20/05; [2005] VSC 181

SUPREME COURT OF VICTORIA

DEVELOPMENT ONE (AUSTRALIA) PTY LTD v COOPER & ORS

Hollingworth J

9, 11 May 2005

CIVIL PROCEEDINGS – LANDLORD AND TENANT – LEASE OF OFFICE PREMISES AT CERTAIN RENTAL – RENT UNPAID – CLAIM ISSUED FOR RENT UNPAID – APPLICATION BY DEFENCE FOR STAY OF PROCEEDING ON BASIS THAT CLAIM SHOULD BE HEARD BY VCAT – APPLICATION DISMISSED BY MAGISTRATE – WHETHER LEASE WAS A RETAIL LEASE – FINDING BY MAGISTRATE THAT THE EXPRESSION "RENT" INCLUDES A CLAIM FOR RENT AND INTEREST – WHETHER MAGISTRATE IN ERROR: *RETAIL LEASES ACT* 2003, SS4(1), 81, 87; *FAIR TRADING ACT* S112.

Pursuant to a lease, office premises were leased for a period of 3 years. When the rental fell into arrears, the lessor issued proceedings in the Magistrates' Court to recover the unpaid rent. In its defence, the lessee denied the claim and stated that the court did not have jurisdiction to deal with the proceedings and alternatively the proceedings should be stayed.The magistrate refused the application for a stay and set the matter down for hearing. Upon application for review—

HELD: Application dismissed.

1. The general scheme of the *Retail Leases Act* 2003 (Act) is that disputes under retail premises leases, other than those relating solely to the payment of rent and a couple of other exceptions can only be heard by VCAT. Retail premises are relevantly defined as premises that under the terms of the lease are to be used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services. Section 81(1) defines a retail tenancy dispute as including "a dispute between a landlord and tenant arising under or in relation to a retail premises lease to which this or previous Acts applied". Section 81(2) excludes from the definition of a retail tenancy dispute a dispute "solely relating to the payment of rent".

2. The obligation to pay interest on outstanding rent is not in the same category as other types of dispute that might arise under retail leases. It is a secondary entitlement which only arises if the primary entitlement to rent has been established. Calculating interest generally involves no more than a mathematical exercise flowing from the application of the interest provision to the rent which has been found to be owing. It seems unlikely that Parliament would have intended that the courts could deal with disputes as to the non-payment of rent, but not a dispute as to the interest payable on that rent. The consequence of the tenant's argument would be that, as soon as contractual interest was claimed, the courts would cease to have jurisdiction and only VCAT could deal with the matter. It cannot be said that the magistrate erred in refusing to stay the proceeding on this ground.

3. The evidence before the magistrate was not sufficient to establish that the premises were used "wholly or predominantly" for the provision of retail services or goods, as required by s4(1) of the Act. Given that finding, it cannot be said that the magistrate erred in refusing to stay the proceedings.

HOLLINGWORTH J:

Introduction

1. The plaintiff's originating motion and summons dated 14 April 2005 seek relief in the nature of *certiorari* to quash the decision of the second defendant ("the magistrate"), made on 21 March 2005. The magistrate refused the plaintiff's application dated 16 March 2005 for a stay of Magistrates' Court proceeding No S02639995 ("the MC proceeding") pursuant to s.112 of the *Fair Trading Act* 1999 ("FTA") or ss87 and 89 of the *Retail Leases Act* 2003, on the basis that the dispute ought to be determined by the Victorian Civil and Administrative Tribunal ("VCAT"). The plaintiff also seeks an order from this court, staying the MC proceeding.

2. By a lease dated 28 April 2003, the first defendants ("the landlord") leased office premises at Suite 4, 1st Floor, 23 Ringwood Street, Ringwood to the plaintiff ("the tenant"). The term of the lease was for three years commencing on 1 June 2003. The initial annual rental was $30,800 per annum, payable by monthly instalments.

3. The landlord issued the MC proceeding on 10 November 2004, seeking $30,203.05 in respect of unpaid rent between 1 June 2003 and 30 September 2004 and $1,496.06 for interest to 30 September 2004. On 17 November 2004 the tenant filed a defence in the MC proceeding. The defence contained a bare denial of liability, together with a pleading in the following terms:

> "That this Honourable Court does not have jurisdiction to deal with these proceedings, alternatively this proceeding should be stayed.
>
> PARTICULARS
> (a) That the lease the subject of these proceedings is a Retail Lease within the meaning of the *Retail Leases Act* 2003 and the plaintiff does not have the certification as required by s87 of that Act;
>
> (b) Alternatively, pursuant to s112 of the *Fair Trading Act*, this proceeding should be stayed."

4. The defence did not foreshadow any counter-claim or allege that the rent was not recoverable due to non-service of a disclosure notice. Although the defence asserted that the proceeding should be stayed, no application for a stay was issued until 16 March 2005, some four months later.

5. The material which was filed in support of the stay application included the affidavit of Gary David Goldsmith, the tenant's solicitor, sworn 16 March 2005. The exhibits to that affidavit included proposed points of claim in VCAT, which, although dated November 2004, have still not been issued. The only allegations in the proposed VCAT claim arise out of the breakdown of the air-conditioning system at the premises on 8 December 2003. The claim for damages is based on breach of an implied covenant of quiet enjoyment, breach of a duty of care or breach of an implied term to repair plant and equipment. The proposed VCAT claim did not seek the recovery of rent already paid, on the basis that a disclosure statement was required by statute but had not been provided by the landlord.

6. On 21 March 2005 the magistrate refused to grant the stay. No written reasons for decision were given. However, the transcript of the hearing, including the magistrate's oral reasons, was tendered before me.

7. The present proceeding is brought pursuant to common law and O56 of the *Supreme Court Rules*.

8. The tenant says, in summary, that the magistrate committed the following errors. First, he held that "rent", for the purposes of the *Retail Leases Act* 2003, does not include interest under a lease. Secondly, he failed to have regard to and misapplied the decision of Nathan J in *Zambelis v Nahas*[1]. It is said that the tenant has a counterclaim in relation to the air-conditioning system dispute and the non-provision of a disclosure statement, and that applying the decision in *Zambelis* should have resulted in a stay being granted. Thirdly, he failed to stay the proceedings under s112 of the FTA. These are said to be either jurisdictional errors or errors on the face of the record.

9. The final ground relied upon by the tenant is that the magistrate went into the merits of a possible defence in relation to an implied covenant of peaceful enjoyment. It is said that the tenant was not given an opportunity to address the magistrate on this point, and that the magistrate's reasoning affected his thinking on the stay application. It is alleged that this amounted to a denial of procedural fairness.

10. An appearance has been entered on behalf of the magistrate, who has indicated in accordance with usual practice that he does not intend to appear and will abide by any order of this court.

Relevant legal principles

11. The court must define what "the record" is in this case. It is well established that the record includes the documents which initiated the impugned process - in this case, the materials in support of the stay application – the pleadings and the impugned order itself. Both parties proceeded on the basis that the transcript of argument, which includes the magistrate's reasons for decision, formed part of the record in this case. Accordingly, it is not necessary for me to consider the debate in the authorities as to whether the record includes the reasons for decision.

12. Errors of law can occur at a number of stages, namely at the time of the finding of primary facts, the directing of oneself as to the law or the applying of the law to the facts found. I also note that it is clear that the error must be apparent on the face of the record.

13. I turn to consider the relevant provisions of the *Retail Leases Act* 2003. The general scheme of the Act is that disputes under retail premises leases, other than those relating solely to the payment of rent and a couple of other exceptions which do not concern us, can only be heard by VCAT.[2] Retail premises are relevantly defined as premises that under the terms of the lease are to be used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services.[3]

14. Section 81(1) defines a retail tenancy dispute. The definition includes "a dispute between a landlord and tenant arising under or in relation to a retail premises lease to which this or previous Acts applied". Section 81(2) excludes from the definition of a retail tenancy dispute a dispute "solely relating to the payment of rent" or another exclusion which is not relevant here. This provision is relevantly similar to the provision in the 1986 Act which was under consideration in the *Zambelis* case.

15. Finally, s87 provides that a retail tenancy dispute can only be the subject of proceedings in VCAT if the Small Business Commissioner has certified in writing that mediation or alternative dispute resolution has failed or is unlikely to resolve the dispute.

16. The other statutory provision relied upon by the tenant is s112 of the FTA, which applies where a person commences court proceedings which arise wholly or predominantly from a "consumer and trader dispute", or are other proceedings in respect of which VCAT has jurisdiction under the FTA. The section requires the court to stay the proceedings if they could be heard by VCAT and the court is satisfied that the proceedings would be more appropriately dealt with by VCAT. In considering questions of appropriateness, the court must consider the relative advantages and disadvantages to the parties (in terms of costs, duration and any other matters the court considers relevant) of having the proceedings determined by VCAT.

The alleged errors: The interest claim

17. The landlord claims rent and interest under the lease. That contractual interest is set at 2% p.a. higher than the relevant rate under the *Penalty Interest Rates Act* 1983. Does the Magistrates' Court have jurisdiction to consider such a claim for contractual interest?

18. The tenant says that although statutory interest on rent may be awarded outside VCAT, contractual interest may not be. It argued that contractual interest is analogous to any other covenant to pay something other than rent.

19. On the other hand, the landlord argued that contractual interest on rent is not beyond the jurisdiction of the Magistrates' Court. Furthermore, the landlord said that if it is wrong in relation to that, it will waive any entitlement to contractual interest and only claim statutory interest.

20. The magistrate held that the expression "rent", when used in the relevant Act, covers a claim for rent and interest. Accordingly, he did not go on to consider the effect of the landlord's offer to waive contractual interest.

21. There appears to be no authority in relation to this question. None was referred to me by either counsel and in the limited time available to me I have not located any authority on this point. However, I make the following observations.

22. The obligation to pay interest on outstanding rent is not in the same category as other types of dispute that might arise under retail leases. It is a secondary entitlement which only arises if the primary entitlement to rent has been established. Calculating interest generally involves no more than a mathematical exercise flowing from the application of the interest provision to the rent which has been found to be owing. It seems to me unlikely that parliament would have intended that the courts could deal with disputes as to the non-payment of rent, but not a dispute as to the interest payable on that rent. The consequence of the tenant's argument would be that, as soon as contractual interest was claimed, the courts would cease to have jurisdiction and only VCAT could deal with the matter.

23. In any event, given the landlord's concession that, if need be, it will waive contractual interest and only seek statutory interest, it cannot be said that the magistrate erred in refusing to stay the proceeding on this ground.

Counterclaim

24. In the *Zambelis* case, the plaintiff landlord had brought proceedings for payment of rent. The defendant tenant had filed a defence and brought a cross-claim which raised alleged breaches of covenant by the landlord. There was no dispute in that case that the premises were retail premises covered by the 1986 Act. Nathan J held that because the dispute had broadened beyond the landlord's claim for rent, the court had no jurisdiction to hear the dispute and it should be referred to arbitration, as required by the Act which was the relevant predecessor to the *Retail Leases Act* 2003.

25. In the present case, it is conceded by the landlord that if the magistrate had concluded that he had a retail tenancy dispute before him, then he should have stayed the proceeding. However, the landlord says that the magistrate was entitled to conclude that the tenant had not established that there was a retail tenancy dispute before him. In fact, the magistrate made no express finding in relation to this point and, on one reading of his ruling, he appears to have proceeded on the assumption that he may have had a retail tenancy dispute before him.

26. In my opinion, the evidence before the magistrate was not sufficient to establish that the premises were used "wholly or predominantly" for the provision of retail services or goods, as required by s4(1). Given that finding, it was not necessary for the magistrate to go on to consider whether or not a disclosure statement was in fact provided or into a consideration of any express or implied covenants in the lease. Nor is it necessary for me to resolve any of the factual issues raised by counsel in relation to those matters.

27. To the extent that he may have proceeded on the basis that the lease before him was a retail premises lease, the magistrate seems to have fallen into error.

FTA

28. Unlike the retail tenancy legislation, VCAT's jurisdiction under the FTA is not exclusive. The court has a discretion as to whether the proceedings commenced in a court would be "more appropriately" dealt with by VCAT. Issues such as costs and duration are amongst the matters to which the court may have regard.

29. Any claim which might be brought by the tenant in VCAT has been threatened for more than a year, but still not commenced. A hearing in VCAT would presumably not occur for at least some months after any proceedings are finally issued (if they are ever issued). The successful party in VCAT proceedings would not recover their legal costs in the absence of special circumstances.

30. On the other hand, the rent dispute can be heard and determined tomorrow in the Magistrates' Court. The successful party can expect to recover costs in the usual way. The only issue currently pleaded in the MC proceeding relates to rent.

31. The claim for rent could not be more appropriately determined in VCAT (assuming for present purposes that it had the necessary jurisdiction).

32. The refusal of a stay does not preclude the tenant from bringing a claim in respect of the air-conditioning issue, if it genuinely wishes to do so.

33. Accordingly, it cannot be said that the magistrate erred in refusing to stay the MC proceeding pursuant to s112.

Implied covenant

34. Finally, I consider the procedural fairness argument. The magistrate considered the merits of a possible defence in relation to the implied covenant of peaceful enjoyment.

35. It is said by the tenant that it was not given an opportunity to address in relation to that. The transcript of proceedings before the magistrate establishes that the landlord's counsel took

the magistrate to the implied covenant and addressed in relation to it. Counsel for the tenant then exercised his right of reply. It seems to me from a reading of the transcript that he could have addressed on the topic but chose not to do so. It certainly cannot be said that the tenant's counsel had no opportunity to address on the matter. Further, it is not clear what, if any, impact this consideration of the implied covenant had on the magistrate's reasoning on the stay application.

Discretionary considerations

36. In so far as any error has been demonstrated, I would refuse to grant the relief sought on discretionary grounds. It is now well established that the court has a discretion to refuse certiorari even though grounds have been made out. It is a general discretion, although it is helpful to have regard to precedent. The discretion is commonly invoked in cases where it is thought preferable in the circumstances for the applicant to pursue the normal appeal processes.

37. If the magistrate who hears the trial purports to exercise a jurisdiction which he or she does not have, the tenant will have such rights of appeal as would lie from a final judgment of the Magistrates' Court. At trial the court will have before it all relevant evidence[4] and could be expected to give more detailed reasons for decision than occurred on the interlocutory application. It seems preferable in this case to leave any jurisdictional issues to be determined through the normal appeal process.

38. A further relevant discretionary consideration is this. Relief in the nature of *certiorari* quashes the impugned decision. It does not compel the decision-maker to start again. Furthermore, the superior court cannot substitute its own decision for that which is quashed.[5] Were I to order relief in the nature of *certiorari* here, I would not grant a stay of the MC proceeding, the trial of which is due to commence tomorrow. Nor could I compel the Magistrates' Court to re-hear the stay application in advance of the trial.

39. The tenant's own conduct has resulted in the present unsatisfactory situation. Although it foreshadowed a stay application in November last year, it took some four months to get around to issuing such an application. It then did so on inadequate material. Its supporting affidavit material also raised no factual matters which had not been known to the tenant for a year or so; that is to say, no new material that might have justified a late application.

40. At the time of refusing the stay application, the magistrate said that the matter should be set down for trial some two weeks thence. In fact, apparently due to case listing considerations, the trial date which was given was some six weeks from the stay application. The tenant then waited more than three weeks after the magistrate's decision before even filing the current application for judicial review. The first return before a master of this court occurred on 6 May 2005. I am not aware of any attempt on the part of the tenant to have the first return, which is a mere formality, occur earlier than that date (either before a master or a judge in the Practice Court) on the basis of urgency. Unfortunately, this has led to the current situation in which the application for judicial review is brought on in a busy Practice Court, only a few days before the Magistrates' Court trial is due to commence. Even if relief in the nature of *certiorari* were ordered, it may well be that it would cause considerable expense and inconvenience for no appreciable benefit in the present case.

41. This delay occurs against a backdrop in which the tenant has still not issued VCAT proceedings in respect of the air-conditioning breakdown of December 2003, notwithstanding its numerous threats to do so over the past year. It only sought the necessary certificate from the Small Business Commissioner on 4 April 2005, after it was unsuccessful in its stay application. Even though alternative dispute resolution is at the heart of the statutory scheme, the tenant's solicitors sought the certificate without first seeking to have the matter mediated, on the bald assertion that "we do not believe that mediation would be useful in this matter." The certificate was granted on 22 April 2005 but proceedings have still not been issued.

42. The way in which the tenant has sought to quantify its air-conditioning claim also leads to concerns that the claim is part of some sort of stalling tactic to avoid paying outstanding rent. When the air-conditioner first broke down, the tenant said it would lose $3,000 per day if it had to send its staff home. A few days later, the tenant claimed that it was losing $12,000 per day, but would only claim $3,000 from the landlord. On 19 December 2003, it rendered an invoice

for about $22,000, being about $3,000 per day for 7 days. Now the tenant says it has a claim for $309,000 because the office air-conditioner was out of action for a total of 8 days, including a weekend. Leaving aside the serious factual dispute as to whether the staff were in fact sent home or the business shut down for some or all of that time, the tenant has made no attempt to explain in the proposed VCAT claim or the solicitors' correspondence how such a sum has been calculated or can be justified. The delay in commencing VCAT proceedings seems even more remarkable if the quantum is truly in excess of $300,000.

Conclusion

43. For those reasons, the plaintiff's application by originating motion dated 14 April will be dismissed.

44. I will make the following orders:

The plaintiff's application by originating motion dated 14 April 2005 be dismissed.

The plaintiff pay the first defendants' costs of this proceeding, including reserved costs.

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[1] (1991) V Conv R 54-396.
[2] Section 89.
[3] Section 4(1).
[4] For example, better evidence as to the use of the premises.
[5] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

APPEARANCES: For the plaintiff Development One Pty Ltd: Mr M Goldblatt, counsel. Goldsmiths, solicitors. For the first defendant Cooper: Mr G Rice, counsel. SV Winter & Co, solicitors. No appearance for second defendant.
