the shop including any fit out. This is because when the applicant entered into the Franchise Agreement it was an existing business with an existing fit out.

11 The respondents proposed a demolition and rebuilding of Level 3 of the Wintergarden Building. Consequently, the Lease was terminated by the agent for the respondents by service of a notice on Jonamill on 23 September 2013 pursuant to clause 41 of the Lease. The notice required Jonamill to provide vacant possession of the Shop by 28 March 2014.

12 Jonamill served a notice on the applicant on 16 October 2013 to terminate the licence for the shop at the end of March 2014. The applicant vacated the shop on or about March 2014 in compliance with the notice from Jonamill.

13 The applicant is seeking from the respondents damages and loss of profits as a result of termination of the Lease.

Retail Leases Act 1994 (RLA)

14 The terms *'retail shop lease* or *lease'* are defined in s3 of the RLA to mean:

> Any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purposes of the use of premises as a retail shop:
>
> (a) whether or not the right is a right of exclusive occupation, and;
>
> (b) whether the agreement is express or implied;
>
> (c) whether the agreement is oral or in writing, or partly oral or partly in writing.

15 Sections 70 and 71 of the RLA state:

> S70 (a) In this division, retail tenancy claim means any of the following:
>
> (a) a claim in connection with a liability or obligation with which a retail tenancy dispute is concerned being:
>
> (i) a claim for payment of money (whether or not stated to be by way of debt, damages, restitution or refund).

> S71 - Lodging of retail tenancy claims with Tribunal
>
> (1) A party or former party to a retail shop lease or former retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal for determination of the claim.

Applicant's submissions

16 The applicant submits that there is an implied lease agreement between the respondents and the applicant. The applicant says that it was the respondents and the agents of the respondents, not Jonamill that often directly approached the applicant to request overdue payments of rent, asks for insurance from the applicant and ultimately drew on the bank guarantee provided by the applicant without necessarily going directly to Jonamill. From this conduct, the applicant argues that the respondents must have had the understanding that they had the right to do so and based on that understanding there should be an implied lease between the respondents and the applicant.

17 The applicant infers that from the regular and direct dealings between the respondents and the applicants, that there must be a contractual relationship between them sufficient to bring the dealings within the concept of a retail shop lease under s3 of the RLA. As noted these dealings regarded the payment of rent, insurance and the bank guarantee.

18 The applicant relies on the decision of Senior Member Reigler of VCAT in *Ireland v Subway Systems Australia Pty Ltd and Anor (Retail Tenancies)* (2012) [VCAT] 1061 (20 July 2012 at [15]:

> Therefore, determining whether the occupancy agreement gives rise to a leasehold interest requires an examination of what, in substance, was granted, rather than what was produced in form.

19 According to the applicant, Senior Member Reigler concluded from the surrounding circumstances and evidence that was provided to the Tribunal that there never was an intention to create a license agreement. He found that on the balance of probabilities, the parties intended to create a sublease and that the words used in the occupancy agreement which purported to deny that intention and were no more than a pretence. One of the reasons that led him to such a conclusion was the anomaly he found in clause 16 of the licence agreement. Senior Member Reigler at [35] stated:

> In particular, what is the purpose of having a clause giving Subway a right to repossess upon termination of the "licence agreement". If the occupancy agreement constituted a mere licence to occupy, no estate in land was ever granted. There is no need to include a term that the licensor "will not be guilty of trespassing on re-entry".

20 Accordingly, the applicant asserts that there are similar anomalies in the Franchise Agreement between the applicant and Jonamill in respect of the following clauses:

(a) clause 10.4.10 states that the franchisee does not have any right to seek an order for possession of the location or commence proceedings for trespass or nuisance, such rights rest solely with the franchisor or its nominee;

(b) under clause 40.9 of the franchise agreement if so required by the franchisor the franchisee will deliver possession of the location to the

franchisor or its nominee; and

(c) under clause 40.11 the franchisee is a sub lessee or licensee of the location, the franchisor will if so required by the franchisor surrender the sublease or licence or assign the sublease or licence to the franchisor's nominee for a consideration of $1.00.

21 Therefore the applicant asserts that, as in the decision in *Subway Systems,* if clause 10.4.10 in the Franchise Agreement constituted a mere licence to occupy then no estate in the land was ever granted. Accordingly there is no need to include terms dealing with trespass, repossession, surrender or assignment of the licence. According to the applicant, such terms only exist when an estate or interest in land is granted therefore using the counterargument because those words are included then the intention was that there be created a sublease not a licence.

22 A second argument put forward by the applicant in asserting that a sublease was in existence is based on clause 63.5 of the Lease between the respondents and Jonamill. Under this clause the respondents agrees that they would accept a bank guarantee from the applicant to replace the bank guarantee supplied by Jonamill. The applicant then asks, if the Lease did not intend to allow a sublease of the premises why would the respondents release Jonamill from the obligation of providing a bank guarantee by accepting a replacement from the applicant? If the Lease only intended to create a licence, the respondents could have requested an additional bank guarantee from the applicant instead of a replacement bank guarantee.

23 The applicant asserts that in light of the anomalies in the Franchise Agreement and the way that the respondents dealt with the applicant over many years of its occupation of the shop, that a sublease was constituted on the terms of the licence in the Franchise Agreement.

Respondents' submissions

24 The respondents say that at all relevant times:

(a) the applicant occupied the shop pursuant to the terms of the licence contained in the Franchise Agreement with Jonamill;

(b) the respondents had no direct contractual relationship with the applicant;

(c) the respondents did not grant the applicant a right to occupy the shop for value; and

(d) there was no retail shop between the applicant and the respondents pursuant to the RLA.

25 Accordingly, the respondents say the applicant has no standing to bring a retail tenancy claim pursuant to ss70 and 71(1) of the RLA.

26 In the application, the applicant confirms that there is no written or otherwise express agreement for lease between the applicant and the respondents. The applicant says though that by virtue of the fact that it provided bank guarantees and insurance policies, it used the premises as a retail shop and paid rent and provided turnover figures to the respondents that it was indeed a lessee pursuant to a sublease. It seeks

to argue in the application documents that its rights of occupation fall within the definition in s3 of the RLA and that consequently the Franchise Agreement effectively made it a sub-lessee.

27 However, the respondents say that the applicant occupied the shop only pursuant to the Franchise Agreement and the licence in the Franchise Agreement and that the performance of the obligations referred to in paragraph 26 of these Reasons were merely consistent with the requirements of clause 10.4 of the Franchise Agreement between the applicant and Jonamill. Pursuant to that Franchise Agreement the applicant was required to perform all the terms and conditions of the Lease as if it were the lessee, but there is no suggestion that it ever acquired any interest of the premises beyond that of its licence agreement with Jonamill.

28 The Tribunal agrees with the submissions made by the respondent that s3 of the RLA Act requires the applicant to establish the existence of an agreement directly with the respondents whereby rights of occupation are granted to the applicant by the respondents. There was no such agreement. In fact the Lease is between the respondent and Jonamill over the shop. There cannot be a second direct lease between the applicant and the respondents for the same premises co-existing with the Lease.

29 The applicant's performance of its obligations under the Franchise Agreement with Jonamill (which includes the obligations to perform all the terms and conditions of the Lease as if it were the lessee) does not create an implied agreement with the respondents whereby the applicant was granted a right of occupation by the respondents. This would be contrary to the terms of the Lease with Jonamill where Jonamill is the lessee.

30 In *Australia Credit & Finance Pty Ltd ATF Sumo Salad, MLC Centre Trust v GPT RE Limited and QRC Limited* [2011] NSW ADT 234, Deputy President Higgins sitting in the Administrative Decisions Tribunal, Retail Leases Division, considered a case involving similar factual situations as this where the operator of a franchised salad business sought a declaration as to the existence of a retail shop lease between it and the lessors of the MLC Centre. The franchisee sought to argue that a retail shop lease existed on the basis that the applicant had made payments as required under the lease held by the franchisor, Sumo Salad (Leasing).

31 The Deputy President dismissed the application at [39].

> … In regard to the premises there are two agreements, a written lease agreement between the respondents and Sumo Salad (Leasing) and a written licence agreement between ACFC (the applicant) and Sumo Salad (Leasing). The written lease is a Retail Shop Lease falling under the provisions of the Retail Leases Act. ACFC's right to occupy the premises and its obligations to pay a licence fee and other costs do not arise from the written lease, they arise from the outlet licence agreement, to which the respondents (Landlord, MLC & QRC) are not a party.
>
> Accordingly, I find that no Retail Shop Lease or Lease existed between the respondents and ACFC. On the basis of this finding, ACFC cannot bring a retail tenancy claim against the respondents under section 71 of the Retail Leases Act.

32 The applicant says, in answer, that this situation is different to the situation that was

considered in *ACFC* in that clause 3.1 of the outlet licence agreement required the franchisee to pay an outlet licence fee for the franchisor in consideration of the grant of the licence. The amount of that fee was equal to rent payable by the franchisor under the lease and the franchisor had the right under clause 3.1 to direct the franchisee to pay the outlet licence fee (not the rent) directly to the lessors. Here there was no such clause in the Franchise Agreement. The Franchise Agreement did not require the applicant to pay directly to Jonamill an outlet licence fee.

Tribunal's view

33 The Tribunal believes that the applicant is misguided in its submissions that the decision of Senior Member Reigler of VCAT in *Subway Systems* is of direct relevance to the application for original decision brought by the applicant against the respondent. It is not relevant in that in the *Subway Systems* decision the lessor was not a party to the dispute between the parties. The dispute was between the franchisees, the Irelands, and the Franchisor or its affiliate, *Subway Systems*. The question to be determined by VCAT was whether the licence to occupy the shop by the Irelands was under a licence, as argued by *Subway Systems,* or under a sublease as argued by the Irelands. This was relevant to that decision because if the dispute was to be viewed as a sublease then VCAT would have jurisdiction and if it was viewed to be a license agreement then it was most likely to be determined by Arbitration in accordance with the terms of the franchise agreement not by VCAT. In any event Senior Member Reigler decided it was a sublease but he also decided that irrespective of the Arbitration in the franchise agreement VCAT had jurisdiction in any event whether it be a licence or a sublease.

34 It is not necessary for this Tribunal to undertake the same exercise as undertaken by Senior Member Reigler and analyse the conduct of the parties and the words of the license granted under clause 10 of the Franchise Agreement. Whether it be a licence or a sublease this is neither relevant as there is no direct relationship between the applicants and the respondents. So, even if the occupation by the applicant of the shop was ultimately determined to be pursuant to a sublease, it would be a sublease between the applicant and Jonamill, not with the respondents directly. There is no grant of any occupation by the respondents to the applicant. Any grant is through Jonamill and it is permissive only in that consent has been granted on the application of Jonamill. The respondents have been quite consistent in the way they have approached the applicant as occupiers of the shop, always acknowledging Jonamill as a lessee and the applicants as agents for Jonamill either as licensee (or if the analysis were to be undertaken then perhaps as sublessee). However, there is no retail shop lease between the applicant and the respondents as defined in s3 of the RLA and the respondents have not agreed to grant a right of occupation of the shop to the applicant.

35 The Tribunal agrees that there is no difference between the current situation and that deliberated upon by Deputy President Higgins in *ACFC*. All the interaction between the

applicant and the respondents such as rent payment, delivery of insurance and the dealings with the bank guarantee are consistent with clause 10 of the Franchise Agreement and do not of themselves go any further to establish a direct relationship between the applicant and the respondents.

36 The Tribunal agrees with the respondents that there is no lease between the respondents and the applicant. The definition of lease is not satisfied as the respondents did not grant any rights to the applicant. Whether the Franchise Agreement constitutes a sublease consented to by the respondents is one that has not been further considered by the Tribunal for the reasons expressed. In any event even if there were to be found a sublease in existence, the applicant's interest in the shop would be subject to the Lease and the lessee's right thereunder, namely Jonamill, to deal with the respondents. It seems on the papers presented to the Tribunal that Jonamill accepted the Notice of Termination of Lease.

37 The Tribunal believes that it would not be appropriate to make any costs order in this matter. However, if the respondents believe otherwise then the respondents must lodge with the Tribunal and serve on the applicant its costs application pursuant to Section 60 of the Civil and Administrative Tribunal Act, 2013 or Rule 38 of the Civil and Administrative Rules 2014 within 21 days of the date of this order.

Orders

1 The Application for Original Decision is dismissed as the applicant has no standing to bring a retail tenancy claim against the respondents.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

11 March 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

Decision last updated: 15 June 2016