



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	203 Castlereagh Street Pty Ltd v Payce Properties Pty Ltd [2015] NSWCATCD 89
Hearing dates:	17 February 2015, on the papers
Decision date:	06 August 2015
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	1 The Tribunal grants leave for the Application for Original Decision to be lodged with the Tribunal. 2 I grant liberty to restore the Application for directions on seven days' notice by either party once the Appeal in AP 14/0351 is determined. 3 No order for costs.
Catchwords:	Section 71B of Retail Leases Act, 1994
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 Retail Leases Act, 1994
Cases Cited:	Bischof & Anor v Werncog Pty Ltd [2004] NSWADT 241 DB Rreef Funds Management Ltd & PT v Valentino Home Fashion Pty Ltd [2009] NSWADT 216 Heatherway Pty Ltd v Dykes & Wildie [2006] NSWADT 354 Polylux Pty Ltd v Corpers (No 5) Pty Ltd [2009] NSWADT 284
Category:	Principal judgment
Parties:	203 Castlereagh Street Pty Ltd (applicant) Payce Properties Pty Ltd (respondent)
Representation:	Counsel: N/A Solicitor: CBP Lawyers (applicant) Agent: Retail Leases Doctor (respondent)
File Number(s):	COM 15/05335
Publication restriction:	Nil

REASONS FOR DECISION

- 1 The applicant, 203 Castlereagh Street Pty Ltd (the **applicant**), was the tenant at premises Shop [***], The Waterfront, Homebush Bay, NSW, from Payce Properties Pty Ltd (the **respondent**). The lease commenced on 18 July 2010 and terminated in July 2014 (the **Lease**).
- 2 There have been a series of cases between the parties and more particularly between the applicant and Skybloo Pty Ltd (**Skybloo**) who purchased the property from the respondent and then terminated the Lease.
- 3 On 27 January 2015, the applicant filed an Application for an Original Decision in the Tribunal (the **application**). The application relates to a claim for rent and land tax purportedly charged incorrectly by the respondent in connection with the Lease. The amounts claimed relate to the following periods:
 - (a) rent – 19 January 2011 to 2 March 2011 (**rent claim**); and
 - (b) land tax – 30 August 2010 to 7 June 2011 (**land tax claim**).
- 4 Section 71(2) of the *Retail Leases Act 1994* (NSW) (**RLA**) provides:

A claim may not be lodged more than three years after the liability or obligation that is the subject of the claim arose.
- 5 Section 71B(1) of the RLA provides:

A retail tenancy claim may be lodged more than 3 years but no later than 6 years after the liability or obligation that is the subject of the claim arose, if the Tribunal orders that the claim may be lodged with the Tribunal.
- 6 When the matter was before me on 17 February 2015, I ordered that the applicant:
 - (a) apply for leave of the Tribunal under s 71B; and
 - (b) file and serve written submissions in relation to such application by 10 March 2015.
- 7 On 1 May 2015, I later ordered that the respondent file written submissions by 7 May 2015 and the applicant file a reply by 21 May 2015.
- 8 It is noted that the applicant has not filed a separate application for leave but seeks leave under s 71B in its submissions as filed.
- 9 Section 71B(3) states:
 - (3) The Tribunal may make an order under this section:
 - (a) on application by the party or former party concerned, and
 - (b) after hearing such of the persons likely to be affected by the application as it sees fit, and
 - (c) if the applicant satisfies the Tribunal that it is just and reasonable to make the order.
- 10 The respondent filed submissions in response to the applicant's submissions. The respondent correctly notes that the onus is on the applicant to satisfy the Tribunal that it is just and reasonable for the Tribunal to make the order extending the time for the Application for an Original Decision to be filed.

SUBMISSIONS FROM THE APPLICANT

- 11 As noted, the applicant has not formally filed an application to seek leave of the

Tribunal under s 71B(3)(a).

- 12 The applicant states that it sought formal leave under s 71B(3) in its submissions in chief filed on 2 April 2015. The applicant draws the Tribunal's attention to s 38(4) of the *Civil and Administrative Tribunal Act 2013 (NCAT Act)* that the Tribunal is to act with 'as little formality as the circumstances of the case permit' and 'without regard to technicalities or legal forms'. The applicant submits that its submissions fulfil the requirement under s 71B(3)(a).
- 13 In relation to the more relevant part of s 71B(3), namely ss(c), and whether the applicant has satisfied the Tribunal that it is just and reasonable to make the order allowing the applicant to claim beyond the three year statutory period, the applicant raises a number of points. Firstly, that the Tribunal may consider the small quantum of the claim as a relevant factor in deciding it is just and reasonable in that the respondent will not suffer any prejudice. Secondly, in relation to additional costs, in separate Tribunal proceedings against the current lessor, Skybloo, the applicant had prepared a number of witness statements and in return received witness statements from Skybloo. The applicant wishes to use these statements in its claim against the respondent to save costs. The form of the statements do not comply with the rules of the Local Court which would, if the Tribunal were not minded to exercise its discretion in favour of the applicant, require the applicant to prepare those statements afresh.
- 14 The applicant refers the Tribunal to the case of *Panache Salons Pty Ltd v Kent Street Pty Ltd* (2009) NSWADT 247 where the Tribunal held at [38-39] that:

“the procedural advantage of bringing proceedings before the Tribunal would be lost if a party were to lodge its claim in a Local Court adding additional costs to the parties contrary to the interests of justice.”
- 15 The applicant's third submission is that this claim has been brought within the three year period in any event and therefore the applicant is not required to seek the Tribunal to exercise a discretion under s 71B. The applicant submits that the respondent's liability as to incorrect invoicing of rent in 2011 arose only on 25 November 2014 pursuant to a letter from the applicant's agent, the Retail Leases Doctor, to the lawyers for the respondent, CBP Lawyers. The submission continues that in fact the liability for the refunding of the land tax invoiced contrary to s 26 of the RLA firstly arose only on the instigation of these proceedings because there was no prior demand for such refund by the applicant.
- 16 The applicant submits that the case of *Bischof & Anor v Werncog Pty Ltd* (2004) NSWADT 241 at [85-87] assists this submission. There, the Tribunal pointed out that in the context of a retail tenancy claim a 'liability' may arise later than the 'obligation' from which the liability is derived and that regarding the applicant's rent claim and land tax claim they accordingly and do so. Consequently, the application complies with s 71(2) for the party lodging the claim to do so within three years after the liability arose.
- 17 To support the assertion that the claim is within the three year period, the applicant points to clause 14.9 of the Lease which states as follows:

'14.9 Condition of the Lessor's Liability

(1) The Lessor, in the case of a remediable breach, is neither in default, nor deemed to be in default, in the observance and performance of the Lessor's obligations unless:

- (i) The Lessee gives written notice of the default to the Lessor; and
- (ii) The Lessor fails to take proper steps to rectify the default within reasonable time.

(2) This clause applies despite any other provision of this lease to the contrary (whether expressed or implied).

18 Consequently, the submission from the applicant is that the obligation of the respondent to refund the overpaid rent and the incorrectly invoiced land tax only arose on 25 November 2014 when the applicant, through its representative, gave written notice to the respondent demanding the refund.

19 In support of its submission regarding the issue that the liability arose at the time that the refund was claimed, namely on 25 November 2014, the applicant relies on paragraphs 22 and 23 of Deputy President Chesterman in *Heatherway Pty Ltd v Dykes & Wildie* (2006) NSWADT 354 at [118-133] and on passages from Callaghan DP in the case of *DB Rreef Funds Management Ltd & PT v Valentino Home Fashion Pty Ltd* (2009) NSWADT 216 which followed *Bischof* and *Heatherway*. At [22-23], Callaghan DP said:

22. In my opinion I should follow the approach dictated by *Bischof & Heatherway*, a retail tenancy claim may ultimately be found by the Tribunal to contain, in respect of a particular Order sought, either a relevant "liability" or a relevant "obligation" such as to warrant an order under s72 of the RL Act.

23. If any of the views which I have expressed above as to the construction of the RL Act were perceived and need any reinforcement, I would draw support from the categorisation of the RL Act as remedial legislation and the consequent appropriateness for it to be interpreted liberally'.

SUBMISSIONS FROM THE RESPONDENT

20 The respondent submits that this concept of liability or obligation to bring the claim within three years is misconceived. Clause 14.9 of the Lease does not deal with the issue of when liability of the respondent as lessor arises but in fact deals with a default situation by the lessor. Whilst the respondent points out that the heading of clause 14.9 '*Condition of the Lessor's Liability*' may in fact allow the applicant to fall into error thinking that the clause in fact deals with liability, there is nowhere in the clause referencing the word '*liability*'. The respondent points to clause 1.2(a) of the Lease which states that headings do not affect the interpretation of the Lease. Clause 14.9 of the Lease does not deal with when the liability of the lessor arose but deals with breaches by the lessor that are to be remedied and the consequence of failure of the lessor to remedy those breaches.

21 The respondent submits that any purported obligation or liability with respect to a claim for overpayment of rent or an outgoing, such as land tax, would have arisen at the time that the purported overpayment was made, that is, at the time in 2010 and 2011. Consequently, the limitation period of three years under s 71(2) of the RLA Act would

- have expired in 2014 and the applicant must seek leave from the Tribunal under s 71B to pursue its claim.
- 22 The Tribunal agrees with the submissions of the respondent in relation to when the liability or obligation of the respondent arose. Clause 14.9 of the Lease is of no assistance to the applicant in relation to the rent claim and land tax claim in any event. The liability of the respondent arose at the time of the payment, which is outside the three year limitation period. Therefore, the Tribunal will now address the more substantive matters raised as to whether the Tribunal is satisfied that it is just and reasonable to make the order allowing the applicant to lodge a claim that is more than three years.
- 23 The respondent submits that the appropriate question to be considered of whether or not an extension of time under s 71B should be granted, is ultimately an assessment by the Tribunal of "*whether there can be a fair trial of the issues between the parties?*" (*Polylux Pty Ltd v Corpers (No. 5) Pty Ltd (2009) NSWADT 284* and *Brisbane South Regional Health Service v Taylor (1996) HCA 25* and *South Western Sydney Area Health Service v Gabriel (2001) NSWCA 477*).
- 24 Further, the respondent submits that it will suffer prejudice if leave is granted by the Tribunal for the following reasons:
- (a) the applicant seeks a declaration as to what it says was the proper commencement date of the Lease. The Lease is a formal document signed by both the applicant and respondent with commencement and termination dates recorded. The applicant seeks declarations inconsistent with the strict terms of the Lease;
 - (b) the respondent, in order to respond to the contentions in the application, would rely on the terms of the Lease. However, the respondent would also be required to adduce further evidence and to rely on the recollection of witnesses of events that occurred five years ago;
 - (c) if it is accepted that the written terms of the Lease are correct, the rent claim has little merit;
 - (d) there are current appeal proceedings on foot between the applicant and Skybloo before the Appeal Panel (AP 14/0351). A principal issue in that Appeal and this application is the commencement date of the Lease. The declaration as sought by the applicant in these proceedings is likely to prejudice the appeal. The respondent submitted that the outcome of the Appeal is also likely to affect the outcome of this application; and
 - (e) the respondent submits that the Tribunal cannot determine this application until the outcome of the Appeal is determined, as the question of the Lease commencement date is being considered by the Appeal Panel.
- 25 Accordingly, the respondent submits that this application for leave be stayed as the outcome of the Appeal may have the result that the application has no merit or, alternatively, that this application be stayed by the Tribunal until the outcome of the appeal is known.
- 26 In relation to the statutory limitation period, the respondent submits, having regard to

procedure under the *Limitation Act 1969*, that the applicant could have instituted a claim in the Local Court and then applied for a transfer to the Tribunal seeking leave under s 71B or alternatively allowed the dispute to remain in the Local Court. The case of *Heatherway Pty Ltd v Dykes & Wildie* (2006) NSWADT 354 dealt with the transfer of proceedings to the Tribunal and held that these proceedings were commenced in the Local Court and then transferred to the Tribunal and in those circumstances, the limitation period would be extended from three years to six years. However, the respondent submits that in this case, no such application has been made to the Local Court or any other Court to transfer proceedings to the Tribunal and accordingly, no extension of time should apply in accordance with the *Heatherway* decision.

TRIBUNAL RESOLUTION OF ISSUES

27 As I said in *Polylux* at [44] and [47]:

44 the primary test for determination as to whether or not an extension of time should be granted is "whether there can be a fair trial of the issues between the parties"... In other words whether there is prejudice to be suffered by the respondent if the extension [to the time to lodge] is granted.

47 Further, this is basically a dispute about the quantum of rent being paid as the financial records would not be hard to be reproduced, so I do not believe there is any prejudice against the respondent in the delay nor am I persuaded that the respondents will suffer any significant forensic disadvantage.

28 Similarly, notwithstanding the excellent submissions on behalf of the respondent, the dispute is one about rent and land tax, particularly the applicability of s 26 of the RLA. The dispute about the commencing date, the evidence required from the respondent and the effect of current proceedings between the parties and other parties are the considerations for the exercise of the discretion of the Tribunal in light of the dictum of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186CLR 541 at [555] that the effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions.

29 Consequently, having reviewed the material before me, I am not persuaded that the quality of justice will be impaired if the applicant is allowed to proceed with the Application for an Original Decision. The matters in dispute relate to claims for overpaid rent and land tax which can be easily dealt with without too much evidence or recollection from witnesses. The same considerations were relevant in *Polylux* and the applicant there was allowed to file.

30 As noted, I would have preferred that the applicant, in seeking the exercise of the Tribunal's discretion under s 71B(3), had filed a separate application. However, I note that Mr Haney Soltan, agent for the applicant, relies on s 38(4) of the NCAT Act which allows some informality and I will accordingly accept the applicant's submissions as the formal application under s 71B(3)(a).

31 However, I do agree with the respondent that the Application for an Original Decision be stayed until the outcome of the Appeal in AP14/0351 is known.

COSTS

32 The applicant seeks its costs of this determination to be paid by the respondent. It is the respondent's position that the costs application be refused by the Tribunal on the basis that pursuant to section 71B(3)(b) the Tribunal can only make an order to extend the jurisdiction of the Tribunal after "*hearing such of the persons likely to be affected by the application as it sees fit*". In this particular case, the respondent has prepared submissions in response to the applicant's submissions in order to comply with section 71B(3)(b) and the applicant in seeking the Tribunal to exercise its discretion must make submissions as it has done. However, the fact that the Tribunal has acceded to the request to allow the applicant to file its claim beyond the three year limitation period does not of itself mean that the applicant should have its costs paid in so seeking the Tribunal to exercise its discretion. The Tribunal agrees with the respondent that costs should not be awarded in respect of the application under s 71B(3). That is not to imply however, that if the applicant is successful on its claim it should not be entitled to costs on that claim.

Orders

- (1) The Tribunal grants leave for the Application for an Original Decision to be lodged with the Tribunal.
- (2) Liberty to restore the Application for directions on seven days' notice by either party once the Appeal in AP14/0351 is determined.
- (3) No order for costs.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

6 August 2015

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: 01 October 2015