DISPUTE TRENDS IN RETAIL AND COMMERCIAL LEASING

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I thank Legalwise Seminars for inviting me to speak to you today. As a practicing barrister I hope to give you some useful insights into the framework available to landlords and tenants to resolve disputes under the *Retail Shop Leases Act* 1994 (Qld) (the RSLA) and for commercial leases generally under the provisions of the *Competition and Consumer Act* (Cth) 2010 (CCA). In his early address, Peter Nugent has brought the seminar up to date with all recent changes to the statute and Damian Salsbury has further emphasised the mandatory disclosure of energy efficiency for commercial office buildings.

My topic is directed towards reviewing trends and recent authorities particularly in regard to:

- Cases of misleading and deceptive conduct (and unconscionable conduct)
- Recent outcomes from relocation and demolition cases
- "Make-good" obligations which provide for agreed damages on lease expiry
- Landlord breaches and remedies

FRAME WORK – DISPUTE RESOLUTION UNDER THE RETAIL SHOP LEASES ACT

One of the primary objects of the *Retail Shop Leases Act 1994* (Qld) (the *RSLA*) is to provide low cost resolution for retail tenancy disputes.[1] This includes "any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into". Sections 19 and 20 provide that parties cannot contract out of the RSLA's protections, and that they will prevail over any inconsistent leases.

[1] Section 4(b).

Part 8 of the Act sets out the process for resolving retail tenancy disputes. The provisions do not exclude other courts' jurisdiction, and where a particular lease refers either to arbitration, or to another court or tribunal, it will still be given operation.[2]

The procedure under Part 8 is, however, considered a low-cost alternative to litigation in the courts system, in line with the stated aims of the Act. A dispute is instituted by lodging a Notice of Dispute on the approved form to mediation.[3] Under section 97, mediators have jurisdiction over all disputes apart from the amount of rent payable prospectively and in arrears, and the amount of outgoings payable. The first port of call, accordingly, will be a mediation conference under section 56 of the Act. At such a conference, representation is limited, and therefore impecunious tenants need not be concerned about being faced with lawyers. At the same time, this does not prevent lawyers from assisting clients in preparing their cases to present at the mediation conference. If an agreement can be reached in mediation, it will be reduced to written form and signed.[4]

The mediator is obliged to refer the matter to the Queensland Civil and Administrative Tribunal (QCAT) where a party fails to attend the mediation conference, or where no resolution is achieved by the conference.[5] A party may also refer the matter to QCAT but only where a mediated settlement has not been complied with, where the mediator refuses to refer the matter, or upon remission by a court. However, a party may only refer a matter if the lease is still current, or has expired not more than a year earlier.[6]

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[2] Section 54.
[3] Section 55.
[4] Section 61.
[5] Section 63.
[6] Section 64.

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL ("QCAT")

QCAT commenced operation on 2 December 2009, created by the *Queensland Civil and Administrative Tribunal Act 2009* and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009*.

The Retail Shop Leases Tribunal was one of the tribunals replaced by QCAT. Dispute resolution under QCAT is not dissimilar to the Retail Shop Leases Tribunal.

Section 103 sets out the jurisdiction of QCAT. The jurisdiction of QCAT is equivalent to the jurisdiction of a Retail Shop Leases Tribunal prior to the commencement of the QCAT Act.

However, the exclusion of a retail tenancy dispute under a retail shop lease for the carrying on of the business of a service station from the jurisdiction of QCAT now reflects the repeal of the *Petroleum retail Marketing Franchise Act 1980* (Cwlth) and the commencement of the *Trade Practices (Industry codes – Oilcode) Regulation* 2006 (Cwlth).

Claims must be under the jurisdictional limit of the District Court. However, because QCAT has the ability to hear minor civil disputes, a dispute about the amount of rent payable or outgoings will likely be brought in QCAT anyway. Proceedings can be transferred between jurisdictions under ss 52 and 53.

Section 28 and 29 of the QCAT Act set out the requirements for the conduct of proceedings. QCAT is required to observe natural justice and to act as quickly, with as little formality and technicality as is consistent with a fair and proper consideration of the matters before it. Each party usually bears their own costs. However, costs orders can be made:

- Against a party in the interests of justice;
- Against a representative of a party if the tribunal considers the representative, rather than the party, is responsible for unnecessarily disadvantaging another party;
- Against intervening parties, i.e. the Attorney-General;
- At any stage of the proceeding.

The QCAT Act encourages the tribunal to fix costs. If this is not possible having regard to the nature of the proceeding, the tribunal may order that costs be assessed under the QCAT rules which may provide that a particular scale under the *Uniform Civil Procedure Rules 1999* must be used in assessing costs for particular matters.

The QCAT Act also has provisions about security for costs – s.109.

Previously under the RSLA appeals were allowed on the basis of jurisdictional error of the tribunal (s.88).

Whereas, the QCAT Act enables a party to appeal against a decision of QCAT to the appeal tribunal (ss25-27, and 142) but only if the tribunal which made the decision was not constituted by, or did not include a judicial member. Appeals from the tribunal constituted by a judicial member are made directly to the Court of Appeal (Part 8, Division 1, Appeals).

A party cannot appeal to the appeal tribunal against a decision of QCAT under s.35 to reject or accept an application or referral or a decision of the party. A decision about the amount of costs may only be appealed to the Court of Appeal.

An appeal to the appeal tribunal may be made on a question of law and, with the leave of the appeal tribunal, on a question of fact or mixed question of fact and law. Also, leave must be obtained to appeal a decision for a minor civil dispute, an interim or other interlocutory order of the tribunal and a decision to award costs.

Section 156 excludes the application of parts 3 to 5 of the *Judicial Review Act* 1991 to decisions or conduct of the tribunal other than on the grounds of jurisdictional error.

Parties can apply for the proceeding (other than an appeal) to be re-opened if:

i. The party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or

ii. The party would suffer a substantial injustice if the proceeding was not re-opened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.

Whilst Parties are encouraged to conduct their own cases before QCAT; legal representatives may also appear by leave.[7]

PROVISIONS OF THE RSLA

My colleagues have averted to the current operation of the provisions which may become flashpoints for disputes. The key provisions to focus on, in my experience, follow.

[7] Section 43, *Queensland Civil and Administrative Tribunal Act* 2009.

Disclosure statements and minimum lease standards

The operative parts of the legislation are Parts 5 and 6, which respectively create disclosure requirements, minimum standards for all retail shop leases, and specific provisions for compensation to be paid to a lessee for loss or damage in prescribed circumstances.

The details of the disclosure statements are set out in the *Retail Shop Leases Regulation 2006*, and the lessor's requirements include an extensive range of matters about the lease, the premises, and the shopping centre or building in which the premises are located.[8] The lessee's requirements are fewer, but equally important, and relate to capacity to make payments under the lease, as well as a list of the promises and representations made during negotiations to the lessee, upon which they intend to rely.[9]

The minimum standards relate to a variety of different matters, and restrict the amounts payable under leases to the following: rent, outgoings, damages for breach of lease, indemnities for wrongful actions, and the lessor's expenses for varying the lease or subletting the lot.[10] Where rent is charged as a proportion of turnover, the formula must be specified,[11] and turnover information is confidential.[12]

[8] Consider also the *Building Energy Efficiency Disclosure Act* 2010.
[9] Regs 3 and 4.
[10] Section 24.
[11] Section 25.
[12] Section 25.

Rent review

Sections 27 to 36 prescribe the manner in which rent reviews must be undertaken. In particular, reviews are limited to one per year, except for the first year of the lease.

The "mischief" to which section 27 subsection (5) is directed is clauses which give a lessor the choice of two or more bases for review, or which automatically provide that the higher of two or more formulae will determine the rent. In *Oz Sushi Pty Ltd*[13], Brabazon QC DCJ determined that a clause which provided that rent would be adjusted to CPI (or, eg, current market rent), but *would never be less than the previous year*, was a ratchet clause, and was forbidden.[14] In *Hurren & Anor v Keencrest Pty Ltd & Anor* [15] Daubney J. "corrected" this meaning, but reinforced that clauses are void which seek to prevent rent from decreasing following review. His Honour stated: *"It is not sufficient to say, as his Honour does, that ratchet clauses "are to be forbidden, and so they are described as a basis for review." To do so is, respectfully, to put the cart before the horse; a ratchet clause will be forbidden if it can be described as a 'basis of review' as ascertained by reference to Parliament's purpose – it is not a 'basis for review' because it was intended to be prohibited".* Consequently the RSLA was amended in 2011 by the insertion of section s.36A prohibiting ratchet rent provisions.

Another factor to contemplate in a commercial context is the operation of section 27(8), which provides that a "major lessee" may opt out of section 27 protections. A major lessee is defined in the schedule dictionary as the lessee of 5 or more retail shops in Australia.

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[13] *Oz Sushi Pty Ltd v Lloyd Bennett & Associates Pty Ltd atf the LR Bennett Family Trust* [2002] QDC 220
[14] Most recently: *Hurren & Anor v Kenncrest Pty Ltd & Anor* [2008] QSC 194.
[15] *Hurren & Anor v Keencrest Pty Ltd & Anor* [2008] QSC 194 at [32].

Section 27(8)(b) requires such a lessee to give the lessor written confirmation that they have been given the appropriate financial and legal advice, but in these circumstances where two large businesses have negotiated their own arrangements, the RSLA will not interfere.

Certain sections prohibit the levying of key money,[16] and regulate the collection of monies for a sinking fund,[17] and for advertising the building.[18]

Outgoings

Sections 37, 37A and 38 cover the treatment of outgoings under a lease. Leases are required to prescribe the types of outgoings payable, and the means of determining the amount of these outgoings.[19] Furthermore, a lessor must provide an annual estimate of the apportionable outgoings that are likely to be incurred.[20] "Apportionable outgoings" refers to all outgoings that are not specifically referable to one premises only, but are instead apportioned between some or all lots.[21]

Capping outgoings or not?

Section 38 purports to caps the proportion of outgoings payable by tenants in buildings or retail shopping centres in line with the proportion of floor space that they occupy – regardless of whether other lots are tenanted or not.[22] In *Sadeo*, the Tribunal found that a lease clause which required a ground floor tenant to pay a lower proportion of apportionable

[16] Section 39.
[17] Section 40.
[18] Section 41.
[19] Section 37(2)(a).
[20] Section 37(2)(b).
[21] Definition of ***apportionable outgoings*** in Schedule Dictionary.
[22] But see the observations in *Hamilton v Armitage* [2006] QSC 189 in relation to Community Title Schemes.

outgoings when the top floor of the building was leased, but a higher proportion when it was not, was clearly contrary to section 38 and was void.[23]

Community Title Scheme

However, s.38 does not protect retail tenants who occupy a lot in a Community Title Scheme (CTS) from paying outgoings greater than the area of the lot as a proportion of other lots leased or occupied by lessees who share the benefits resulting from the outgoing. The judgment in *Hamilton v Armitage and Anor*[24] found against the tenant who was being charged 14.5% of the apportionable outgoings, passed on from the landlord who was paying that proportion of outgoings based on the lot entitlement schedule, although the tenant occupied only 7.3% of the total area occupied by all the lots in the building. This Judgment found that in the case of lessors who were owners of lots, but not the owner of all of the lots or the whole of a building, are treated by interpreting section 38 by the insertion of the words "owned by such lessor" after the words “bears to the total area of all premises in the... building".

In my opinion this interpretation is inconsistent with the intention of Parliament to give the widest protection to tenants, and in fact exposes a great many tenants to the risk of being overcharged. Section 38 does not apply to them. Every tenant in a commercial or mixed CTS (“strata building”) with a lease before 2006, and from then any tenant in a CTS with less than 5 retail tenancies in the building, is not appropriately protected by s.38.

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[23] *Sadeo Pty Ltd t/as Black Cat Café v Singleton*, Dispute 53/2003, Directions Hearing Decision, 17 November 2003, Chairman Forbes.
[24] *Hamilton v Armitage and Anor* [2006] QSC 189

In 2006 the Queensland Parliament amended the definition of "retail shopping centre" in section 6 of the Act to bring it in line with the analogous legislation in New South Wales. Community Title Schemes with 5 or more retail shops are now expressly covered in all circumstances by section 38. Previously multi-storey shopping centres sometimes fell outside the definition.

The impact of the decision in *Hamilton* as it stands is that, if a building has one owner, tenants have the full protection of section 38. A second possible result of this decision, which is binding on QCAT, is that as soon as even one lot becomes owned separately, the owner of that lot can pass on all of their outgoings to the tenant of that lot, regardless of whether those outgoings bear any proportion to the lot's size, or indeed meet the definition of apportionable outgoings (ss 37 and 40).

If there is an imbalance stemming from the lot entitlement schedule and a body corporate charges a disproportionately high part of their expenses onto a minority owner or owners, that owner or owners may then pass it in whole or divide it between their tenants without reference to the area of those tenants' lots, “to the total area of all premises in the building… that are leased to or occupied by lessees". This is the effect of the interpretation in *Hamilton* given by the Supreme Court.

In my opinion, the crucial misunderstanding that this decision is based on, and one of further concern to tenants in lots in a CTS, is that apportionable outgoings can somehow be equated to a body corporate's budget, when in fact many items may be budgeted which can never be passed on to tenants. It is this misunderstanding which led to the Supreme Court being unwilling to accept a literal interpretation of the Act.

For all of these reasons, in my view, the judgment is of detriment to a wide class of retail tenants in Queensland.

The land tax inclusion

The *Revenue and Other Legislation Amendment Act* 2009 (Qld), removed the prohibition in the Land Tax Act 1915 (now replaced by the new *Land Tax Act* 2010 (Qld), which took effect from 30 June 2010) on lessors to pass through land tax as an outgoing as a cost to lessees of commercial premises. . Arguably also, leases of commercial premises from 1992 to 2009 are no longer subject to the prior prohibition.

However, similar restrictions contained in the *Residential Tenancies Act* 1994 and the RSLA remain in force.

Compensation provisions

Division 7 of Part 6 of the Act deals with circumstances under which compensation is payable to a tenant by the landlord under the Act. These include: a lessor restricting the access of lessees or customers to leased shops; disruption to a lessee's trading; the failure to repair broken plant or equipment, or to remedy defects in the building; and the failure to clean and maintain the building.[25] These create statutory causes of action in respect of common law landlord's covenants, in effect – repair, quiet enjoyment, and non-derogation from grant. Sections 46 and 46AA create the equivalent of a covenant for renewal, where none is written into the lease. The provisions, by implication, give rise to compensation. Further down, section 46K creates a final basis for compensation, namely the early

[25] Section 43(1).

termination of a lease due to the demolition of the building in which the premises are situated.

There are also further provisions for compensation where entry into a lease is procured by false and misleading statements or misrepresentations, and where the premises are not available for trading on the agreed date.[26]

Under section 44 of the RSLA, compensation may be agreed on between the parties, but where this is not possible, the issue must be resolved via the dispute resolution process. This process, which I have already described, begins with mediation, and may end up with a case before QCAT.

Assignment of leases

Certain circumstances surrounding the assignment of leases may also create a retail tenancy dispute under section 50 of the RSLA. Where a tenant seeks in writing consent to a particular assignment, and no response is received for a month, a dispute is held to exist. Similarly, where the landlord purports to add to the responsibilities, or take away from the rights of the assignee in relation to the original lease, or to impose a condition which is unreasonable in exchange for consent, a dispute exists.

Unconscionable conduct

In 2000, the RSLA was amended to insert a new Division 8A into Part 6, which deals with minimum lease standards. The division introduced protections derived from section 51AC of the *Trade Practices Act 1974* (Cth) (the *TPA*) – "Unconscionable conduct in business

[26] Section 43(2).

transactions" (now schedule 2, s.22 of the *Competition and Consumer Act* 2010 (Cth) (CCA) - into the *RSLA*.

The operative provisions are paragraphs (1) and (2) of section 46A, which enjoin both lessors and lessees from conduct in relation to leases which is "in all the circumstances, unconscionable." Paragraph (3) excludes certain behaviour from the ambit of unconscionability – merely instituting legal or arbitral proceedings cannot be unconscionable by itself, nor can a mere failure to issue or renew a lease. These provisions are in line with s.22 of the CCA.

Section 46B provides a list of matters which QCAT may have regard to when deciding a section 46A issue. This list is inclusive, not exclusive, and covers a range of matters which will be familiar to those conversant with the previous TPA, the CCA, and common law unconscionability; parties' relative bargaining power, unnecessary conditions, capacity to understand documents, undue influence, comparable transactions elsewhere, industry codes, and willingness to disclose and to negotiate.

There is, however, an important distinction between s 46A of the Act and s.22 of the *CCA*. The latter was introduced in response to perceived weaknesses in the then s.51AA, TPA, (now s.22, CCA) in relation to small businesses – in particular tenants and franchisees. A number of commentators have examined the section in this context and concluded that it is intended to extend the concept of "unconscionability" between the traditional equitable

doctrine based on *Blomley v Ryan* and *CBA v Amadio*, and that embodied in the then s.51AA.[27]

This doctrine hinges around the idea of "special disadvantage", and this has been confirmed in a commercial leasing context by both the Full Federal Court in *ACCC v Samton Holdings Pty Ltd*,[28] and the High Court in *ACCC v C G Berbatis Holdings Pty Ltd*. [29] While both cases were brought under then s.51AA, not s.51AC, the Courts define "unconscionability" in a broad manner, without specifically confining the application of this definition to s 51AA.

There are two single judge decisions in the Federal Court that gave then s.51AC a broader application, however both predate the High Court judgment in *Berbatis* and it is accordingly unclear to what extent they withstand that case.[30] There are two subsequent decisions; the facts in *4WD Systems* in any event fell short of unconscionability and no authoritative statement was made of the law but in *Dukemaster*, a comprehensive analysis maintains a broader application.[31]

The Queensland Parliament specifically incorporates this element into s 46A of the Act:[32]

> *The community at large associates the term unconscionable conduct with unfair behaviour. However, the term has specific legal meaning that requires* ***more than***

[27] See Sharon Christensen and Bill Duncan, 'Unconscionablility in Commercial Leasing – Distinguishing a Hard Bargain from Unfair Tactics' (2005) *Competition and Consumer Law Journal* 158, and articles discussed therein.
[28] (2003) 189 ALR 76.
[29] (2003) 214 CLR 51 per Gleeson CJ at [14]-[15], Gummow and Hayne JJ at [55]-[63], and Callinan J at [182]-[185].
[30] *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304; *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286; *ACCC v Dukemaster Pty Ltd* [2009] FCA 682.
[31] *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491 at [183] et seq.
[32] Explanatory Memorandum to the *Retail Shop Leases Amendment Act 2000*, p 12, emphasis added.

> ***mere 'unfair' conduct*** *in order for the behaviour to be classed as 'unconscionable'.*
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> *Unconscionable conduct may be understood as* ***taking advantage of a party who then does not make an independent and voluntary decision or who cannot make a judgment as to what is in their best interests****. The provisions for unconscionable conduct prohibit a stronger party dealing with a disadvantaged party in a harsh or oppressive manner.*

The 2006 Amendment Act did not amend ss 46A and 46B in light of the cases on the *TPA* unconscionability provisions, or for any other reason.

As a result of this, it may be difficult to argue that the definition of unconscionability in the s 51AC cases ought to prevail over the approach taken by the High Court in *Berbatis*, which requires special disadvantage to be shown, of which Gleeson CJ notes:

> *Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. […]*
>
> *In the present case, there was neither a special disadvantage on the part of the lessees, nor unconscientious conduct on the part of the lessors. All the people involved in the transaction were business people, concerned to advance or protect*

> *their own financial interests. […The lessees] were at a distinct disadvantage, but there was nothing "special" about it.*

Both this case and *Samton*[33] involved lessors exploiting lessees' weak positions for commercial gain, and the Courts note that both cases involved a degree of moral turpitude or "unfairness". However, in spite of this, no breach of the *TPA* was found in either case, as the lessees were considered to be experienced in the commercial field, and not at any special disadvantage in the required legal sense.

On account of the Explanatory Memorandum, it is advised that s.46A is read as having the same requirement, and that the list of matters which are relevant under s.46B are relevant only within this context. At the same time, there is the potential of recourse for conduct which is unconscionable in the broader sense to the Federal Court under s.51AC[34].

In *Gilmour v Hing*,[35] the Retail Leasing Tribunal found unconscionable conduct where a landlord had allowed a failing video store onto a month-by-month tenancy while it recovered, but then posted a "for lease" sign in front of the premises and began to entertain offers.

ACCC v Leelee Pty Ltd[36] demonstrates that a lease-related unconscionability claim also was brought under section 51AC of the *Trade Practices Act*, and this is not affected by the existence of the *RSLA* remedy. The jurisdictional issues which this possibility enlivens will

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[33] See note 31.
[34] *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at 114: *"The application of the meaning accorded to the concept will always be a matter of judgment in every case and will depend upon a careful consideration of the circumstances of each case"*
[35] Dispute 94/2003, Full Tribunal Decision, 14 December 2004.
[36] *ACCC v Leelee Pty Ltd* [1999] FCA 1121.

be discussed later in this paper. It is significant to note that section 51AC, TPA, commenced on 1 July 1998, nearly three years before the RSLA provisions.

Misleading and deceptive conduct

Section 52 of the *Trade Practices Act*, regarding misleading and deceptive conduct, are complementary to the unconscionability provision in section 51AC. The New South Wales *Retail Leases Act*, which is based on the Queensland Act, was likewise amended to incorporate provisions analogous to section 51AC. The point of departure is that the NSW legislature also inserted a section 52-type prohibition on misleading and deceptive conduct in connection with retail leases.

However, the RSLA does contain subsection 43(2), which makes a lessor liable to compensate a lessee who is induced to *enter* a lease by false or misleading statements, or by misrepresentations. *Queensway*[37] drew attention to the distinction between "mere puffs" and actual representations, and it was held by Chairman Forbes as she was then, that the hyperbole in an advertising brochure for a proposed shopping centre did not give rise to compensation when a business failed. In *Logan City Shopping Centre v Retail Shop Leases Tribunal*,[38] McMurdo J considered the proper interpretation of the section, and it's applicability to misleading conduct in relation to the *assignment* of leases. While there are a number of provisions in the RSLA which treat both the creation of an initial lease and the assignment of a lease in a like manner, McMurdo J was unable to extend the protection of the RSLA as far as allowing an assignee to recover compensation under 43(2). The

[37] *Queensway Developments Pty Ltd t/as Bambos Clothing v Simnat Pty Ltd & Chevron Developments Pty Ltd*, Dispute 11/2002, Full Tribunal Decision, 17 October 2002.
[38] *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal* [2006] QSC 172.

amendment to s.43(2) by the *Criminal Code and other Legislation Amendment Act* 2011, remedied this injustice.

It should, however, be noted that there is often a degree of overlap between the doctrines regarding unconscionable conduct and false and misleading statements, such that the assignee in the matter might have equally argued that the inducements to adopt the assignment of the lease were, in all the circumstances, unconscionable.

Conversely, where an unconscionability action under section 46A is unavailable because the lease was entered into before the commencement of that section, it may be that the protection of section 43(2) will be available.

CHOICE OF FORUM

The remedies which QCAT may grant are, naturally, limited to those enlivened by the legislation. By contrast, an application to a court will be made in the context of the broad powers of that court. Matters which may be litigated under the *Competition and Consumer Act*, and equitable remedies, are of particular interest.

The legal practitioner acting must make an early considered recommendation as to the forum - s.94 RSLA.

One advantage of making a *CCA* application which has already been mentioned is that the commencement date for section then 51AC is 1 July 1998, about three years before the *RSLA* section 46A. If contraventions or indeed any relevant “conduct” occurred within that period, an application to court will be able to consider that conduct.

Costs in the forum

An issue which may be particularly important when choosing a forum is that of costs. Under section 102 of the *Queensland Civil and Administrative Tribunal Act,* QCAT, the Tribunal may only award costs in limited circumstances – where proceedings are frivolous or vexatious, or procedures are not followed. On the one hand, this may be an incentive for litigants with less funding available than the party they are likely to confront. On the other hand, where a claimant has a high probability of success, it may be prudent to seek to recover their costs outlaid by applying to court.

A CASE-BY-CASE CONSIDERATION

The *Retail Shop Leases Act* introduces a range of means by which tenants and landlords can resolve disputes. Common law and equitable principles are formalised in the RSLA, and remedies by way of compensation, enforcement of the RSLA in the nature of mandatory and prohibitory injunctions, rectification of a lease, and a number of other matters.

QCAT's jurisdiction does not, however, displace that of the courts, and where significant sums of money or complex issues of law are involved, or where greater finality is sought, court remedies are still available to parties.

The choice of forum, and the nature of the remedy pursued, naturally needs to be assessed on a case-by-case basis, taking into account the resources of the client, the need for finality, and the time frame in which a result is needed.

INSTRUCTIVE RECENT TRENDS AND DECISIONS

QCAT has been in existence for nearly two years and has doubtless bought an increased level of judicial expertise to the handling of retail shop leasing disputes. However, there is no information available on which issues are contested in retail leasing dispute applications lodged, how many have proceeded to mediation, how many have been resolved at mediation, how many have proceeded to a hearing, or how many have settled prior to a hearing.

There are very few reported decisions about retail and commercial leasing disputes. There were 67 applications in 2009-2010 on the Civil List of Retail Shop leases disputes according to the QCAT Annual Report. Of these 85% are reported as "cleared".[39]

The fact that there are few published decisions may itself suggest the efficacy of the QCAT in resolving disputes by mediation and settlement, a primary objective.

So far in 2011 there have been eight retail shop leasing dispute decisions published, five of which were applications for leave to appeal from a decision of QCAT. QCAT's jurisdiction was the subject of one matter; compensation under s.43 of the RSLA and provision of financial records to enable the auditor to prepare annual audited statements of the lessor outgoings constituted to other matters. Of the eight cases QCAT found equally in favor of landlords and tenants.

As to "make-good" obligations which provide for agreed damages on lease expiry it is sufficient to say that the lessor must elect under the terms of the lease to instruct the tenant

[39] QCAT Annual Report 2009-2010, http://www.qcat.gld.gov.au/1777.htm

at lease end to remove fixtures and make good, in a reasonable time, and before re-letting the premises with existing fixtures.[40]

Recent cases of interest

Misleading and deceptive conduct and unconscionable conduct: *ACCC v Dukemaster Pty Ltd* [2009] FCA 682.

The tenants succeeded in obtaining injunctions and damages arising out of representations made to them by the landlord (the first respondent) and its agent or servant (the second respondent), prior to the tenants entering leases in relation to a shopping centre.

The respondent, the landlord of the Food Court of the Paramount Centre in Melbourne, was found to have engaged in misleading and deceptive conduct and, in all the circumstances, unconscionable conduct, in contravention of ss52 and 51AC TPA in representing to tenants (five in number) that the rent for a shop in the food court was reasonable and below market value.

Relocation resulting from misleading and deceptive representations and damages for economic loss*: Mooloolaba Slipways Pty Ltd & Anor v Cashlaw Pty Ltd & Ors* [2011] QSC 236

The lessor induced the lessees to expend capital on plant and equipment as ship engineers in a shipwright and slipway premise, whilst failing to advise the lessee that a sale of the lease of the land on which the premise stood was proceeding with a property developer.

[40] *Quadra Pacific (Aust) Corporation P/L v Mercantile Credits Ltd* [2000] QCA 284 at [14] to [17].

Atkinson J held breaches of s 52 TPA, and awarded damages under s 82(1) TPA in the total of $1,785,920.

Determination of rental: *Century Developments (Qld) Pty Ltd v Ex parte Glenn Donald Ballard* [2011] QSC 117.

A valuer was appointed to determine market rental under the terms of the lease and the RSLA. Prior to conducting the valuation, the valuer requested that the parties enter into a deed, which included a release and indemnity in relation to any claims. The parties each provided submissions to the valuer but not to each other. The landlord later sought to avoid the determination on the basis that the parties had not provided copies of their submissions to each other.

The question before the Court was whether the finding as to market rental could be set aside on the basis that the parties had not provided copies of their submissions to each other.

The decision of Daubney J. was that the rental review being undertaken was made in accordance with the terms of the lease and not the deed (which was a separate contractual arrangement). His Honour also found that it was not a condition of the agreement that the parties had to provide their submissions to each other.

Curiously, the decision does not reference s.28A RSLA, which states:

28A Parties' submissions to specialist retail valuer

1. For section 28, the lessor and lessee may each make a written submission to the specialist retail valuer about the current market rent of the retail shop.

2. A submission must be made within the reasonable period decided by the valuer (the *submission period*).

3. A party making a submission must give a copy of it to the other party within the submission period.

4. A party who receives a copy of a submission may give the valuer a written response to it.

5. The response must be given within the reasonable period decided by the valuer.

:HSH Hotels (Australia) Ltd v State of Queensland [2011] QSC 29

The applicant leased from the respondent premises, which it used as a hotel. The lease provided for rental fixed as "a sum equal to 7.5% of the Valuer General's unimproved capital value of the said land at the respective dates that the annual rental becomes due and payable".

The question was whether rental should be calculated with reference to the legislation in existence at the commencement of the lease, being the *Valuation of Land Act 1944* (Qld), or new legislation which replaced that Act, being the *Land Valuation Act 2010* (Qld).

This distinction was important for the lessee as under the old Act, the unimproved value of land included any increase in the value of the land that had happened in accordance with a

development approval, other than a hotel licence relating to the land or an improvement of the land.

In this case, Peter Lyons J. held that rental should be calculated in accordance with the provisions of the legislation in force at the time at which the rent is to be determined.

The cautionary lesson here is when drafting the clause which determines current rental with reference to a statutory valuation, that the clause or lease generally adequately addresses the situation where the reference legislation may be amended or repealed in the future.

Binding Agreement for lease: *Highgrove Bathrooms Townsville Pty Ltd v Serobotto Nominees Pty Ltd* [2011] QSC 109.

The parties entered into negotiations for a lease over a premises, which the plaintiff intended to use the premises as a bathroom store. By email, a representative for the defendant lessor invited the prospective lessee to put forward a lease proposal. The proposal made provisions for the term of the lease, the rent, the commencement date, the premises to be let and other details. The parties also agreed to a 12-month rent-free period.

Representatives for the parties later met at the premises to talk about the extensive fit-out required by the plaintiff. The plaintiff asserted that the parties' representatives shook hands, noting they had a "deal".

Three days after the meeting, the defendant's representative emailed a "letter of offer" inviting the plaintiff to submit the offer to the plaintiff's directors. The plaintiff signed the intent to lease document and paid a deposit. The lessor then sent draft lease documents,

but noted that it reserved the rights to change the documents as it had not yet reviewed them.

The plaintiff requested some changes to the lease documents that had been agreed in the letter of offer but were not reflected in the documentation. The defendant subsequently advised the plaintiff that it did not wish to proceed with the lease.

Byrne SJA. held that the claim failed and no agreement for lease was made. While the plaintiff's offer was communicated in the letter of offer; this offer was not accepted by the defendant. The retention of the plaintiff's deposit did not amount to the conclusion of the negotiations – instead the deposit was in the nature of a pre-contract payment.

The court further found that the defendant's delivery of the draft lease did not manifest an intention on the defendant's behalf to accept the offer. The plaintiff explicitly recognised that this draft did not conform with the offer (as it had pointed out inconsistencies between the draft lease and the letter of offer), so it could not therefore be said to have constituted an effective acceptance of the offer. Secondly, the defendant had clearly informed the plaintiff that the draft was being forwarded merely for consideration as it had not have time to review it.

Relief against forfeiture: *Leahy v Austwin Management Services Pty Ltd* [2011] QCA 186.

The respondent was a sublessee of premises owned by the appellant, which he used as a mechanic's workshop. The respondent had occupied the premises for some 25 years without default and was not in default at any time during the hearing of the matter. The appellant terminated the head lease following a failure by the head lessee to pay rent. The

respondent successfully obtained an order under s.125 Property Law Act that the appellant grant him a lease of the premises for the remainder of the term of his sublease, which was approximately 18 months.

The Court of Appeal upheld the decision at first instance, on the basis that it was appropriate to grant of a new lease as:

- the respondent had been in occupation of the premises for 25 years;
- the respondent continued to conduct a business from the premises;
- the respondent and his two employees would be affected if they had to leave; and
- the term of the new lease was relatively short – only 18 mths.

The appellant failed to provide evidence of prejudice of sufficient weight to overturn the decision of the primary Judge.

Form 7 Breach Notices: *Cairns City Supermarkets Pty Ltd & Anor v Lightbrake Pty Ltd* [2011] QCA 205.

In this case, on appeal from QCAT ([2010] QCAT 598), the first and second appellants leased premises in a shopping centre owned by the respondent. The respondent re-entered both premises and terminated the leases following a failure to comply with a Form 7 Notice to remedy breach served pursuant to s.124 of the Property Law Act. The outgoings statement was disputed.

The appellants disputed the amounts claimed in the Notices on the basis that part of the electricity bill could relate to electricity not used by the first appellant (although no evidence was put on by appellant about how much of the total electricity charges this might be). The appellants also claimed that the Notices had been irregularly served, the Notices having been served on the corporate lessees' registered office and on the office of their solicitors.

The Court of Appeal held that the fact that a Notice overstates the amount said to be owing will not result in that Notice being invalid in every case. It is a question of fact and degree. The Court also found that the Notices, which were served on the corporate lessees' registered offices were properly served under the leases.

A cautionary note; while this decision suggests that an overstatement of the amount owing may not automatically invalidate a Breach Notice, this may not be the position in every case[41].

CONCLUSION

The new grounds which may be fertile for dispute may relate to issues such as:

- landlords commencing to include land tax in outgoing budgets for existing commercial premises leases, particularly where the rent is stipulated on a gross basis and outgoings are only payable as a proportion to an increase in outgoings over a base year; and the previous disclosed base years outgoings excluded land tax as was proper under the legislation of that time.

[41] See also *Banks v Wells [2010] QCAT 238 at para 14: "A condition precedent for the exercise of an option to renew a lease is that the tenant is not in breach at the time. We find that at the time the Applicants purported to exercise the option to renew the term, they were aware that they were in default of payments under the lease, and in breach. We are not persuaded that it was reasonable in the circumstances for the Applicants to believe that their liability for the rates component of outgoings had been waived for the entire term. Consequently, we find that they have forfeited the right to exercise the option".*

- the impact of NABERS star ratings from disclosure, in terms of market review invites a contest arguing against increases of rent or outgoings because of the failure to improve star ratings into the future, or alleging a lessor is converting capital expenditure by claiming building maintenance.

The framework for the resolution of the disputes under the RSLA, and in the Courts, and the known flashpoints of past matters disputed, will be supplemented with these new areas, in my view.

QCAT's efficacy in dispute resolution in retail leasing matters is established.

LINDSEY ALFORD
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7 September 2011