



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Lane Cove 83 Pty Limited v Vodafone Network Pty Limited [2017] NSWCATCD 13
Hearing dates:	21 December 2016
Decision date:	07 March 2017
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	1 The lease for the premises being a telecommunications base station is not a retail shop lease. 2. The Tribunal does not have jurisdiction.
Catchwords:	Sections 3 and 5 of the Retail Leases Act, 1994, whether premises are a retail shop and whether in a retail shopping centre or office tower
Legislation Cited:	Retail Leases Act, 1994
Cases Cited:	Diamond Certification Laboratories Pty Ltd v The Trust Company Ltd [2015] NSW CATCD 122 Honings Bakery Pty Ltd v Verialis Pty Ltd [2014] NSW CAT CD87 Manly Council v Malouf t/as Fusion Point (2004) NSW CA 299
Texts Cited:	Shorter Oxford Dictionary
Category:	Principal judgment
Parties:	Lane Cove 83 Pty Limited (Applicant) Vodafone Network Pty Limited (Respondent)
Representation:	Counsel: Mr N Owens SC (Applicant) Mr J Simpkins SC (Respondent) Solicitors: Mayweathers (Applicant) Bird and Bird (Respondent)
File Number(s):	COM 16/31935

Publication restriction: Nil

REASONS FOR DECISION

- 1 The issue for determination by this Tribunal is whether a lease of part of the rooftop area of a building in Lane Cove (**the Property**) for use as a telecommunication base station is a 'retail shop lease' for the purposes of the Retail Leases Act 1994 (**RLA**).
- 2 Lane Cove 83 Pty Ltd (**the applicant**), as lessor, entered into a lease with Vodafone Network Pty Ltd (**the respondent**), as lessee, in respect of premises described in the lease as Part Folio Identifier 1/579164 being that part of the premises shown on the plan annexed to registered lease number 2644058W (**the Lease**) marked 'B', hatched black and thereon described as lease site (**the premises**). The permitted use under clause 4.1 of the Lease is "a telecommunications base station".

Description of the premises

- 3 Mr James Elliott, the property manager at Colliers International in an affidavit dated 14 December 2016, filed on behalf of the applicant, describes the property in which the premises is located as follows:
 5. Constructed on the property is a 4 level building comprising a basement car park, ground floor arcade (arcade) 2 upper level premises (first floor and second floor) and rooftop premises (rooftop). The basement car park, the arcade, first floor and second floor and rooftop are all located within the property.
 6. Directly outside the property, Lane Cove City Council has installed a sign which refers to the property as 'Rosenthal Arcade'.
 7. In the arcade there are 8 premises from which a number of businesses operate including a kebab takeaway restaurant, a nail bar, a beauty salon, timber flooring supply shop, health and beauty gift shop, print and poster shop, an Indian restaurant and a Thai massage shop.
 8. On the first floor there are 5 premises from which 2 businesses operate including a pilates studio and a healthcare clinic.
 9. On the second floor there are 6 premises from which 5 businesses operate including an internet marketing company, a sports and physiotherapy studio, 2 offices and a child psychology clinic.
 10. On the roof there are premises from which a number of businesses operate including the respondent and another telecommunications provider.
 11. On the roof the respondent has installed its telecommunication equipment and has erected a structure (structure).
 12. The structure occupies approximately 9.25 square metres and houses some of the respondent's telecommunication equipment.
 13. I also understand the structure has been constructed using metal sheeting, it has 4 walls, a lockable door and a roof and is affixed to the Roof.'
- 4 The respondent engaged valuers Herron Todd White to undertake a rental assessment of the Lease (the assessment). A copy of the assessment dated 21 December 2010 was submitted into evidence. The description of the property at page 16 is as follows:

The subject property in Lane Cove would be considered to be within the suburban area, where rentals tend to generally be between \$20,000.00 and \$30,000.00 per annum,

however this may be exceeded if the lessee is anxious to lease the site. The subject space is located on top of one of the larger buildings in Lane Cove, close to the top of the hill and shares the site with two other telecommunications groups.

5 Later in the assessment there is a further description of the property:

Rental evidence for other telecommunications towers in the report take into consideration the neighbouring tower at 83 Longueville Road, Lane Cove (the subject property) and the parent site comprises a multilevel retail/commercial building located within the commercial tower.

6 The applicant filed an Application for Original Decision seeking a declaration regarding the validity of the Lease pursuant to s72 of the RLA dealing with retail tenancy claims. A retail tenancy claim under s71 of the RLA must relate to a retail shop lease.

Statutory definitions under the RLA

7 Section 3 of the RLA defines retail shop as follows:

'retail shop' means premises that:

- (a) 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 (whether or not in a retail shopping centre), or
- (b) are used, or proposed to be used, for the carrying on of any business (whether or not a business prescribed for the purposes of paragraph (a)) in a retail shopping centre.

8 The definition of 'retail shopping centre' within s3 of the RLA is as follows:

'retail shopping centre' means a cluster of premises that has all the following attributes:

- (a) at least 5 of the premises are used wholly or predominantly for the carrying on of one or more listed businesses,
- (b) the premises are all owned by the same person, or have (or would if leased have) the same lessor or the same head lessor, or comprise lots within a single strata plan under the Strata Schemes Development Act 2015,
- (c) the premises are located in the one building or in 2 or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the retail shops,
- (d) the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court, or shopping arcade.'

9 Section 3 of the RLA contains the definition of 'retail shop lease' as follows:

'retail shop lease' or 'lease' means 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;

- (a) whether or not the right is a right of exclusive occupation; and
- (b) whether the agreement is express or implied; and
- (c) whether the agreement is oral or in writing or partly oral or partly in writing.

10 Section 5 of the RLA relevantly provides:

This Act does not apply to any of the following retail shops:

...

- (d) any premises in an office tower that forms part of a retail shopping centre...

11 Consequently, the question to be addressed by this Tribunal as noted in paragraph 1 of

these Reasons is whether the Lease is a retail shop lease.

- 12 At the hearing on 21 December 2016, the applicant was represented by Nicholas Owens SC and the respondent was represented by Jonathon Simpkins SC.

Submissions on jurisdiction from the applicant

- 13 The applicant contends that these proceedings are 'proceedings for a retail tenancy claim' and within the meaning of s72 of the RLA because:
- (a) the premises the subject of the Lease is a retail shop (see s3 of the RLA);
 - (b) the lease is a retail shop lease (see s3 of the RLA);
 - (c) the dispute between the parties concerns 'the liabilities or obligations...of a party...to a retail shop lease...being liabilities or obligations which arise under the lease' and is thus a 'retail tenancy dispute' (see s63 of the RLA);
 - (d) the claim advanced by the applicant in the proceedings is a 'claim in connection with a liability or obligation with which a retail tenancy dispute is concerned', and is thus a 'retail tenancy claim' (see s70 of the RLA).
- 14 The applicant submits that the premises falls within the second limb of the definition of retail shop under s3 of the RLA, namely that the premises is used or proposed to be used for the carrying on of any business in a retail shopping centre and the Rosenthal Arcade is a retail shopping centre in accordance with s3 of the RLA. According to the applicant's submission, the fact that the use of the premises as a telecommunications base station is not a use that appears within Schedule 1 of the RLA (which lists the relevant retail uses as prescribed under paragraph 3(a) of the definition of retail shop in s3 of the RLA) is irrelevant because of the words in paragraph 3(b) that it is for the carrying on of any business (whether or not a business described for the purposes of paragraph (a)) in a retail shopping centre.

Submissions on jurisdiction by the respondent

- 15 The respondent submits that the Tribunal does not have jurisdiction and asks the Tribunal to follow the established approach of the Tribunal in the decision of Honings Bakery Pty Ltd v Cerialis Pty Ltd [2014] NSW CAT CD87, that is, the correct approach is to look at the permitted use or agreed permitted use of the premises in the Lease. Once that has taken place, then the premises must still fulfil the definition of a retail shop, whether in a shopping centre or not..
- 16 The respondent correctly notes the approach taken by the Tribunal in these matters as set out in Honings. There the Tribunal articulated that the correct approach to be taken in determining whether there is 'retail tenancy dispute' over which it has jurisdiction (s72) was stated at [36-37] as follows:

36. Both Counsel submitted to the Tribunal that 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] NSW ADT and in Moweno Pty Ltd v Stratis Promotions Pty Ltd [2002] NSW SC1151 approved by the Court of Appeal in (2003) NSW CA376.

37. In summary it is as follows:

- (a) firstly, one looks at the lease to see what is the permitted or agreed use of the premises;
- (b) if the agreement clearly defines what the use of the premises is to be, then the question whether or not the premises are a 'retail shop' under s3 of the Act will be determined by whether or not that use appears within Schedule 1;
- (c) if the permitted or agreed use is not clear or is uncertain, or the use covers a number of different types of businesses some of which are, or may be, within Schedule 1 described businesses, then 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.

17 As it is clear that the use of the premises as a telecommunications base is not a use identified in Schedule 1, the focus will be on the definition of retail shop in s3(b) of the RLA. In this regard, the second limb of the definition specifically provides that a retail shop means premises that are used...for the carrying on of any business (whether or not a business prescribed for the purposes of (a)) in a retail shopping centre.

18 The respondent submitted that the premises the subject of the Lease did not fall within s3(b) of the definition of retail shop for the following reasons:

- (a) the ordinary meaning conveyed by the term retail shop is a place where goods or services are sold, and no goods or services are sold upon the premises;
- (b) the premises is not in a retail shopping centre (emphasis added) for the purposes of s3(b); and
- (c) the respondent is not carrying on any business from a 'retail shopping centre'.

19 The effect of the applicant's submission is that any premises used to carry on any business (whether retail or not) in a retail shopping centre is a retail shop for the purposes of s3(b) of the RLA. The respondent asserted that the submission is based on a construction of the definition of retail shop in s3(b) which ignores the ordinary meaning conveyed by those words. The respondent submitted that the ordinary meaning conveyed by the words retail shop in s3(b) is a building where goods are sold (in other words 'a shop').

20 The respondent submitted that the purpose of the definition of retail shop in s3 is to encompass only the following types of premises:

- (a) shops that are carrying on any of the business as specified in Schedule 1 of the RLA whether or not they are in a retail shopping centre (per s3(a)); and
- (b) shops that are in a retail shopping centre, whether or not they are carrying on any of the business as specified in Schedule 1 of the RLA (s3(b));

21 The respondent drew the attention of the Tribunal to the decision of the New South Wales Court of Appeal in *Manly Council v Malouf t/as Fusion Point* (2004) NSW CA 299. In that case the Court of Appeal considered the meaning of the words 'premises'

within the definition of retail shop in s3 of the RLA. The decision of Handley JA is pertinent. He held that the meaning of 'premises' in the context of the definition of retail shop was influenced by the ordinary meaning of the word 'shop' as a building where goods are sold. Handley JA at [8-17] stated:

8. The word defined in a statute may properly influence the interpretation of the definition. See *Conservative and Unionist Central Office v Burrell* (1982) 1 WLR 522 CA at 525 per Lawton LJ). As Bennion states (Statutory Interpretation 3rd ed 1997 p434):

Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court;

9. The citations to this passage include *Delaney v Staples* (1992) 1AC 687 at 692 where Lord Browne-Wilkinson said:

The proper answer to this case turns on the special definition of 'wages' in s7 of the Act but it is important to approach such definition bearing in mind the normal meaning of the word.

10. The principle applies with special force in the present case because the great majority of the businesses listed in Schedule 1 incorporate the word 'shop' which must be used in the Schedule in its ordinary and popular meaning. This is given in the *Macquarie Dictionary* as 'a building where goods are sold retail'. Its meaning in the *Shorter Oxford Dictionary* is 'a house or building where goods are made or prepared for sale and sold'.

11. Although the relevant part of Schedule 1 'restaurants, cafeterias, coffee lounges and other eating places' does not incorporate the word 'shop' there is every reason for construing these words as having a similar connotation because the context in which they appear. This used to be known as the *noscitur a sociis* rule of construction.

12. A retail shop is defined as meaning 'premises' used for particular purposes.

16... (T)he meaning of premises in this or any other Act largely depends on its context in the particular statute. **In this case where the word is used in the definition of retail shop its meaning in that context takes colour from the ordinary meaning of shop as a building where goods are sold.** In that context the word 'premises' should be understood as used in its narrower meaning of a building or similar structure with any associated land not including vacant or bare land. The critical definition which governs the jurisdiction of the Tribunal is that of 'retail shop lease or lease'. This is given exclusive definition ('means'):

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 ...

17. This definition also incorporates the words 'retail shop' and 'premises' and again in this context the word 'premises' takes its colour from the fact that they are to be leased for the purpose of their use as a retail shop. The word should again be understood as used in its narrower meaning of a building or similar structure with any associated land not including vacant or bare land (our emphasis).

22 In further support of the submission that the ordinary meaning conveyed by the definition of retail shop in s3(b) is a building where goods or services are sold, the respondent points to other sections in the RLA namely ss20, 34, 37, 46, 58 and 61 where each section supports the construction of the definition of retail shop which is consistent with the purpose and object of the RLA to apply to only those leases concerning premises for the sale of goods and/or services.

23 The respondent also drew the attention of the Tribunal to the Explanatory Note to the Retail Leases Bill 1994 and the second reading speech confirming that the ordinary meaning conveyed by the definition of retail shop in s3(b) of the RLA is a building

where goods or services are sold (see s34 of the Interpretation Act 1987). The Explanatory Note to the Retail Leases Bill 1994 provides as follows:

The object of this bill is to impose certain requirements and restrictions on leases for retail shops and on the practices of lessors and lessees under those leases.

The expression 'retail shop' means a shop in which any of the businesses listed in schedule 1 is carried on or which is situate in a retail shopping centre.

Generally the bill applies to leases for a term of...the bill does not apply to some retail shops (as provided by clause 5 of the Bill) (such as shops that are used for the carrying on of a business by the lessee on behalf of the lessor).

- 24 The second reading speech of the Retail Leases Bill 1994 was delivered by Ray Chappell on 20 April 1994, the NSW Minister for Small Business and Minister for Regional Development at the time. At paragraph 2 of his speech Mr Chappell said:

The Bill I have introduced today is intended to foster good leasing practices in the retail industry, nothing more and nothing less.

Resolution by the Tribunal

- 25 The Tribunal agrees with the submission of the respondent that from the Explanatory Note to the Retail Leases Bill and from the second reading speech it is clear that the RLA is intended to be restricted in its application to leases within the retail industry. The use of the premises leased to the respondent pursuant to the Lease as 'a telecommunications base station' (clause 4.1 of the Lease) located on the rooftop area of the building in Lane Cove is clearly not related to or concerned with the retail industry.
- 26 The Tribunal, following the decision in *Malouf v Manly Council*, finds that the ordinary meaning conveyed by the definition of retail shop in s3 (be it in s3(a) or s3(b)) of the RLA is a building where goods are sold. There are no goods sold at a telecommunications base station nor are the premises set up as a shop in the ordinary sense. There is no shop entry, no shop fittings, no shop counter, and no ability for the public to trade in the premises.
- 27 It is not the purpose of the definition of retail shop in s3 to encompass premises that are not shops (i.e. premises where goods and/or services are not sold).
- 28 Accordingly, the Tribunal finds that the premises leased to the respondent is not a retail shop for the purposes of both s3(a) and s3(b) of the RLA. Consequently, the Tribunal does not have jurisdiction.
- 29 If the Tribunal is in error in determining that the ordinary meaning of shop excludes the premises, then it was submitted by the respondent that the premises are in any event excluded, as they are not within a shopping centre, but if so then they are within an office tower, as defined in s5 of the RLA.
- 30 If the Tribunal is incorrect in its application of the ordinary meaning of retail shop, then for the premises to be a retail shop and come within s3(b) of the RLA there has to be 'the carrying on of any business' in a shopping centre.
- 31 The carrying on of any business suggests active occupation or profession (see

Commission of Inland Revenue v Marine Steam Turbine Co Ltd (1919) 12TC 174 per Rollatt J at 179). As noted by the respondent the only thing that happens from the premises is the automated transmission of mobile phone calls through a telecommunications base station located on the roof of the building. This is not a business in the ordinary sense of trade and commerce being carried on within the premises.

Are the premises within a retail shopping centre?

- 32 There is a preliminary issue in any event as to whether in fact premises on a roof are in fact either within a retail shopping centre (s3(b) of the RLA) or even for that matter in an office tower (s5(d) of the RLA). The Tribunal is of the view that the premises on the roof are not necessarily within a retail shopping centre nor within an office tower. The premises are on the roof, not in the building.
- 33 The respondent submitted that the premises are not in a retail shopping centre due to the fact that the premises are located on the rooftop of the building and are physically separate from the retail component of the building forming the arcade. As noted from the affidavit of James Elliott referred to in paragraph 3 of these Reasons, the arcade component of the property known as Rosenthal Arcade contained eight premises on the ground floor which are retail. However on the first and second floors there are offices, which are not necessarily retail.
- 34 Further, even though the Council has installed a sign, 'Rosenthal Arcade', this does not of itself indicate that the whole building is the arcade. The Tribunal further notes from the assessment that the property being valued which is leased to the respondent is roof space containing a shed, in addition to areas for cables and communications equipment on various parts of the roof.
- 35 The respondent referred the Tribunal to the recent decision of the Appeal Panel in Diamond Certification Laboratories Pty Ltd v The Trust Company Ltd [2015] NSW CATCD 122 where particular premises in a plaza which was used for commercial (as opposed to retail) purposes was not considered to be within a retail shopping centre. Further, the Appeal Panel considered that the premises did not fall within the definition of retail shop in s3(b) of the Act at [(42-43):

42. The Appeal Panel has concluded that the ... business was not conducted in a retail shopping centre for the following reasons:

1. the subject premises are separated physically from the retail area because of the lift foyer on Level 1;
2. the separation by the glass door from the retail zone, and the restricted hours has a consequence that the subject premises were treated differently to shop premises in the retail area;
3. whilst the council plan shows that the subject premises were, at some early stage, treated as 'existing retail' for the purpose of the requisite statutory local government development approval, the physical layout has changed. At that time a staircase existed from the ground floor of the Castlereagh Street entrance. It provided access to the subject premises and to the retail shopping area on Level 1. However, the staircase has been removed. Accordingly, physical access from the Castlereagh Street entrance to the subject premises is thereafter only via the tower lifts, or from the Pitt Street

entrance. This alteration has removed street access to the retail area from Castlereagh Street;

4. clients of (the business) could only gain access after normal business hours to (the business) either via the tower lift, through the sliding-glass door if escorted by representatives of (the business) who held security passes. Access to the retail area have no such restrictions;

5. unlike other shops in the retail zone, the subject premises have no indicia of a 'shop'. Particularly:

(i) there was no shopfront;

(ii) no goods were displayed;

(iii) no goods were displayed for sale;

(iv) access to the subject premises was restricted, as already referred to; and

(v) a client needed to pass through a door from a partitioned reception area before arriving at the central operational space.

43. It follows from our findings that (the) submissions on the issue of 'shop' as defined in the Act do not succeed.

36 The respondent submitted that the Tribunal should take the same approach as the Appeal Panel. In particular, the respondent referred to the description of the premises in the assessment that the roof top area is currently tenanted by three telecommunications companies for the placement of telecommunications infrastructure and the area contains a shed in addition to areas where cables and communications equipment are on various parts of the roof. The assessment confirmed that the premises leased to the respondent are physically separated from the retail zone of the building. They are located on the roof top of the building whereas the retail zone is located on the ground floor.

37 Accordingly, the Tribunal agrees that the premises do not fall within the definition of retail shopping centre in s3 of the Act. The roof of the property which contains the premises is physically separated from the retail shopping centre, Rosenthal Arcade. This separation and the lack of appearance of a shop are similar to the facts in the decision of the Appeal Panel in Diamond Certification and was significant in the determination by the Appeal Panel that the premises were not within a retail shopping centre.

38 Lastly, in any event, the Tribunal asked that the premises are within an office tower (per s5 of the RLA).

39 'Office' is defined in the Shorter Oxford Dictionary to be:

A room or building or other place for business, room or department for clerical or administrative work.

40 From the affidavit of Mr James Elliott, the Tribunal notes that the five premises on levels 2 and 3 include a Pilates studio and a health clinic and on the second floor the premises are occupied by an internal marketing company, a sports and physiotherapy studio and two offices and a child psychology clinic. None of these premises appear to be used as retail and the uses are more in line with what one would expect to be within an office tower. The roof is above the two floors of offices. The premises are within an office tower.

41 Consequently, the Tribunal does not have jurisdiction.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

7 March 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

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Decision last updated: 19 April 2017