Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Freedom Group Australia Pty Ltd v RO Corporate Pty Ltd [2016] NSWCATCD 59**
Hearing dates:	17 May 2016
Decision date:	14 July 2016
Jurisdiction:	Consumer and Commercial Division
Before:	S Thode, Senior Member
Decision:	1 The lease between the parties is not a retail shop lease within the meaning of the Retail Leases Act 1994 (NSW). 2 The Tribunal does not have jurisdiction to hear and determine the issues between the parties.
Catchwords:	Retail shop – lettable area
Legislation Cited:	Retail Leases Act 1994
Cases Cited:	Thompson v Easterbrook (1951) 83 CLR 467; Wood & Wilson v Bergman [2003] NSWADT 82; Moweno Pty Limited v Stratis Promotions Pty Limited (2002); Jones v Dunkel (1959) 101 CLR 298
Category:	Principal judgment
Parties:	Freedom Group Australia Pty Ltd (applicant) RO Corporate Pty Ltd (respondent)
File Number(s):	COM 16/15195
Publication restriction:	Nil

REASONS FOR DECISION ON COSTS APPLICATIONS

Introduction

1 On 29 March 2016, Freedom Group Australia Pty Ltd ("the applicant") filed an application in the Consumer and Commercial Division of the Tribunal, seeking a declaration that the oral lease entered into by the parties concerned a retail shop for the purpose of the Retail Leases Act 1994 (the Act).

2

The applicant further sought a declaration in the following terms: “this lease relates to the operation of a retail shop being Willow Tree Truck Stop on part of the premises in Lot 21 of Deposited Plan 1011519 New England Highway Willow Tree NSW 2329 comprising a service station building and associated improvements“. The parties entered into an agreement on or about 12 December 2012 but a written lease between the parties was not executed.

3 The applicant also sought orders that the terms of the lease remain in effect until 13 December 2017 subject to the applicant paying to the respondent the sum of $14,000.00 per month plus council rates.

4 RO Corporate Pty Ltd (the respondent) submits that the Tribunal does not have jurisdiction to hear and determine the issues between the parties as the lease is not a retail shop lease as defined by the Act. The respondent maintains the predominant use of the premises is a service station and service stations are excluded from the definition of retail shop lease.

5 The applicant submits that the lease is a retail shop lease as defined by the Act, as the lease was an agreement under which the applicant agreed to grant for value a right of occupation for the purpose of the use of the premises as a retail shop, namely a roadhouse where trucks would pull in to use the amenities, eat and sleep. The use of the petrol bowsers and the use of the premises as a service station were not the “predominant use” of the premises within the meaning of the Act.

6 It is not in contention between the parties that, in order to succeed, the applicant bears the onus of proof to establish that it occupies a retail shop used wholly or predominantly for the carrying out of a business specified in schedule 1 to the Act. Service Stations are not included in the list of businesses set out in Schedule 1.

7 The hearing was conducted on 17 May 2016 to determine whether the premises are a retail shop for the purpose of the Act, and secondly, if the lettable area exceeds 1000sqm as prescribed by section 5b of the Act.

8 On or about 16 March 2016, the respondent by its solicitor served a notice terminating the applicant’s lease of Lot 21 DP 1011519 (the premises). The applicant seeks a declaration that the premises are a retail shop for the purpose of the Act, and that the lease entered between the parties was a retail lease governed by the Act and should remain in effect until 3 December 2017.

The relevant provisions of the Retail Leases Act

9 Section 72 of the Act provides that the Tribunal may make a number of orders "in proceedings for a retail tenancy claim". Section 70 defines "retail tenancy claim" as any "claim in connection with a liability or obligation with which a retail tenancy dispute is concerned".

10 The term "retail tenancy dispute" is relevantly defined at s 63 to be:

> "any dispute concerning the obligations... of a party... to a retail shop lease... being liabilities or obligations which arose under the lease... or which arose in connection with

> the use or occupation of the retail shop to which the lease or former lease relates..."

11 A "retail shop lease" is defined at s 3 of the Act inter alia to be:

> "any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop...".

12 A "retail shop" is defined by s 3 of the Act to mean "premises that are used, or proposed to be used, wholly or predominantly for the carrying on of one or more of the businesses prescribed for the purposes of this paragraph".

13 Schedule 1 to the Act sets out a list of the businesses prescribed for the purposes of the definition of "retail shop".

14 Importantly, as set out above, a service station is not included in the schedule to the Act.

15 Section 5(a) of the Act prescribes that “this Act does not apply to any of the following retail shops: (a) shops that have a lettable area of 1000 square meters or more.” The respondent contends that even if it is found that the premises are a retail shop for the purpose of the Act, the Tribunal must find that the lettable area considerably exceeds the 1000 square meters prescribed by the Act.

The Hearing

16 The applicant tendered affidavits of its former director, Mr Naveen Kumar and annexures dated 1 May 2016; a statement of Mr Ravijeet Singh, director, dated 1 May 2016. Both Messrs Kumar and Singh were cross-examined. The applicant relies on its submissions dated 2 June 2016.

17 The respondent relies on the statements of Mr Vikas Garg dated 15 April 2016 and 9 May 2016 respectively; the statement of David Sullivan and annexures dated 15 April 2016; statement of Agita Antoon dated 18 April 2016. Mr David Sullivan was cross-examined. The respondent relies on its submissions received by the Tribunal on 3 June 2016.

Chronology of facts and events

18 The applicant acquired the lease of the land in December 2012 when it purchased the premises from the registered proprietors of the land. Until December 2012 the previous proprietors (Fenech and Melrose) had carried on a business of a truck stop. The petrol pumps had not been in use for some time before acquisition by the applicant. It appears not to be in contention that the pumps were disused for at least six months before the current applicant leased the premises. At the time occupation was granted, the business consisted of a general store, convenience truck shop with a kitchen and diner known as the “Willow Tree Diner”. The parties negotiated a figure of $40,000 for the “goodwill” of the business. No written agreement was executed.

19 The lease was to be a five year lease with 2.5 year options at an agreed rent of $14,000.00 per month after three months at $10,000.00. At all material times the applicant has paid to the registered proprietors (and then the respondent) the rent as

agreed. After the applicant went into occupation, the applicant's directors and the previous owners sought to negotiate a written agreement. The applicant's directors had engaged Lake Macquarie conveyancers to conduct negotiations on their behalf. The then owners, Ms Melrose and Mr Fenech, entered into negotiations to formalise the arrangement.

20 A first amended invitation to lease was sent to the applicant's conveyancers . The first amended invitation to lease describes the premises in terms as follows

> Folio: 21/1011519 known as Willow Tree Service Station, New England Highway, Willow Tree NSW being 12,150 square meters and comprising the service station building and associated improvements; hard stand and truck parking area."

21 That same invitation at 7.1 stated the permitted use as "operation of service station business; storage of fuel and gas supplies; retail sale of hot and cold beverages food and grocery items and motor vehicle accessories".

22 Negotiations continued until about August 2013. Although the documents were prepared, a formal written retail lease was never executed.

23 The respondent submits that "at this point in the negotiations, there was no challenge to the description of the land being a service station."

24 Over objection the "invitation to lease" was admitted into evidence. Both Mr Singh and Mr Kumar admitted to having read the invitation to lease prior to the hearing.

Jurisdiction of the Tribunal

25 The approach to be taken by the Tribunal in determining whether there is a "retail tenancy dispute" over which it has jurisdiction is well established and is set out in *Wood & Wilson v Bergman* [2003] NSWADT 82 and *Moweno Pty Limited v Stratis Promotions Pty Limited* (2002) NSWSC 1151 approved by the Court of Appeal in (2003) NSWCA 376 (Moweno). Both parties rely on the authority of Moweno.

26 In order to determine whether the Tribunal has jurisdiction, I must firstly determine if the predominant use of the premises is a service station or a truck stop. If the answer to the former is in the negative, I must determine whether the lettable area exceeds the meterage prescribed by section 5a of the Act. If it does, the premises are not a retail shop for the purpose of the Act.

27 The starting point for any enquiry whether or not premises are a "retail shop" under s 3 of the Act must be whether or not the use of the premises is a listed use as set out in Schedule 1 of the Act. In addition, an analysis is required of the actual use(s) of the premises to determine whether the predominant use(s) fall within one or more of the businesses prescribed in Schedule 1.

28 It is not contentious that the onus of establishing that the predominant use of the premises falls within the uses set out in schedule 1 to the Act rests with the applicant.

29 The Tribunal's powers in section 72 of the Act are to grant relief in connection with a retail tenancy dispute. The powers include a relief from forfeiture and declaratory relief as the parties' rights and obligations.

Submission on behalf of the applicant

30 The applicant filed written submissions dated 16 May 2016 and 26 May 2016.

31 The applicant submits that although there was no written agreement between the parties the evidence demonstrates that the use in contemplation of the parties at the time the lease was entered into was for carrying out the existing business which was sold to the applicant by the registered proprietor. That is to say that the previous proprietors carried on business as a truckstop café exclusively selling refreshments, meals and other grocery lines.

32 There was never an intention to use the premises predominantly as a service station. It is acknowledged that Schedule 1 of the Act does not make any mention of a service station. The applicant states that the evidence of Mr Singh makes it plain that the small amount of fuel that was sold was not enough to keep the business viable (see statement of Mr Singh page 6 Annexure I).

33 The fact that the premises were used from April 2013 onwards, as a petrol station, does not detract from the fact that the predominant purpose of the premises, at the time of entering the lease, was for use as a truck stop. The fact that there was a subsequent sale of fuel is immaterial. There has been no variation in the purpose for which the lease was granted.

34 The applicant submits that Mr Kumar, in oral evidence, stated that the position of the truck stop was a significant indicia supporting the contention that the premises were used as a truck stop and not as a service station.

35 Apparently Willow Tree Truck Stop is the closest truck stop to a nearby weigh bridge. The truck stop operates as a holding point and roadhouse for long haul drivers required to take their load over the weighbridge. Mr Kumar gave evidence that many drivers stopped at the roadhouse to wait for the bridge to open and this was a convenient point for those drivers trying to wait for the weighbridge to open and to get food and rest.

> Implicitly stopping to refuel at Willow Tree is less important than [avoiding] the weighbridge to afford the applicant an opportunity to sell steaks or burgers to drivers (see submissions paragraph 11).

36 The applicant submits that the disputes between the parties turns on whether or not the applicant is entitled to the protection of the Act for an oral grant of the right to occupy the premises and subsequently, whether the Tribunal has the jurisdiction to grant the relief sought

37 The Willow Tree Diner lease was granted for the predominant use of the business as a truck stop, not a service station. In the absence of evidence that it was the sale of fuel that was the predominant purpose of the granting of the lease, the subsequent sale of fuel at the premises is irrelevant. This is regardless of the applicant's evidence that the quantities of the fuel sold alone would be unviable (see submissions para 22). The initial purpose of the grant is determinative of whether the lease is a retail shop lease and not the use actually made of the premises.

Submissions on behalf of the respondent

38 The respondent relies on submissions dated 3 June 2016. In summary, it is submitted that the applicant's witnesses' evidence was in large part irrelevant as it expressed the subjective views of Messrs Singh and Kumar as to the predominant purpose of the use of the premises. It is incumbent upon the Tribunal to determine on an objective basis whether the terms of the agreement for occupation was for the purpose of carrying on of a business of a retail shop, or whether the predominant use of the land was for the carrying of a business not specified in Schedule 1, namely that of a service station.

39 The respondent is particularly critical of the fact that the applicant has filed no evidence or correspondence concerning the negotiations between the applicant and the previous owners dating back to 2012. It was the applicant who sought to formalise the agreement between Mr Singh and Ms Melrose, the former owner. A draft lease was prepared and the description of the premises were said to comprise a "service station building" and associated improvements. The commencement date was stipulated as 13 June 2013 for a period of five years and a further five years. The premises are described on page 5 as "Willow Tree Service Station". The respondent submits that this document, although never executed, demonstrate that it was the intention of the applicant at all times to conduct the business predominantly as a service station.

40 Further correspondence of 2 September 2013 stipulates that the lessor shall maintain the underground petrol tank and comply with EPA requirements regarding petrol pumps again indicating that the negotiations in relation to use and maintenance of petrol pumps and tanks was a further indicia that the parties were negotiating about premises predominantly leased for the purpose of carrying on business as a petrol station. The parties ceased negotiations on or about 26 September 2013. An offer was communicated to the respondent on that day, but the offer was not accepted and the lease was not executed.

41 The respondent issued a summons seeking the production of documentary evidence of the negotiations. The applicant stated it did not have the requisite time to produce documents in time for the hearing. The respondent invites the Tribunal to draw an inference that the inability or unwillingness of the applicant to produce correspondence surrounding the negotiations would be capable of an inference that had the applicant produced further documents and correspondence surrounding the negotiations of the lease, it would not have assisted the applicant's case (see *Jones v Dunkel* (1959) 101 CLR 298 at 308 and 312.)

42 The respondent submits that the draft lease was sufficient for either party to have obtained an order for specific performance, and that would have resulted in a lease or at the very least the applicant at the time of the sale of the property in 2016 the applicant had an enforceable equitable interest

> The sale to the respondent defeated the prospect of specific performance and now because the area is outside the limit for a retail lease under the Act, the applicant does not want the lease, but rather wants a lease of a minimal but undefined and unquantified area that would squeeze in under 1000 square metres but which would not allow trucks to park on the adjoining land beyond the leased area or to pass through the New England Highway. It could no longer be called a truck stop.

The Tribunal's findings and decision

43 Having regard to the evidence and the witnesses' demeanour in the witness box I have arrived at the following findings.

44 Mr Kumar, although a previous director, left most of the dealings in respect of the service station to Mr Singh. Nevertheless, he confirms that the first improvements to the petrol bowsers on the premises were made within a few weeks of taking possession of the premises.

45 I have had regard to his answers that the petrol bowsers were installed on or before 30 April 2015 and that it must have taken several weeks if not months to make the bowsers operational. I find that, given the remoteness of the area, that it would have taken a considerable time to secure contractors from Sydney to install the Caltex bowsers or to make them operational by 30 April 2013. I am therefore satisfied on the balance of probabilities that the applicant took steps to make the service station operational within weeks of taking possession in December 2012.

46 I do not accept the assertion of Mr Kumar that there was an intention to predominantly use the premises as a roadhouse and that the bowsers were made operational as an "'afterthought' to provide additional services to diners". Viewed from the main road there is a large sign advertising fuel supply at varying prices. There are four bowsers with driveway areas on both sides. There is a facility at the rear of the shop for customers to receive LPG. Having regard to the photographs tendered by the applicant I am satisfied that the premises are predominantly arranged to function as a service station.

47 I find, on balance, that it is more likely than not that food and beverages were additional goods and service offered to persons who were predominantly in need of petrol, given petrol generated twice as much revenue as food and cigarettes. In coming to this conclusion I have had particular regard to the evidence of Vikas Garg and attachment B to his statement. The Cash Drawer Reconciliation reports demonstrate that the income generated by fuel sales vastly exceeded any income generated by income from truck stop sales. In particular the assertion that the truck stop predominantly existed by reason of hot food sales is in no way reflected in the sales figures. Hot Food sales comprised, on average about 10% of the business' sale, and petrol accounted for approximately 60% of total sales.

48 I have accepted into evidence the statement of Ms Antoon and its annexures.

49 I accept as evidence the statement of the invitation to lease and that these were attempts by the parties to formalise their existing oral agreement. I am not satisfied that these documents constituted an attempt to vary the use of the premises from being predominantly a truck stop to a service station. I am satisfied that the invitation to lease did not comprise a variation to an existing lease, it was merely an attempt to formalise an oral arrangement that was already in existence and this included the lease of a service station and truck stop.

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I am satisfied that the document referred to as “an invitation to lease” although it came into existence after occupation was granted, was evidence, albeit not the only evidence, on which the Tribunal may rely to arrive at a finding that the intention of the parties was at all times that the premises would be predominantly used as a service station.

51 In the absence of a clear and unequivocal written statement which would describe its predominant use at the time the applicant took possession of the premises, the Tribunal is entitled to look at the actual use of the premises since December 2012. As already noted above, I have had particular regard to the sales records tendered by the parties. It is noted that the annual income tax return for the year ending 30 June 2015 establishes that the predominant part of the revenue is derived from the sale of petrol. I have also had regard to the admission of Mr Kumar that the petrol station has operated since 30 April 2013 at the earliest.

52 I have further had regard to the evidence of Mr Sullivan, who observed trucks taking in petrol at the time he spent 8 hours at the premises. I am satisfied on the balance of probabilities, that the predominant use of the premises was for the sale of petrol to truckers.

53 I have had regard to the oral evidence of Mr Kumar, who under cross examination volunteered that his “service station” was the only service station available for truckers to either wait for (or avoid) the weighbridge and, when he observed the use of the word “service station” corrected himself and used the words “roadhouse”. I reject the evidence of Mr Kumar and Mr Singh insofar it refers to “their intention” and prefer the independent evidence that points to the actual intended use (the invitation to lease) and the ITR 14/15, which demonstrates that the predominant revenue is derived from the sale of petrol.

54 In *Moweno Pty Limited v Stratis Promotions Pty Limited* (2002) NSWSC 1152 Barrett J [25] defined the circumstances in which evidence of actual use of the relevant premises would be useful

> "only if the written agreement of the parties was uncertain or there was some suggestion that the true terms of their bargain were to be gathered from their conduct, as distinct from the written word".

55 Barrett J also cited [20] a passage from the joint judgment of Dixon, Williams, Webb, Fullagar and Kitto JJ in *Thompson v Easterbrook* (1951) 83 CLR 467 at [481], in dealing with the situation where the purpose for which a lease is granted is not apparent from the terms of the lease. Their Honours cited the following dictum of Lord Watson in the English case of *Westropp v Elligott* (1884) 9 App Cas 815 at [831]:

> "Where the particular purpose for which the holding is to be used is not defined by contract, the legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must as intelligent and reasonable men be held to have had in their contemplation when they entered the lease."

56 I have also had regard to the decision of *Akora (Bondi Junction) Pty Limited v Buttrose* [2008] NSWADT 275, where the question arose whether the applicant operated a

catering business or a bakery and Judicial Member Molloy [53, 54 and 56] found:

> "53 It is plain to me, overwhelmingly on the evidence, that whether or not the Applicant operated a catering business, the fact is that the premises in question were being used as a bakery and as a takeaway shop. The use of the administrative office upstairs was certainly minor.
>
> 54 I clearly conclude that the evidence demonstrates that Ms Logue had a catering business but that it was not conducted from the premises.
>
> 56 I am content to find that the premises were used for the carrying out of a bakery and/or a takeaway food shop. There is nothing in the Act that prohibits a bakery business operating from a retail shop, and which is not in breach of sections to sell its product to other shop or clients."

57 The principles as set out in Akora above are similar to the facts in the instant case, there is in my view, overwhelming evidence that the service of fuel was the predominant use of the business and the use of the premises as a roadhouse where ancillary or incidental to the sale of petrol. I conclude that the evidence demonstrates that the applicant carried out business as a petrol station.

58 The Tribunal deduces that the intention of both of the parties for the use of the premises was for use of a service station with ancillary use as a truck stop diner, the subjective opinion evidence by Mr Singh of the use of the current premises as predominantly for dining purposes is not relevant. The predominant use of the premises is for a service station not for dining use. The applicant bears the onus of having to satisfy the Tribunal that this is a retail tenancy dispute and the applicant has not discharged that onus.

59 Having arrived at a finding that the premises are not used for a business covered in Schedule 1, it is not necessary for me to address the second issue in dispute, whether the shop as a lettable area occupies more than 1000 square meters (see applicant's submissions at para 32). However, for abundant caution and to give finality to the proceedings I make the following findings in respect of this issue also.

60 Even if have erred and the premises concern a "retail shop" for the purpose of the Act, I am satisfied that the area that comprises lettable area is an area greater than 1000sqm. It is not controversial that an area clearly defined as "car parking space" is not included in the definition of "lettable area". For the reasons that follow I am of the view that the truck parking zone is not a mere "car parking space".

61 I am satisfied that the most of the area which comprises the parking lot and the associated area leased to the applicant (being in total 12,150 square meters) is used for the purpose of carrying on a business as a service station and for the ancillary business of conducting a truck shop diner. The evidence is relatively uncontroversial. Mr Singh and Mr Kumar both gave evidence that the trucks must cross from the highway across the bitumen petrol bowser area in order to arrive at the truck parking area. Here the trucks may park and wait for the weighbridge to open. It was the evidence of Mr Singh that the trucks sometimes park overnight and that the drivers sleep in their trucks. It was not clear to the Tribunal whether this was a practice adopted to avoid weighing or to wait for the weighbridge to open. Additionally Mr Singh

gave evidence that he has installed a washing machine in the laundry and that area around the storage area is also in use by the business. I am satisfied that the truck parking area, as opposed to the parking area closer to the shop for smaller vehicles, is used for drivers to purchase petrol, get sleep, buy food, use the facilities and is an area integral to the use of the business and not a mere car parking space. The business is reliant upon use of an area exceeding 1000sqm of lettable area within the meaning of section 3 of the Act in order to conduct business as a service station and truck stop.

Orders

62 The lease between the parties is not a retail shop lease within the meaning of the Retail Leases Act 1994 (NSW).

63 The Tribunal does not have jurisdiction to hear and determine the issues between the parties.

Costs

64 The Tribunal notes that the respondent seeks its costs on an indemnity basis.

65 The parties may address the Tribunal in written submissions addressing section 60 and Rule 38 of the New South Wales Civil and Administrative Tribunal Act.

(1) The respondent shall file and serve its outline of submission on or before 22 July 2016

(2) The applicant shall file and serve any submissions on costs on or before 27 July 2016.

(3) In the event that the parties do not agree to dispense with a hearing on the question of costs (and to have the question of costs determined on the papers) the parties have liberty to apply on seven days' notice to have a hearing on the question of costs.

S Thode

Senior Member

Civil and Administrative Tribunal of NSW

14 July 2016

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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: 28 September 2016