44/94

SUPREME COURT OF VICTORIA

GALTIERI v BANISCAS

Mandie J

10, 21 June 1994 — [1994] V Conv R 54-504

LANDLORD AND TENANT – LEASE EXPIRED – PREMISES VACATED – CLAIM BY LANDLORD FOR ARREARS OF RENT – COUNTERCLAIM BY TENANT – RELATIONSHIP DETERMINED – WHETHER DISPUTE EXISTED BETWEEN PARTIES WHEN PROCEEDINGS COMMENCED: *RETAIL TENANCIES ACT* 1986, S21.

Section 21 of the *Retail Tenancies Act* 1986 ('Act') provides (so far as relevant):

> "(1) Any dispute between a landlord and a tenant arising under a retail premises lease ... must be referred to arbitration ..."

(1) Once a landlord and tenant relationship is determined prior to the commencement of legal proceedings, there can be no dispute within s21 of the Act so as to require a reference to arbitration.

***Haidar v Blendale Pty Ltd* [1993] VicRp 89; [1993] 2 VR 524; [1993] V Conv R 54-476; and *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd* [1989] VicRp 54; [1989] VR 584; [1988] V Conv R 54-326, applied.**

(2) Accordingly, where a landlord claimed arrears of rent and other monies subsequent to the expiration of the lease and the tenant's vacating the premises, a magistrate was in error in dismissing the claim on the ground that there was a dispute between the parties under the lease so as to deprive the Magistrates' Court of jurisdiction to hear and determine the claim.

MANDIE J: [1] This is an appeal from a decision of the Magistrates' Court pursuant to s109 of the *Magistrates' Court Act* 1989. The appeal raises questions as to the proper construction of s21 of the *Retail Tenancies Act* 1986 and arises in the following circumstances. By a complaint filed 3rd May 1993 in the Magistrates' Court at Melbourne, the appellants claimed from the respondent the sum of $7,656.24 being monies allegedly owed "for arrears of rent and costs of repairs for damages caused by the defendant to the plaintiff's property". The claim was said to arise on 14th January 1993. The particulars of the claim dated 23rd April 1993 alleged that the plaintiffs were "at all material times the owner and landlords of the premises at 218 Buckley Street, Essendon and the Defendant was the Tenant of the said premises from 15/1/1990 to 14/1/1993 pursuant to a lease dated 14th February 1990" and they claimed:

"(a)	Rent	$1,191.66
(b)	Rates owed pursuant to Lease	$3,270.58
(c)	Cost of damages caused by Defendant	$2,875.00
(d)	Cost of rubbish removal	$320.00
		$7,657.24

details of which have already been forwarded to the Defendant."

The appellants also claimed "interest from 11/3/93 until payment". The respondent filed a Notice of Defence on 24th May 1993. Subsequently amended particulars of claim were filed pleading the lease and relevant terms and conditions thereof, alleging the above and additional breaches of the lease and that the defendant had vacated the premises in or **[2]** about January 1993 and claiming monies in various revised amounts totalling $8,821.01, including arrears of rent to the date of expiry of the lease together with interest in the sum of $1,280.66 calculated from various dates in 1992 and 1993. The additional breaches alleged included using the premises for other than the permitted use of take-away food premises and converting the rear of the premises to a dwelling without the consent of the plaintiffs. An amended Defence and Counterclaim dated October 1993 was filed denying liability, alleging that the premises were vacated with the plaintiffs' consent on or about 14th October 1992 and in effect that the lease was terminated by agreement at that time, expanding on other defences and counterclaiming for the return of a security deposit in the sum of $1,191.67 and for other relief. The defence further contended that the Court had no

jurisdiction to hear the claim by reason of the operation of s21 of the *Retail Tenancies Act* 1986. A defence to counterclaim was filed by the plaintiffs.

The matter came before the Magistrates' Court on 25th October 1993 and the parties were represented by counsel. The learned magistrate gave leave by consent for the abovementioned amendments to be made. Counsel then made submissions on the question of jurisdiction and of costs. It was common ground that the lease was a retail premises lease. After an adjournment to consider the matter, Her Worship upheld the defendant's submission that the Court had no jurisdiction and ordered that the claim be dismissed with no order as to costs.

[3] The material before me clearly does not give a full account of the magistrate's reasons. However, it is apparent that she had read the relevant decisions which had been cited to her and considered that she was constrained by the legislation. Explicitly or implicitly, she accepted the defendant's submission that there was a "dispute" between "a landlord and a tenant" arising "under" a retail premises lease notwithstanding the plaintiffs' submissions that the parties were no longer landlord and tenant, the lease had expired and the tenant had vacated the premises when the dispute arose. I note that there was no allegation in the documents filed or in the submissions made to the magistrate that a dispute had arisen before the commencement of the proceedings and certainly not before the lease had expired on 14th January 1993 (assuming that it had not been terminated earlier). The Master's order dated 22nd November 1993 stated the following questions of law to be raised by the appeal:

> "(a) Whether claims made in respect of alleged breaches of terms of a retail premises lease which has been determined by effluxion of time are disputes to which Section 21 of the *Retail Tenancies Act* 1986 ('the Act') applies, where the claims are made and proceedings issued after the said determination and the determination of the lease is not in dispute.
>
> (b) Whether the Magistrates' Court of Victoria has jurisdiction to hear and determine claims in respect of alleged breaches of terms of a retail premises lease which has been determined by effluxion of time, where the claims are made and proceedings issued after the said determination and the determination of the lease is not in dispute.
>
> (c) Whether claims made in respect of alleged breaches of a retail premises lease that has been determined by effluxion of time, are disputes 'between a landlord and a Tenant' within the terms of Section 21 of The Act, where the claims are made and proceedings issued after the said determination, and the determination of the lease is not in dispute.
>
> (d) Whether claims made in respect of alleged breaches of a retail premises lease that has been determined by effluxion of time, are disputes 'arising under a retail premises lease' within the terms of Section 21 of The Act, where the claims are made and proceedings issued after the said determination and the determination of the lease is not in dispute.
>
> (e) Whether, after the determination of a lease by effluxion of time, claims of rent, outgoings and damages for breaches of covenant, and a set-off and counterclaim for refund of security monies (or bond monies), are disputes 'between a landlord and a tenant' and 'arising under a retail premises lease' within the meaning of Section 21 of The Act."

Mr Kovacs of counsel appeared before me on behalf of the appellants. The respondent was called but there was no appearance. Shortly thereafter the respondent entered the Court and I was informed of her presence. She listened to the proceedings but on being asked indicated that she did not wish to appear or make any submissions. Mr Kovacs submitted that the learned magistrate should have found that she had jurisdiction. He said that the key issue was whether there was a dispute between "landlord and tenant" within the meaning of s21. He said that the magistrate had not been referred to one relevant case, namely *Haidar & Anor v Blendale Pty Ltd* [1993] VicRp 89; [1993] 2 VR 524; [1993] V Conv R 54-476 (earlier reported in the *Victorian Conveyancing Reports*). Counsel said that a further issue was whether the dispute arose "out of" rather than "under" the retail premises lease. Section 21 of the *Retail Tenancies Act* ("the Act") provides:

> **[5]** "(1) Any dispute between a landlord and a tenant arising under a retail premises lease, other than a claim by the landlord solely for the payment of rent or a dispute which is capable of being determined by a registered valuer under section 10, 11 or 13, must be referred to arbitration in accordance with this Part.

(2) The landlord or the tenant or both may give notice of a dispute to which sub-section (1) is prescribed for the purposes of this section.

(3) As soon as practicable after receiving notice of a dispute under sub-section (2) the prescribed person must appoint an arbitrator from the panel of arbitrators to determine the dispute.

(4) Despite anything to the contrary in the *Commercial Arbitration Act* 1984 or any other Act, a dispute which is capable of being referred to arbitration under this section is not justiciable in any court or tribunal."

In *Haidar v Blendale Pty Ltd* (*supra*) the original lessees had assigned their interest under a retail premises lease before a dispute arose between them and the lessor in relation to a sum allegedly paid by the lessees as key money the payment of which was in effect prohibited by the Act. Counsel for the lessees conceded that the assignment that brought the lessor-lessee relationship to an end and that thereafter there was no landlord and tenant relationship within the meaning of the Act. Nevertheless, Gobbo J briefly considered the validity of the point so conceded and, making the distinction between privity of contract and privity of estate, concluded that "There being no relationship of landlord and tenant at the time these proceedings, more particularly this dispute, came before the court, s21 could not apply."

[6] In *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd* [1989] VicRp 54; [1989] VR 584, 586; [1988] V Conv R 54-326 Ormiston J said that there was no dispute between "a landlord and a tenant" when the relationship had been determined at the time when the proceedings were brought. The case involved an application for relief from forfeiture (so that the lease had already been determined) and it was independently considered that there was therefore no dispute arising "under" the lease. His Honour recognised that the words (landlord and tenant) "could loosely describe the parties to this proceeding after re-entry" but clearly considered that such a construction was incorrect.

In *536 Swanston Street Pty Ltd v Harbrut Pty Ltd* (1988) V Conv R 54-323, Kaye J held that a dispute under a retail premises lease had to be referred to arbitration but it would seem that either the landlord-tenant relationship had not been determined in that case or at least it is not clear that it had been so determined from a reading of the report.

In *Klewet Pty Ltd v Lansdown* [1989] VicRp 85; [1989] VR 969; [1990] V Conv R 54-368, Ormiston J applied his decision in the *Jam Factory Case*. His Honour again said that there could be no dispute between "landlord and tenant" once the tenancy had been determined. In *Zambelis v Nahas* (1991) V Conv R 54-396, Nathan J dismissed an appeal from a magistrate who had ruled that he had no jurisdiction by reason of s21 of the Act. It seems however that the tenancy was a continuing one in that case. In any event, the point here at issue was not argued.

In my respectful opinion, the approach taken in the cases referred to, that there can be no dispute between "landlord and tenant" once that relationship had determined, is correct as a matter of interpretation of the plain language of the Act. In the present case, there was no relationship between landlord and tenant existing when the proceedings were commenced, nor was there any contention or evidence that a dispute had arisen at any time when such a relationship had still existed (if that be relevant).

I conclude that the Magistrates' Court did have jurisdiction to hear the proceedings. Having regard to that conclusion it is unnecessary to consider the further argument that the dispute did not arise "under" a retail premises lease once the lease had determined. It is regrettable that questions of jurisdiction should arise with respect to a small claim such as this which could otherwise have been determined on the merits by the Magistrates' Court in October 1993.

The appeal is allowed. It will be ordered that the orders of the Magistrates' Court be set aside and the proceedings remitted to Her Worship for hearing and determination. I will hear submissions as to costs.

APPEARANCES: For the appellants Galtieri: Mr P Kovacs, counsel. NC Gay & Co, solicitors. No appearance for the respondent Baniscus.
