Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Bounouar v South Coogee Bowling Club Ltd [2016] NSWCATCD 67**
Hearing dates:	12 February 2016 and 13 May 2016
Decision date:	01 July 2016
Jurisdiction:	Consumer and Commercial Division
Before:	G Meadows, Senior Member
Decision:	1. The Tribunal determines the parties entered into a retail lease for a period of 5 years commencing on 2 March 2012 and terminating on 1 March 2017. 2. The order made by consent on matter number COM 16/06518 on 12 February is discharged. 3. The matters are to be listed for directions at the earliest available date by direction of the Divisional Registrar.
Catchwords:	ADMINISTRATIVE LAW—Retail Leases—whether applicant is a retail business—whether located in a shopping centre—whether lease between the parties
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Retail Leases Act 1994
Cases Cited:	ACN 079 830 596 Pty Ltd (trading as Jolly Joe's Fish 'n' Chips) v Wallis Lake Fisherman's Co-operative Ltd [2007] NSWADT 297 Clasic International Pty Ltd v Lagos and Ors [2002] NSWSC 1155 Gnych v Polish Club Limited [2015] HCA 23
Category:	Principal judgment
Parties:	Amina Bounouar (applicant) South Coogee Bowling Club Ltd (respondent)
Representation:	Mr Brendan Pigott, Solicitor (Applicant) Mr Jacques Kosmin, Kosmin & Associates (Respondent)
File Number(s):	COM 16/06518 and COM 16/06524
Publication restriction:	Nil

REASONS FOR DECISION

Background

1 On 9 February 2016 the applicant tenant filed application COM 16/06518 for interim orders under the *Retail Leases Act* 1994 (RL Act) and on the same date filed application COM 16/06524 for an original decision pursuant to the RL Act.

2 On or about 2 March 2012 the applicant commenced operating the kitchen and dining room at the respondent's premises. The business is described as a kitchen and bistro.

3 The applicant was not and has never been required to and has not paid rent since her business commenced at the respondent's premises. Apart from an issue in relation to obtaining public liability insurance, it appears the applicant has made no other contribution either in monetary or any form to the respondent or its members and guests, except for the provision of food.

4 The applicant's operation continued without issue until about 24 December 2015 when the applicant was advised by an official of the respondent that the respondent intended to terminate the applicant's business and to have an alternative operator conduct the business. The reason given to the applicant was that the new operator would be able to renovate the kitchen at its expense. The applicant was advised that her business would finish on 31 January 2016.

5 The respondent provided a formal notice of termination by letter dated 24 December 2015 over the signature of Mr Michael Davies, Club President. That letter confirms the general nature of the facts in the previous paragraph, with the addition of the following:

> "As you well know the club has been under orders from Randwick Council Health Officers to renovate the current kitchen in order to meet current requirements. Unfortunately the club is not in financial position to fund such renovations in the current environment."

6 As is usual with an application for an interim order, the matters were listed for urgent interim hearing, on 12 June 2016. At that hearing the following order was made:

> "1. By consent, the respondent will take no steps to disturb the applicant's exclusive occupation of the bistro kitchen and dining room until further order of the Tribunal."

7 Also on 12 February 2016, Senior Member Rosser made orders on the original application for the parties to serve all documents on which they intended to rely by 21 March 2016 and 4 April 2016 respectively.

8 On 1 April 2016 the solicitor for the respondent wrote to the Registry advising that the mandatory mediation (on 30 March 2016) had not resolved the dispute, that the applicant had not provided any further documents than those attached to the original application, noted the matter was set down for hearing on 19 April 2016 and requested that order 5 made on 12 February 2016 (for the respondent to file its evidence) be varied to 13 April 2016.

9 In response to that request, the solicitor for the applicant noted the potential prejudice to the applicant by such late service of evidence but concluded by stating that the

applicant had no real objection to the extension of time provided the hearing date could be adjourned so the matter could be properly prepared.

10 On 14 April 2016 Senior Member Vrabac amended the 12 February 2016 timetable, extending time for compliance with orders 4 and 5 until 14 April 2016 and 19 April 2016 respectively.

11 On 18 April 2016 the solicitor for the applicant again wrote to the Tribunal (by facsimile) noting the applicant had requested certain documents from the respondent (apparently being business records of the respondent), seeking informal production. This letter was accompanied by an application for issue of a summons for those documents. The Tribunal required the applicant also request an order for "shortened service" and that was provided immediately.

12 Despite the short time period, the respondent produced a bundle of documents at the hearing on the following day, being 19 April 2016.

13 The respondent had also filed a bundle of evidence in the Registry on 14 April 2016.

14 At the hearing on 19 April 2016, by consent the parties agreed to provide any documents and written submissions to be relied upon by them on 26 April 2016 and 3 May 2016 respectively. The decision was to be made on the papers.

15 This is the decision.

The Applications

16 As the respondent has pointed out in its submissions, the applicant has not actually specified any orders she seeks in the application for an original order. In the application for interim orders the applicant seeks the following:

(1) That the applicant has a valid lease of the kitchen & dining room until 3 March 2017.

(2) That the applicant has exclusive rights to supply food and meals to persons using the respondent's dining room.

17 On the basis of the wording in the application for an original decision, it appears clear that the applicant is seeking the same orders and is therefore bringing a "retail tenancy claim" pursuant to s 71 of the RL Act. It may be that the applicant is in fact bringing a combined retail tenancy claim and unconscionable conduct claim under both ss 71 and 71A of the RL Act. As this decision relates to the preliminary issue of whether there is a retail lease at all, those questions do not require a finding at this stage.

The Legislation

18 "Retail shop lease" or "lease is defined in s 3 of the RL Act 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 and partly in writing.
>
> Note. Sections 6, 6A and 84B limit the retail shop leases to which this Act applies.

There is no issue in relation to sections 6, 6A (except in relation to s 6A(4) as noted below) and 84B in this matter.

Submissions

Respondent's First Submissions

19 The respondent submits that the there is no lease, only a licence agreement. No lease has been granted pursuant to the RL Act as no right of occupation has been granted "for value".

20 Secondly the respondent submits that the respondent itself does not have a lease of its premises, only a licence agreement and is specifically prevented under the terms of that licence agreement from granting any sublease. That licence was to expire on 16 May 2015 and therefore under the terms of that licence the respondent could not have granted a 5-year lease in 2012 as alleged.

21 The respondent also submits that there is no evidence of any agreement for the applicant to have "possession" of the kitchen or dining room, no evidence of "exclusive possession" being granted and no evidence of any exclusive right to supply food and meals to persons using the respondent's dining being granted to the applicant.

22 There is no evidence of the applicant having current public risk insurance.

23 Finally, the respondent submits there is no evidence of the applicant having requested a 5-year term prior to the expiration of the lease as required by s 6A(4) of the RL Act.

Applicant's Submissions

24 The applicant extracts the statutory definition of "retail lease" and submits that a restaurant is a "retail shop": *Gnych v Polish Club Limited* [2015] HCA 23 at [11].

25 The applicant next submits that the definition refers to "value", not to "rent" or "current market rent" or similar, and refers to authorities in relation to the meaning of "consideration".

26 The applicant next refers to a letter from the applicant's solicitor to the respondent dated 13 January 2016 in which the applicant gives notice to the respondent pursuant to s 6A(4) of the RL Act that the applicant elects to have the benefits of s 16 of the RL Act apply to her. The applicant submits that this letter is referred to in the affidavit of Mr Silvano Ventura dated 14 April 2016, that there is no prejudice to the respondent and that the letter should be admitted to evidence.

27 The applicant refers to a certificate of public risk insurance dated 18 February 2014 being provided to the respondent by email dated 19 February 2014, being part of the "value" given to the respondent for the lease. In support of that submission the applicant also seeks to rely upon the documents produced by the respondent in

response to the summons.

28 Next the applicant submits that it was a term of her lease that she remain open at certain hours and provide lower cost meals. It is further submitted that that evidence has not been challenged by the respondent.

29 In relation to the respondent's licence, the applicant submits that a sub-lease is not absolutely prohibited but if consent is granted then "such activities" (sub-licensing or parting with possession) may proceed. In any event, the applicant submits finally, that is not relevant. The agreement in question is between these parties whereas any alleged breach of the licence would be between the respondent in this matter and the licensor. There may then be questions in relation to breaches of the Australian Consumer Law (ACL) as between the current parties and in that case the applicant seeks an "enquiry as to damages".

Respondent's Further Submissions

30 These submissions include many of the matters referred to in the respondent's first submissions. Here I summarise only the additional material.

31 The respondent concedes that "value" can refer to something different to "rent" and that if the applicant was required to contribute to outgoings then that could constitute "value". However, the respondent strongly rejects the submission that any requirement to have public liability insurance and to provide evidence of such insurance could be "value" so as to attract the provisions of the RL Act.

32 In relation to the letter of 13 January 2016 referred to by the applicant, the respondent submits that this was a letter from the applicant's solicitor and there is no provision in the RL Act for a solicitor to serve such notice on behalf of a "lessee" nor for such a notice to be served by email as this one was. Therefore, even if the arrangement is deemed to be a "retail lease" the applicant is not entitled to a 5-year term under the RL Act because no notice pursuant to s 6A(4) has been validly served.

33 The respondent then submits that any reference to the ACL is irrelevant to these proceedings, that the respondent denies any breach of the ACL and there is no evidence of any such breach and that the applicant has never claimed, and is not entitled to, damages.

34 The respondent then makes some interesting submissions in relation to "mistake".

(1) It is reasonable to infer from the evidence that at the time of entering the arrangement the parties were unaware of the RL Act and in particular its provisions in relation to extending the term of a retail lease;

(2) there is no evidence the parties entered into the arrangement with the benefit of legal advice;

(3) there is no evidence that had the parties known about the applicability and effect of the RL Act they would still have entered the arrangement; and

(4) therefore, if the RL Act is applicable, the arrangement was entered into by mistake and should be set aside: *Clasic International Pty Ltd v Lagos and Ors* [2002] NSWWC 1155.

35 It follows that the applicant has failed to establish she has any lease and even if she did she has not given the notice required under the RL Act and in any case it should be set aside for mistake. The arrangement was validly terminated by the respondent as at 29 February 2016.

36 The respondent submits the application should be dismissed, the applicant ordered to pay the respondent's costs and the order of 12 February 2016 be revoked. The respondent indicates it would be prepared to allow the applicant 14 days to remain in the premises to facilitate an orderly termination of the arrangement.

37 Finally the respondent submits that in the event the Tribunal is mindful to grant the application, any right to continuing occupation should be subject to the applicant:

(1) complying with Council requirements;

(2) complying with Licensing requirements;

(3) complying with OH&S requirements;

(4) having workers compensation insurance for her employees;

(5) using the premises only for on-site catering; and

(6) being responsible for such outgoings as are incurred by or relate to her use of the premises.

Consideration and Determination

38 It has been settled doctrine for many years that the fact that a lessor, or perhaps more particularly, a sub-lessor, has occupation of premises subject to a licence rather than a lease does not affect the legal nature of the arrangement between the sub-lessor and the sub-lessee. As was stated in *ACN 079 830 596 Pty Ltd (trading as Jolly Joe's Fish 'n' Chips) v Wallis Lake Fisherman's Co-operative Ltd* [2007] NSWADT 297:

> [40] In my view, contrary to the Co-op's submission, it is immaterial that the entitlement under which the Co-op occupied the premises was that of a licence rather than a lease. It will be seen that the definition in the RL Act does not interest itself in the question of the legal entitlement held by the person who grants the right of occupation for value. It is enough to attract the operation of the Act that a person grants to another a 'right of occupation'.
>
> [41] On ordinary principles, the owner of the freehold (in this instance the State) is not affected by any arrangement made by a lessee or a licensee to allow into occupation a third party. Were the owner to bring to an end lawfully the lessee's or licensee's occupation the third party would be equally affected. But the third party would have rights enforceable against the other party to the arrangement. See generally, *Conoid Pty Limited & Anor v International Theme Park Limited* [2000] NSWCA 189 per Giles JA at [18].

39 I note there was considerable litigation following the above decision in relation to the award of damages and costs, including an appeal to the Supreme Court of NSW, but the decision in relation to the existence of the lease was not appealed or was not successfully appealed. The respondent has not taken me to any decision to the contrary.

40 The central issue in these proceedings was whether the "arrangement" was an agreement was a grant to another person **for value** of a right of occupation of premises for the purpose of the use of the premises as a retail shop. Although the respondent

submitted in relation to whether there was “exclusive” possession of the subject premises or an exclusive right to serve meals, the main issue was that of “value”.

41 The parties submitted respectively that the provision of public liability was or was not part of the “value” for which the lease was granted.

42 In my opinion, although those submissions may raise some difficult legal issues, they are in general misconceived. The value provided by the applicant’s business to the respondent is quite obvious, given the nature of the respondent’s activities and the nature of the premises in which those activities are catered for. It is obvious the club has a building including a kitchen and a dining room (although there is no evidence as to the structure or inclusions in those facilities). The applicant provides the plain and obvious value to the club’s members and guests of providing (apparently) cheap meals. The value to “the club” is therefore obvious: its members and guests are able to eat cheaply on the premises at hours to suit them.

43 It seems to me to be so obvious that evidence is unnecessary to support the conclusion, that a bowling club with the activities described and suggested in the newsletter evidence provided by the applicant at which the members and guests can enjoy a meal is a far more attractive proposition than a club offering no meals, requiring the members and guests to bring their own or to leave the premises to obtain takeaway food (and of course there is no evidence of the availability of suitable businesses nearby).

44 I find that the agreement between the parties was a grant by the respondent to another the applicant for value of the right of occupation of premises for the purpose of the use of the premises as a retail shop, being a restaurant, bistro or similar, of a kind included in Schedule 1 to the RL Act.

45 There does not appear to be any issue as to whether the business is a retail shop. In that regard there are numerous decisions of this Tribunal (or its predecessor the Administrative Decisions Tribunal, at least) in relation to similar businesses operating with sporting or recreational clubs in similar circumstances to those demonstrated in these proceedings. In any case, no submissions were made to the contrary.

46 The respondent’s submissions in relation to “mistake” also appear to me to be misconceived. I note the submission is really no more than a bald assertion unsupported by argument. There is no submission or evidence that the parties or either of them were mistaken otherwise than by not realising the RL Act would apply. That is not a “mistake”, it is merely an assertion of ignorance of the law. How either or both of the parties were otherwise mistaken as to the terms of the agreement (whether or not either or both parties considered they were agreeing to a “lease”) is not described by the respondent. In my view the doctrine of mistake is not applicable to these proceedings.

47 Both parties have raised the issue of s 6A of the RL Act as summarised above.

48 It follows from my findings that there is a lease between the parties, that the provisions

of s 16(1) and (2) of the RL Act apply. No evidence or submissions have been provided or made to me as to the term of the agreement. It appears to be agreed between the parties that the agreement commenced on or about 2 March 2012. Pursuant to s 16(1) the term of the lease is 5 years and therefore the term is to 1 March 2017. Why there needs to be any reference to s 6A(4) of the RL Act is not clear to me.

49 For the above reasons, the Tribunal finds that the parties entered into a retail lease commencing on or about 2 March 2012 with a term of 5 years.

50 Finally, the respondent submitted that should I find there is a retail lease, any such lease should be subject to the requirements set out in paragraph 37 above. I decline to make any such order, as the terms of the lease are subject to, first, the requirements of the RL Act; secondly, the intentions of the parties to the lease; and, thirdly, the requirements of any other applicable law. Most of the items mentioned in paragraph 37 would be required pursuant to other laws of state, including workers compensation and OH&S requirements. Other items depend on the agreement's terms, such as whether the lessee is required to contribute to outgoings. There is no evidence before me of any such agreements previously and there is no formal application before me to vary the terms of the lease nor any submission that I have power to do so.

51 As a result of this decision, the order made by consent on matter number COM 16/06518 on 12 February is discharged.

52 As noted by the respondent, there are no actual orders sought by the applicant in relation to the application for an original decision. The matters are to be listed for directions to enable the parties to consider and advise the Tribunal whether further actions or orders are sought or required.

Geoffrey Meadows

Senior Member

Civil and Administrative Tribunal of New South Wales

1 July 2016

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

Decision last updated: 06 October 2016