Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Anastopoulos v University of Sydney Union [2017] NSWCATCD 6**
Hearing dates:	13 September 2016
Decision date:	30 January 2017
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	1. The 2.9 metre sliding door is not to be permanently closed. 2. Either party can restore this matter for Directions Hearing after 28 days from publication of these Reasons.
Catchwords:	Breach of covenant for quiet enjoyment
Legislation Cited:	Retail Leases Act, 1994
Cases Cited:	Byrnes v Jokana Pty Ltd [2002] FCA 41 Vasile & Anor v Perpetual Trustee WA Ltd & Ors (1987) NSW SC 97829
Category:	Principal judgment
Parties:	Nicholas Anastopoulos (Applicant) University of Sydney Union (Respondent)
Representation:	Self (Applicant) Agent Taylor Nicholas (Respondent)
File Number(s):	COM 16/27189
Publication restriction:	Nil

REASONS FOR DECISION

1 The respondent, University of Sydney Union (USU) is an unincorporated association affiliated with the University of Sydney (University). It has the right to use and occupy various parts of the university campus and property owned by the University to provide and make services available for the benefit of students of the University, pursuant to an Occupation Licence between the University, as licensor, and USU, as licensee,

commencing 1 January 2007 (Head Licence).

2 Under clause 15 of the Head Licence, USU is permitted to sub-licence part of the property owned by the University with the consent of the University. One of these properties is the Jane Foss Russel building (JFR Building).

3 On 8 January 2010, USU granted a licence to Nicolas Anastopoulos (the applicant) in respect of the area known as S Retail Area 6 (the premises) for a term of six years (JFR Licence). The permitted use of the premises pursuant to the JFR Licence is selling and serving food items limited to those set out in the approved menu in Annexure E2.

4 On 26 April 2012, USU also granted a licence to the applicant in respect of the area known as Shop [***], Wentworth Building (Wentworth Licence). The Wentworth Building is adjacent to the JFR Building and the two buildings are interconnected.

5 The applicant operated cafes from the two licensed areas. There has been a series of disputes between the parties regarding both licences concerning the opening up of a competing cafe in the Wentworth Building by USU and a complaint by USU that the applicant was serving food, such as burritos and Vietnamese rolls, contrary to the permitted use as set out in the JFR Licence. These disputes were resolved by mediation and subsequently settled between the parties.

6 Now there is an ongoing dispute regarding the JFR Licence. On 9 June 2016, the applicant filed an Application for Original Decision seeking orders from the Tribunal that the applicant be allowed to reopen a sliding door between the foyer in the JFR Building and the premises, that the applicant be granted a rent reduction under s 34 of the *Retail Leases Act 1994* (RLA) and for a claim for loss of profits as a consequence of the actions by the University and USU by closing the sliding door. There was also a claim of unconscionable behaviour by USU but that claim seems not to have been further pursued in the litigation.

7 Again this dispute was the subject of a mediation and on 19 April 2016 an agreement was reached between the parties as a result of the mediation. However, whatever was agreed upon has not been carried out to the satisfaction of the applicant, partly I assume because such agreement was predicated upon USU obtaining the consent of the University. In any event the applicant has pursued its claim and seeks the orders from the Tribunal irrespective of what was agreed at the mediation. Consequently, I have not reviewed the mediation agreement.

The cause of the Dispute

8 The applicant states in its amendment to the Application for Original Decision on 31 July 2016 that on Thursday, 29 October 2015 at approximately 1.00 pm a USU employee entered the premises unannounced and, despite the objections of the applicant, closed the sliding door measuring 2.9m fronting the foyer of the JFR Building.

9 The applicant further states that he was advised by the USU employee that USU was

instructed to do so by the University because of smells emanating from the premises as a result of cooking by the applicant. The applicant was subsequently provided with a copy of a letter from Ms Kathy Tilbury, property manager of the University, addressed to Andrew Woodward, the CEO of USU, dated 17 December 2015 which clearly sets out the background of the reason for the closure of the sliding door. Ms Tilbury states:

> We confirm that due to the odour originating from the premises of your tenant we have decided to permanently close the sliding door between the lift foyer of the Jane Foss Russell Building ('Building') and the premises. We will undertake a major refurbishment in the lift foyer in early 2016 and as part of these works will be installing a new perimeter wall to close off the existing door.
>
> Since your tenant has commenced cooking meat on the premises an unpleasant smell has been causing significant concern throughout the building and we have been left with no choice but to lock off this door to alleviate this problem. We note we have also been forced to go to other expenses throughout the building, including installing additional glass panelling on the first floor to reduce the impact of the odours.
>
> It is our understanding that there is no exhaust system within the premises which is contributing to the problem of the odour. If this is the case, would you please inform your tenant that cooking within the premises is not permitted without the installation of an exhaust system, and to cease any further cooking until an exhaust system is installed.
>
> Please also let us know whether your tenant is cooking on a gas or an electric grill, as we are concerned that he may be using gas bottles in the premises, which are not permitted.

10 The applicant complains that:

(1) USU (and the University) has acted without justification in closing the sliding door on the basis that cooking within the premises is a breach of the development approval from Sydney Council.

(2) USU has breached his right of quiet possession.

(3) The door closure has affected customer flow to the applicant’s business by reducing the visibility of the premises and customer access to the premises.

(4) The closure of the door has had a direct effect on sales and profit.

11 The applicant also says that USU was not justified in closing the door and issuing a breach notice based upon its claim that the applicant was engaged in cooking at the premises and that the cooking equipment used is in breach of the development consent approved by the University and Sydney Council.

The applicant's submissions

12 The applicant referred in his submissions to the permitted use in the JFR Licence and to the fact that he had obtained the relevant approvals from Sydney City Council through a development process and obtained development consent for the permitted use of the venue, which included cooking limited to domestic gas stove, crepe maker and press toaster.

13 In his statement of 12 September 2016, the applicant stated as follows:

> We cook approximately 200 crepes from 7.00 am to 6.00 pm each day. The cooking involves placing batter on a hot skillet that is brushed with butter. An endless range of ingredients can then be added during the cooking process before the crepe is folded and served hot.

> Our wraps and sandwiches all have ingredients that need to be served cooked and hot.
>
> My permitted use of the premises for my Wentworth cafe was worded exactly the same as in my licence for the JFR building with a similar menu and without mention of the word 'cooking'.
>
> I accepted the licence to the JFR building on the reasonable understanding that the permitted use of the premises was based on the approved menu and conditions set on (out) the development application.
>
> The respondent's claim that my licence in the JFR building does not allow me to do any cooking is not supportive of the approved menu and the development application or the fact I have been cooking in the premises since the start of a licence in 2010 without any such prior claim.

14 The applicant submitted that USU had engaged in misleading and deceptive representations in order to justify its interference with the tenancy, that the closing of the 2.9m sliding door cannot stop smells emanating from the premises because it does not provide an air tight seal and that it was unnecessary and reckless by USU and the University to close the door.

15 Further, the applicant argued that the USU and the University are being unreasonable to expect that there should be no cooking smells emanating from the premises into the JFR Building, given their approval for the tenancy to operate as a cafe and the applicant argued that the issue is not that there are smells emanating from cooking but rather whether the smells are classed as offensive odours.

16 The applicant stated that there was no inspection undertaken by a Sydney City Council environment officer to support any complaint that there are offensive odours emanating from the premises and consequently that the applicant would be in breach of the development consent and the JFR Licence.

17 The applicant argued that by closing the 2.9m sliding door and producing photos to the effect that the line of sight to the premises was impeded, that access to the premises was substantially hampered and this resulted in reduced desirability of the tenancy and receiving considerably less exposure and consequently reducing customer access. The applicant maintained that customer access through the sliding door was critical at peak times.

Hearing

18 At the hearing on 13 September 2016, the applicant submitted no evidence other than the statements within the Application for Original Decision and the photos attached. USU was represented by its managing agent, Mr Andrew Taylor of Taylor Nicholas, who provided affidavits from himself, Mr Andrew Woodward, CEO of USU, Ms Kathleen Tilbury, property manager of the University, Mr Alistair Cowie, director of marketing and facilities at USU and from Ms Daniela Grech, the property manager at Taylor Nicholas.

Submissions on behalf of USU

19 Mr Andrew Taylor relied on the complaints about the smells emanating from the premises as evidenced in the affidavits, the direction from the University to close the sliding door and the ongoing breach of the JFR License by the applicant in continuing

to do certain cooking within the premises. Mr Taylor referred to the letter from Ms Tilbury (set out in paragraph 9 of these Reasons) where she states that:

> Since the tenant has commenced cooking meat on the premises an unpleasant smell has been causing significant concern throughout the building.

20 Ms Tilbury had previously sent a letter on 15 March 2015 to USU noting that in relation to the premises:

> Currently the sub-licensee is selling cooked meat rolls which were not approved as part of the permitted use by the University. Can you please advise your sub-licensee that this product is not in accordance with his approved permitted use clause. The University also advises that it will not approve the product due to the cooking odours being omitted (sic) out of the tenancy into the Jane Foss Russell building.
>
> Therefore, can you please advise your sub-licensee to cease cooking and selling the cooked meat rolls immediately as it does not comply with the permitted use clause of his sub-licence.

21 USU then issued a notice of breach letter dated 17 March 2015. Pursuant to the breach notice USU required the applicant to cease selling burritos and Vietnamese rolls.

22 Mr Alistair Cowie in his affidavit of 29 August 2016 states at paragraphs 13 to 16 the following:

> 13. I walk past Nick's Café every morning on my way to work. On Tuesday, 28 July 2015 I was confronted by a very strong odour of what I thought to be grilling meat and onions. I asked Josh Bennett to investigate and he told me that Nick had installed a grill and range hood and was grilling meat in the premises. I wrote to Taylor Nicholas to inform them that he was doing this despite our request for more information and no approval having been given by either USU or more importantly the University.
>
> 14. On 9 October Josh Bennett reported to me that there was still a strong odour coming from Nick's Café. He investigated further and found that the staff were not using the extractor. I asked him to write to Taylor Nicholas to let them know that this issue was ongoing and that it was having an impact on the building and could potentially cause a fire alarm to be activated.
>
> 15. On 28 October 2015 USU received notice from the University that they wanted the sliding door that opened from Nick's Café into the JFR Building foyer closed due to cooking smells and mess left by customers. I asked Robert Banister to pass on this information to Taylor Nicholas on the same day so that they could inform the sub licensee.
>
> 16. On 29 October I instructed Robert Banister to close the door.

23 In Mr Cowie's affidavit he also refers to the sales figures of the applicant and notes there was fluctuating patronage during some of the months owing to University holidays and student scheduling of lessons and that the applicant suffered loss of business because of the closure of the sliding door.

24 Further, in relation to the door closure and the notice provided to the applicant, Ms Daniella Grech, the property manager at Taylor Nicholas, says in her affidavit also dated 29 April 2016 at paragraphs 27 to 30 the following:

> 27. On Wednesday, 28 October 2016 Robert Banister (USU facilities manager) emailed me asking that I advise (the applicant) that the foyer door would be closed off the following morning as per the instructions from Kathy Tilbury.
>
> 28. On the same day Wednesday, 28 October 2016 I emailed Nick advising him of the instructions.
>
> 29. On the same day Wednesday, 28 October 2060, I sent Nick an SMS advising him that I had sent an important email regarding the foyer and asked that he read the email and comply with the instruction.

30. On Thursday, 29 October 2015 I sent an email to Nick referring him to the email sent the day prior asking him to comply with University's instructions.

31. On Thursday, 29 October 2015 at sometime during the late morning I received a call from Robert advising that Nick had not complied with the USU's request and the foyer door was opened and that he would be going to block it off himself.

25 Mr Andrew Taylor in his affidavit of 26 August 2016 at paragraphs 5 and following relates the history of the use of the premises:

5. At all times during the negotiations with Nick it was made clear that the shop he intended to lease would not allow cooking on site as there was no exhaust system that could cope with or exhaust any cooking smells. Nick said words to the effect: 'It will only be a café. Everything we will sell will be pre-cooked or pre-prepared so I don't need an exhaust for what I'll be doing. The most I'll be doing is re-heating ….' These comments were backed up by Nick's preparation and lodgement of his development application to council for his use.

6. Nick was also made aware that the USU was not offering any exclusivity of outlet type or offering.

7. Nick obtained a development consent for his proposed use from Sydney Council around 16 December 2009. He was well aware of the requirements of the University as he was a long term operator on the campus. He was also an experienced cafe operator and prepared the development application and plans for the application so knew the conditions in the consent relating to the use of the premises … Specifically this consent states at clause 11:

11. Emissions

The use of the premises must not give rise to the emission of gases, vapours or other impurities which are a nuisance, injurious or prejudicial to health.

12. Cooking

(a) It is not possible for a commercial local exhaust system to be installed at this premises therefore cooking equipment is limited to the domestic gas stove, crepe maker and press toaster as shown on the approved design.

(b) As there will not be a (sic) exhaust hood that complies with AS 1668.1 and AS 1668.2 the total maximum power of the combined cooking apparatus must not exceed -

(i) 0.5kW electrical power; or

(ii) 1.8Mj gas per m2 of the floor area of the room or enclosure.

13. No odorous cooking processes.

Odorous cooking processes such as deep fat frying, frying and charcoal cooking is not permitted at the premises.

26 Mr Andrew Woodward, CEO of USU, in his affidavit of 29 August 2016 states as follows:

5. The USU takes its role as the procurer and provider of facilities and services, including food retail services very seriously and a part of the steps that it takes in the furtherance of the objectives for which the USU was formed. The USU approaches its dealings in connection with the licences it grants and tenants and occupiers of the areas which it licences from the University, with professionalism, fairness, integrity and good faith.

18. …I engaged in a conversation with the applicant (on 28 July 2016) …

19. During this exchange I suggested to the applicant that all he needed to do was to sign an undertaking required by the University, acknowledging that cooking from the premises is not permitted under the JFR Licence or the current development approval for the premises and that the applicant would not cook from the premises or undertake food preparation from the premises in breach of the licence or development approval or likely to cause offensive odours and vapours to emanate from the premises, and the University would re open the door.

> 20. The applicant indicated that he did not want to sign the undertaking because he did not think it was fair that the University should be able to tell him what to do.

The terms of the JFR Licence

27 Clause 14 states as follows:

> 14. Use and carrying on business
>
> 14.1 You must use the premises only for the permitted use.
>
> 14.2 In carrying out the permitted use you must at all times conduct your business in the best manner.
>
> 14.3 You must obtain relevant approval(s) from the authorities for your use of the premises and always:
>
> (a) keep the approval(s) current;
>
> (b) comply with all conditions of the approval(s).

28 Annexure E to the JFR Licence sets out the approved menu which in relation to food is as follows:

- Toasted sandwiches
- Toasted wraps
- Bagels, crepes, muffins, pastries, cakes
- Salad
- Quiches
- Snacks.

29 Clause 15 sets out the licensee's obligations which includes:

> 15.1. Things you must do
>
> (c) comply on time with all laws and the requirements of authorities in connection with the premises, your business, your property and the use or occupation of the premises (including obtaining all permits) …

30 Under clause 15.2 among things listed that the applicant must not do is that the applicant must not:

> (c) do anything in or around the building which in our reasonable opinion may be annoying dangerous or offensive.

31 Clause 18 sets out obligations of USU including:

> 18.1 Quiet Enjoyment
>
> (a) Subject to this licence while you comply with your obligations under this license:
>
> (i) You may enter and use the premises during the term of this licence without interference from us. The legal right to possession of the premises remains with us.

32 USU has the right under clause 18.3(b) of the JFR Licence to carry out certain works:

> 18.3(b) We may:
>
> (i) carry out any works in the building or the premises (including but not limited to alterations and redevelopment) or limit access to or close the common areas if we take reasonable steps (except in emergencies) to minimise interference with your business;

33 Common areas are defined in clause 25.1 to be:

> Common areas means those parts of the building which we intend for common use which include loading docks, entrances, footpaths, access ways, stairs, elevators and toilets and those parts of the University necessary to gain access to the building.

Head Licence

34 Under clause 4.1(f) of the Head Licence, USU covenanted with respect to the use of the licensed area that USU must:

> not do anything in or upon the licensed premises or the building which in the opinion of the licensor may become a nuisance, disturbance, obstruction or cause of damage whether to the licensor or to other tenants or users of the building, nor to use the licensed premises in any noxious or offensive manner.

Cases on relevant points

35 The parties did not refer to any cases. However, there have been a number of cases in relation to disputes between landlords and tenants regarding the landlord's ability to change or alter certain parts of the premises and whether there has been a breach of the covenant for quiet enjoyment.

36 In *Vasile & Anor v Perpetual Trustee WA Ltd & Ors* (1987) NSW SC 97829 the plaintiff had leased a coffee shop in an office building in North Sydney. The landlord planned substantial alterations to the building including removal of a side doorway from the coffee shop into the main lobby of the building. It was held by His Honour Byson J that the proposed works constituted a derogation from the grant and a breach of the covenant for quiet enjoyment in that part of the demised area would be occupied and filled with masonry and that access from the lobby to the premises would be prevented. Further, he held that although the terms of the lease permitted the lessor to enter and repair the premises or other parts of the building, the lessor was not entitled to materially change the nature of the lease or render it less effective.

37 Allsop J in *Byrnes v Jokana Pty Ltd* [2002] FCA 41 dealt with a dispute regarding a failed business venture in the Orange Grove Shopping Centre. Part of the dispute centred upon an alleged breach of the right of quiet enjoyment. Allsop J (at paragraphs 58 and following) examined in some detail the law on quiet enjoyment:

> 58 The law on the covenant for quiet enjoyment has been recently reviewed by the Full Court of this Court in Hawkesbury Nominees Pty Ltd v Battik Pty Ltd (2000) FCA 185. I refer in particular to the reasons for the judgment set out therein … assisted by their Honours' reasons, I take the following to be the relevant principles.
>
> 59. It should be recognised that the ordinary principles of contract apply to leases.
>
> 60. The function of a covenant is twofold:
>
> (a) it is a limited undertaking as to title; and
>
> (b) it is a covenant that the tenant should peaceably hold and enjoy the demised premises without interruption by the lessor or those claiming through the lessor: Goldsworthy Mining Ltd v FC of T (1973) 128 CLR 199 at 214. The purpose of the covenant is to prevent the landlord annulling its own deed by interfering with the possession of the tenant.
>
> 61. Where the demise has been granted for the carrying on by the tenant of a particular business known to both parties, it is that business which forms the framework of the analysis as to whether there has been interference with the possession of the tenant. It is the ordinary and lawful enjoyment of the demised premises for the known

purpose which is to be protected from interference which is substantial.

62. It is a question of fact whether the lessee's ordinary use of the premises has been substantially interfered with: Southwark LBC v Tanner (2001) 1AC1, 9- 11. The tenant is entitled to the full benefit of the demise, of the possession, for the known or nominated purpose: Kenny v Preen (1963) 1QB499, 511.

63. A consequence of the proposition that it is a question of fact as to whether interference with possession for the known or nominated use is substantial is that one should be careful not to elevate factual decisions in other cases to statements of principle: Teubner v Humble (1963) 108 CLR 491, 503 per Windier J and Bus v Sydney County Council (1989) 167 CLR 78 at 89 per Mason CJ, Deane, Dawson and Tooagy JJ. For instance, it has been sometimes said that a mere noise or invasion of privacy is insufficient, that there must be 'some physical interference with the enjoyment of the demised premises': Browne v Flower (1911) 1Ch 219, 228 and Phelps v City of London Corp (1916) 2Ch 255, 267. Such distinctions are factual and not founded on application of principle: … for instance, there is no reason why noise alone could not amount to a breach of the covenant in respect of the demise for the purpose of conducting a hospital for persons suffering from nervous shock or nervous breakdown.

64. The real question is, what is the best way to express the degree of interference with possession required (bearing in mind the known or designated purpose of the demise). One needs to be careful with the adverb 'substantially' in the phrase 'substantially interfered with'. It does not elevate the requirement to one of 'practical frustration' of the lease: Aussie Traveller Pty Ltd v Marklea Pty Ltd (1997) 1 Qd R1 at 8-10 … If full enjoyment is the entitlement: Kenny v Preen … then a material reduction in that fitness suffices to create a breach. … I agree with McPherson JA in Aussie Traveller Pty Ltd v Marklea Pty Ltd supra, at 8-12, that it is not necessary for there to be practical frustration of the lease, or that the interference render it impracticable or uneconomic to carry on the lessee's business for there to be a breach of the covenant. However, as is discussed below, the degree of seriousness of the breach is central to the assessment of the legal consequences of breach, in particular whether the tenant is entitled to terminate the lease.

65. In assessing whether there has been a material reduction in the fitness of the premises for the business, the accepted state of the premises at the time of grant is relevant. The covenant does not apply to things done before, or the state of affairs at, the grant. The tenant takes a property not only in the physical condition in which he, she or it finds it, but also subject to uses which the parties must have contemplated would be made of the parts retained by the landlord …

66. Where the acts are not those of the lessor, the lessor is nevertheless liable for them if it fails to takes steps to eliminate or prevent them …

68. Finally, the assessment of the interference concerns the possession of the premises for the purpose known. There may be demonstrated by the business purpose being shown to be tangibly interfered with. It is unnecessary in this process to show that the business was or would have been otherwise a success. If the demise is made for a business purpose and interference is caused such that the possession for that purpose is materially affected in the way I have described, it is no answer to say that the business as run by these tenants was otherwise hopeless and their business, in the sense of their profitability, was harmed only marginally. If the ordinary lawful use of the premises, the possession of the premises, for that known purpose, has been the subject of material derogation or interference, a breach has occurred. The question of whether there was any affectation of profitability, and if so, to what degree, is a question for the assessment of damages.

69. If a breach has occurred, the question arises as to the consequences thereof. A breach will sound in damages, it will also entitle termination where the interference is of a sufficiently serious nature.

Tribunal determination

38 The questions to be determined by the Tribunal are as follows:

(1) Did USU have the right to enter the premises and close the sliding door as it did?

(2) Was the applicant in breach of the JFR Licence by cooking on the premises?

Depending on the Tribunal's findings on these two questions, the issue of damages claimed by the applicant will then need to be considered.

39 USU's right to enter the premises and close the sliding door was couched by USU in the language that it was being done because of the complaints that the smell and odours emanating from the premises was a nuisance and would result in a breach of the JFR Licence.

40 However clause 18.3 of the JFR Licence gives to USU a right to carry out works in the tenancy as follows:

> We (the USU) may carry out any works in the premises including but not limited to alterations and redevelopment or limit access to or close the common areas if we take reasonable steps (except in emergencies) to minimise interference with your business.

41 Again the Tribunal has to assess what were these reasonable steps. Firstly, a reasonable step to be expected is that the licensee be provided with notice. From the evidence of Ms Daniela Grech I am satisfied that notice was given to the applicant. Secondly, reasonable steps would include advising the licensee of the reason for the actions taken in closing the sliding door. I am satisfied that this was done. The applicant was constantly informed by USU that the applicant's actions by cooking within the premises and creating odours was, in the reasonable opinion of USU (and the University based on complaints the University had received), noxious and offensive and consequently a breach of clause 5.2(c) of the JFR Licence. However, no formal breach notice was given such as the breach notice regarding the sale of burritos and Vietnamese rolls.

42 The complaint by Ms Tilbury in her letter to USU on 15 March 2015 referred to at paragraph 20 of these Reasons alerted USU as to a potential breach of clause 4.1(f) of the Head Licence which states as follows:

> The licensee must at the licensee's cost, except where such costs are to be met by the licensor under the services agreement:
>
> (f) not do anything in or upon the licensed premises or the building which in the opinion of the licensor (the University) may become a nuisance, disturbance, obstruction or cause of damage whether to the licensor or to other tenants or users of the building, and not use the licenced premises in any noxious or offensive manner.

43 It is quite clear on the evidence provided to the Tribunal from Mr Alistair Cowie that there were noxious and offensive odours emanating from the premises which formed the subject of complaints to the University. However, the question is whether permanently closing the sliding door was the right course of action to be taken by both the University and USU pursuant to the Head Licence and the JFR Licence in relation to this problem. As pointed out by the applicant, even if the sliding door was permanently closed there is no stopping of the smells emanating from the café to the rest of the JFR Building because there is no seal between the gap in the door and the structure.

44 As I have mentioned, USU did issue a breach notice to the applicant requiring the applicant to cease selling certain products contrary to the menu. There appears to have

been no breach notice issued regarding cooking by the applicant.

45 On a perusal of the Head Licence I could find no right for the University to require the permanent closure of the sliding door. There is no equivalent clause such as clause 18.3 in the JFR Licence appearing in the Head Licence. Ms Tilbury in her letter of 17 December 2015 to USU stated that *'we have decided to permanently close the sliding door between the lift foyer of the Jane Foss Russell building and the premises*.' I cannot see on what basis the University is permitted within the Head Licence to close the door.

46 Accordingly, as a result of the direction that USU received from Ms Tilbury on behalf of the University, there was a potential for USU to be in breach of the Head Licence as a result of the actions of its sub-licensee, the applicant.

Dispute regarding quiet enjoyment of the premises

47 More relevant is whether clause 18.3 of the JFR Licence permits USU to do as requested by the University and permanently close the sliding door.

48 The applicant raises his right under clause 18.1 to quiet enjoyment of the premises and views the actions taken by USU as a breach of that right and consequently a breach of the JFR Licence. On a closer reading of clause 18.1 the Tribunal notes that it is in fact not an open right but a very limited right based on the usual '*subject to the licence while you comply with your obligations under this license you may … (have the right to quiet enjoyment)*'. That is, the right is based on compliance by the applicant with all its obligations under the JFR Licence.

49 Consequently, the second question arises as to whether the applicant was in breach of the JFR Licence and not able to avail itself of the right to quiet enjoyment given under clause 18.1. From the evidence provided by Mr Taylor in his affidavit annexing the Disclosure Statement and the development consent from Sydney City Council, it is quite evident that due to the fact that a commercial local exhaust system could not be installed in the premises the cooking equipment was limited to domestic gas stove, crepe maker and press toaster. Any other cooking apparatus was contrary to the development consent granted by Sydney City Council and also the consent to the applicant by the University.

50 The Tribunal is satisfied that the applicant had in fact embarked upon cooking meat and onions within the premises contrary to the development consent and thus in breach of the JFR Licence. Such a breach by itself would disentitle the applicant to the benefit of the provisions of quiet enjoyment under clause 18.1.

51 However, the Tribunal notes that the applicant has ceased cooking meat and onions. On the assumption that the applicant is proceeding in relation to its food preparation and sale of food in accordance with the JFR Licence and the development consent obtained from Sydney City Council, the question is can the applicant now take the benefit of the covenant for quiet enjoyment under clause 18.1.

52 There appears to be an issue between the parties as to what 'cooking' means. USU and the University appear to take the position that no cooking can be done within the

premises. This is clear from the submissions made by the applicant referred to in paragraph 15 of these Reasons. Mr Andrew Woodward at paragraphs 19 and 20 of his affidavit of 29 August 2016 refers to discussions with the applicant that there should be no cooking by the applicant in the premises (see paragraph 26 of these Reasons). I would have expected that crepes, which was part of the menu, are required to be freshly cooked and served and not reheated. The development consent from Sydney City Council refers to certain cooking apparatus being permitted such as crepe maker, gas oven and toaster, provided no odorous smells are emanated from the premises. I understand that some people might be sensitive to crepe smells but I would not consider such smells to be noxious or offensive.

53 If USU and the University take the position that no cooking is permitted under the JFR Licence then the Tribunal views that position to be incorrect. As noted, clause 18.3 of the JFR Licence gives a right to USU to do work in the premises such as close off access to the common areas provided USU take reasonable steps to minimise interference with the business being conducted by the applicant. This clause follows the right to use the premises without interference contained in clause 18.1(a)(i).

54 Accordingly, the analysis undertaken by AllsopJ in *Byrnes v Jakana* is most helpful, in particular paragraph 65. Allsop J places emphasis on the state of the premises at the time the grant was made. At the time the applicant took possession of the premises, the sliding door was not permanently closed. The applicant has indicated that the permanent closure of the sliding door has had a material effect on his business. There is now diminished utility of the open space and flow between the premises and the foyer of the JFR Building. There is a lack of visibility of the business and a reasonable belief that assumptions are made by potential patrons that on seeing the sliding door permanently closed, that the café may not be open and therefore patrons go elsewhere.

55 Whilst a lot of these matters may be subjective and there is evidence, particularly from Mr Cowie, about sales figures and the fluctuating patronage consequently affecting those sales figures, nevertheless the photos produced by the applicant clearly show some visual and physical impact by USU (and the University) in closing the sliding door permanently. Allsop J clearly differentiated between the physical effect by the interference on the premises and ultimately what that effect may resonate in damages (see paragraph 68 of the judgment). There appears to have been no attempt by USU to minimise any interference with the business of the applicant when the sliding door was closed. Such non action does not seem to accord with the sentiments expressed by Mr Andrew Woodward when he states in his affidavit that USU approaches its dealings with licensees with professionalism, fairness, integrity and good faith.

56 In this regard, the Tribunal is satisfied that when USU permanently closed the sliding door it did so not in compliance with clause 18.3(b)(i) because it did not take reasonable steps to minimise the interference to the business as a result of the door being permanently closed. Further, the Tribunal is of the view that USU is in breach of

clause 18.1(a)(i) in that by closing the sliding door permanently, it has not provided to the applicant use of the premises without interference.

57 It appears to the Tribunal that USU, in seeking to remedy the breach by the applicant of the JFR Licence in cooking meat and onions and causing offensive and noxious odours, undertook self-remedy by closing the sliding door, when instead a breach notice should have been issued. The breach notice would have required the applicant to cease cooking meat and onions, which the applicant has subsequently done. The breach notice could hardly have required the applicant to cease cooking altogether, which is what USU (and the University) appear to seek particularly in light of the discussions between Mr Woodward, the CEO, and the applicant, with regard to the settlement offer. [see paragraph 26 of these Reasons].

58 In relation to damages, the Tribunal is not satisfied that any claim by the applicant has been properly articulated in this case. If the applicant wishes to pursue damages then the Tribunal will allow the applicant to restore the matter for the Directions Hearing after 28 days from the date of publication of these Reasons.

59 Accordingly the Tribunal makes the following orders:

(1) The 2.9 metre sliding door is not to be permanently closed.

(2) Either party can restore this matter for Directions Hearing after 28 days from publication of these Reasons.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

30 January 2017

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: 01 March 2017