Conveyancing and property

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STATUTORY WARFARE? WHAT HAPPENS WHEN RETAIL LEASE LEGISLATION COLLIDES WITH LIQUOR LICENSING LAWS?

CATERING LICENCES IN PUBS AND CLUBS

This is a story of competing statutes. One statute – regulating retail leases – creates a right; the other statute – regulating liquor licensing – appears immediately to strike it down. The recent New South Wales Court of Appeal decision of *Polish Club Ltd v Gnych* [2014] NSWCA 321 wrestled with the consequences. Before considering the decision, we need to set the context.

Hotels and licensed clubs usually provide food to patrons. Indeed, in New South Wales, hotels are required by s 17(4) of the *Liquor Act 2007* (NSW) to make food available whenever liquor is sold or supplied for consumption on the licensed premises. No doubt because they do not regard the sale of food as part of their core business, hotels and clubs commonly enter into agreements by which food for patrons is provided by others, by operating a restaurant or cafe on the licensed premises.

These agreements often are called licences. They sometimes expressly state that the parties do not intend to create the relationship of lessor and lessee. They may not grant exclusive possession of any part of the licensed premises. Sometimes they go so far as to state that the agreement is not a licence to occupy any part of the premises.

EFFECT OF RETAIL LEASES ACT

Nonetheless, several decisions have held that the *Retail Leases Act 1994* (NSW) converts such agreements into five-year leases.[1] There seems to be only one decision to the contrary, *Constantinos Trembelas v Cyprus Community (NSW)* (unreported, Supreme Court, NSW, Windeyer J, 2 June 1998). There, it was held that no retail shop lease arose because the agreement did not grant a right of occupation, being "no more than a catering concession arrangement which gives exclusive food catering rights for the bistro and non-exclusive rights to cater in the auditorium". It thus granted "not a right of occupation but a right to conduct an operation on certain premises upon certain terms and conditions". That decision, however, has effectively been distinguished out of existence by subsequent cases.[2]

BREADTH OF DEFINITION OF "RETAIL SHOP LEASE"

The transformation of a licence into a lease results from the breadth of the definition of "retail shop lease" in s 3 of the Act, namely as "any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop".[3] Any restaurant, cafeteria, coffee lounge or other eating place is a "retail shop" (see s 3 and Sch 1 for definition of "retail shop").

The parties' belief or intention as to whether their agreement constituted a retail shop lease is irrelevant to the determination of the issue.[4] Further, if the licensee needs to occupy the premises in

[1] *Cozens v Coffs Harbour Yacht Club Ltd* [2006] NSWADT 362; *Bigdale Pty Ltd t/as Enigma v Royal Motor Yacht Club Port Hacking Branch (NSW)* [2010] NSWSC 1196; *Lytton v North Bondi RSL Club Ltd* [2012] NSWADTAP 8; *Gnych v Polish Club Ltd* [2013] NSWSC 1249; *Grimson v Gamone Pty Ltd* (NSW Administrative Decisions Tribunal, File No 135142, Montgomery JM, 24 February 2014); *Norma Farah t/as Luscious Food Catering v Nelmeer Ashfield Pty Ltd* [2014] NSWCATCD 144 (internal appeal pending).

[2] For example, *Lytton v North Bondi RSL Club Ltd* [2012] NSWADTAP 8 at [26]; *Norma Farah t/as Luscious Food Catering v Nelmeer Ashfield Pty Ltd* [2014] NSWCATCD 144 at [39]-[44].

[3] *Moweno Pty Ltd v Stratis Promotions Pty Ltd* [2002] NSWSC 1151 at [4].

[4] *Lytton v North Bondi RSL Club Ltd* [2011] NSWADT 86 at [9]; appeal dismissed *Lytton v North Bondi RSL Club Ltd* [2012] NSWADTAP 8; *Norma Farah t/as Luscious Food Catering v Nelmeer Ashfield Pty Ltd* [2014] NSWCATCD 144 at [6].

order to give effect to the agreement, a statement in the agreement that it does not give the licensee any right to occupy any part of the premises will be treated as "meaningless" or (inconsistently) void because inconsistent with the Act.[5] And the licensor's belief that restrictions in its head lease deprived it of power to grant a lease also is irrelevant to whether a retail shop lease came into existence.[6]

The definition of "retail shop lease" expressly states that the "right of occupation" granted by the agreement need not be a right of exclusive occupation in order for the agreement to constitute a retail shop lease. And the agreement can be express or implied. Despite the statutory enactment of the Statute of Frauds (*Conveyancing Act 1919* (NSW), ss 23C(1), 54A(1)), a retail shop lease, as defined, can be oral or written, or partly oral and partly written. Further, despite the requirements of the *Real Property Act 1900* (NSW) that a lease for more than three years be in the approved form (s 53(1)) and registered (s 42(1)(d)), the *Retail Leases Act* has the effect that, whatever the parties may agree, a retail shop lease has a term of five years unless the lessee waives the five-year term by providing a solicitor's certificate (s 16(1) – (3)).

Effect of Retail Leases Act, s 8

Under s 8(1) of the *Retail Leases Act*, a retail shop lease is considered to have been entered into when a person enters into possession of a retail shop as lessee under a lease or begins to pay rent as lessee under the lease, whichever happens first. Section 8(1) has been construed as causing a retail shop lease to come into existence if, at the time when a person enters into possession of a retail shop or begins to pay rent for those premises, there exists a "consensus" that the relationship between the parties is to be that of lessor and lessee. This is the case even if no lease document has been executed by that time and even if none is subsequently executed.[7]

Under s 5(b) of the *Retail Leases Act*, the Act does not apply to retail shops "that are used wholly or predominantly for the carrying on of a business by the lessee on behalf of the lessor". Given that the licensee of a hotel has a statutory obligation to provide food to patrons whenever liquor is sold or supplied for consumption on the premises, one might think that a caterer who, by agreement, provides food to patrons on behalf of the licensee is carrying on the business of providing food on behalf of the licensee of the hotel. But this argument is yet to be accepted. Instead, the fact that the caterer, rather than the hotel, provides food has been treated as an indication that the caterer is carrying on business on its own behalf.[8]

Can the imposition of a five-year lease be avoided?

Earlier, we referred to s 16(1) of the *Retail Leases Act*, under which a retail shop lease has a term of five years unless the lessee waives the right to that term by providing a solicitor's certificate. Until very recently, in the absence of a solicitor's certificate, there seemed to be only two ways of avoiding this compulsory extension to a five-year term. The first way was to provide that the agreement could be terminated on short notice. It is clear law that a retail shop lease may contain a provision by which the lease can be brought to an end before the end of its five-year term and that such a provision is not inconsistent with s 16(1). (Were it inconsistent, s 7 of the Act would render it void.) In *Blackler v Felpure Pty Ltd* [2000] NSW ConvR 55-921 at [25]; [1999] NSWSC 958, Bryson J said:

> There is no guarantee in the *Retail Leases Act* that the term for which a retail shop lease is entered into will not, after it is entered into, be interrupted by any supervening event. There could be supervening events which bring the term to an end by conduct of a public authority such as resumption of the land, and *there also could be supervening events which bring the term for which the lease is entered into to*

[5] *Norma Farah t/as Luscious Food Catering v Nelmeer Ashfield Pty Ltd* [2014] NSWCATCD 144 at [32]-[34].

[6] *Cozens v Coffs Harbour Yacht Club Ltd* [2006] NSWADT 362 at [10]-[13].

[7] *73 Union St Retail Pty Ltd v J&S Group Pty Ltd* [2013] NSWADTAP 32 at [134]; see also *Spuds Surf Chatswood Pty Ltd v PT Ltd* [2012] NSWADTAP 2 at [183]-[191]; *Tarleton & Peters Pty Ltd v EK Nominees Pty Ltd* [2010] NSWADT 248; *Perhauz v SAF Properties Pty Ltd* [2007] NSWADT 122; *O'Neill v Henry* [2009] NSWADT 254; *Helou v Bong Bong Pty Ltd t/as Regional Retail Properties* [2006] NSWADT 128; *Randi Wixs Pty Ltd v Pokana Pty Ltd [No 2]* [2003] NSWADT 4; contra (without reference to authority) *Re Creditors' Trust Deed* [2013] NSWSC 1258 at [31].

[8] For example, *Norma Farah t/as Luscious Food Catering v Nelmeer Ashfield Pty Ltd* [2014] NSWCATCD 144 at [45]-[46].

> *an end before the expiry of the term through the operation of provisions of the lease itself*. Leases commonly contain express or implied provisions under which their terms can be brought to an end for breach of covenant; such provisions are not, as I have observed, regulated by the *Retail Leases Act* [emphasis added].

In *Grimson v Gamone Pty Ltd* (NSW Administrative Decisions Tribunal, No 135142, Montgomery JM, 24 February 2014), the New South Wales Administrative Decisions Tribunal (now incorporated into the New South Wales Civil and Administrative Tribunal) considered a licence transmuted into a five-year lease by the Act that permitted either party to terminate the agreement on three months' notice. Relying on *Blackler*, the Tribunal found that a notice given by the lessor was effective to terminate the lease.

However, a potential caterer might well be reluctant to enter into an agreement that permits the licensor to terminate it on short notice. And in any case, a caterer who was willing to do this presumably also would be willing to provide a certificate under s 16(3) of the *Retail Leases Act* to prevent the imposition of a five-year term. The usefulness of this method of avoiding the force of the retail leases legislation thus is limited.

The second way of avoiding the force of this aspect of the *Retail Leases Act* was provided by *Classic International Pty Ltd v Lagos* (2002) 60 NSWLR 241. In that case, Palmer J considered a one-year licence. His Honour found that both parties believed that their agreement provided for a one-year term, did not know that the effect of the Act was to transmute the licence into a five-year lease, and would not have entered into the agreement had they known this. His Honour set the agreement aside for common mistake.

However, a licensor who is aware, when entering into the agreement, of the effect of the retail leases legislation, cannot take advantage of this decision. Thus, it is unavailable to licensors who wish to avoid a five-year term being imposed by the *Retail Leases Act*. In any event, the result of the decision being applicable is that no agreement will exist between the parties.

A NEW DEVELOPMENT: POLISH CLUB LTD V GNYCH

This brings us to the decision in *Polish Club Ltd v Gnych* [2014] NSWCA 321, the latest and most startling development in the field.

In that case, the parties did not agree on the terms of a license or a lease. After some negotiations, they agreed *in principle* that Mr and Mrs Gnych would be granted a lease of the restaurant area on the first floor of the Polish Club and a storeroom and toilet on the ground floor, and that they would have non-exclusive access to a hall for overflow customers and to cater for larger functions.

Later, Mr and Mrs Gnych's solicitors sent the Club a "term sheet" which appeared to be incomplete and purported to set out the terms of a proposed lease of the restaurant area, kitchen and downstairs storage area and of a licence of the hall on various days.

Mr and Mrs Gnych's solicitors then sent the Club a draft lease and a licence agreement, but neither was ever signed. Two days later, however, the Club permitted Mr and Mrs Gnych to commence operating the restaurant. The Club then retained solicitors and there were further negotiations concerning the terms of the licence agreement and the lease, but they "came to nought" (at [12]).

Mr and Mrs Gnych asserted that a five-year lease had arisen by operation of s 8 of the *Retail Leases Act* (at [20]). The trial judge and the Court of Appeal agreed.

In the Court of Appeal, Tobias AJA said (at [76]) that Mr and Mrs Gnych had conceded in oral argument that:

> [T]here was at least an implied agreement between the parties that [they] would have exclusive possession of the restaurant area. Furthermore, the parties seem to have agreed the rent (which was, I infer, paid over a period of some 17 months). By virtue of s 16(1) of the RL Act the term of the respondents' [that is, Mr and Mrs Gnych's] exclusive occupation was five years from 31 March 2012.

Nonetheless, the Club succeeded on appeal because the Court of Appeal held that the lease was rendered illegal, and therefore void and unenforceable, by s 92(1)(d) of the *Liquor Act 2007* (NSW).

Section 92 provides in part:

> **92. Control of business conducted on licensed premises**
> (1) A licensee or a related corporation of the licensee must not:
> ...
> (c) lease or sublease any part of the licensed premises on which liquor is ordinarily sold or supplied for consumption on the premises or on which approved gaming machines are ordinarily kept, used or operated, or
> (d) lease or sublease any other part of the licensed premises except with the approval of the [Independent Liquor and Gaming] Authority.

The Court of Appeal agreed with the trial judge that s 92(1)(d) applied to all the parts of the licensed premises to which s 92(1)(c) did *not* apply. Hence, it applied to the restaurant and kitchen operated by Mr and Mrs Gnych. Because the Authority had not approved a lease of those areas, the court had to determine whether the lease that arose under the *Retail Leases Act* breached s 92(1)(d).

The Court of Appeal considered the law on illegality and was inclined to hold that a lease arising under the *Retail Leases Act* which did not carry with it a right to exclusive possession of part of the licensed premises "would not qualify as a lease under the general law" (at [75]; see also at [78]) and thus such a lease would not breach s 92(1)(d). In other words, some retail shop leases are not leases for the purposes of the *Liquor Act*.

As noted, however, Mr and Mrs Gnych had accepted that their agreement with the Club gave them exclusive possession of the restaurant area. They submitted, however, that the reference to "lease" in s 92(1) was to the grant of a lease at law; that in their case there was no grant of such a lease because their lease came into existence only by operation of the *Retail Leases Act*; and that such a "lease" did not involve the grant by the licensee of a lease under the general law (at [74]).

These submissions were supported by the holding of the trial judge, who had ruled that their claim did not depend on any illegality, "as they were simply asserting a lease that arose from the conduct of the parties and by operation of s 16(1) of the *Retail Leases Act*" (at [62]).

Tobias AJA (at [77]), with whom Meagher and Leeming JJA agreed, did not accept the submission or the reasoning of the trial judge:

> It is trite law that a lease or leasehold interest is created whenever one person gives another the legal right to exclusive possession of land for a period or term that is certain (or capable of being rendered certain) … Once the respondents entered into possession the term of their right to occupy was rendered certain by s 16(1) of the RL Act. It follows in my view that contrary to the respondents' contentions, there was created between the parties a lease at law. The fact that the term of the lease depended on the operation of the RL Act does not detract from that conclusion.

As a result, the Court of Appeal held that the lease at law breached s 92(1)(d). Therefore the lease was void and unenforceable (at [78]-[81]).

The Court of Appeal's decision thus had the result that the moment the *Retail Leases Act* caused a lease to come into existence, the *Liquor Act* rendered that lease illegal and therefore void and unenforceable.

With respect, where the element that makes the arrangement a "lease", namely the certainty of term, is supplied by the operation of the *Retail Leases Act*, can it fairly be said that s 92(1)(d) of the *Liquor Act* was breached because the licensee or related corporation had "lease[d] … part of the licensed premises"? In other words, in the circumstance that what converts the parties' arrangement into a lease is not something that the parties did but, rather, the operation of the *Retail Leases Act*, has the licensee or related corporation entered into a lease and thus done an illegal act?

Tobias AJA said (at [78]):

> The position may well have been different had the parties not agreed that the respondents had the right to exclusive possession of the restaurant area … There therefore was a lease by the Club to the respondents within the meaning of s 92(1) of the *Liquor Act*.

With respect, however, this reasoning omits a step – that the element which transformed the arrangement into a lease at law was the operation of the *Retail Leases Act* (by providing certainty as to the term), rather than anything done by either party.

It seems inherently contradictory to say that an arrangement which is converted into a lease by operation of one New South Wales statute is illegal because it breaches another New South Wales statute. To put it another way, how can a relationship that comes into existence only by force of one New South Wales statute be regarded as illegal by reference to another New South Wales statute? A thoughtful observer from Mars might well assume that all the laws passed by the New South Wales Parliament were intended to co-exist in harmony and that it therefore was strange that, in this case, two statutes seemed to be at war with each other.

For those acting for pubs and clubs, however, the *Polish Club* decision seems to create a mechanism for avoiding the imposition by the *Retail Leases Act* of a five-year term on catering licences. If the caterer is granted exclusive possession of some part of the licensed premises, pursuant to a licence with a term of, say, one year, the *Retail Leases Act* will convert the licence into a five-year lease. But the *Liquor Act* will immediately render that lease illegal, void and unenforceable – thus presumably leaving the parties with the one-year licence to which they originally agreed. The downside of employing the mechanism, however, is that it may necessarily involve an illegal act by the person granting the licence.

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DATE FOR ASSESSMENT OF DAMAGES

As a general principle, damages for breach of contract are assessed as of the date of the breach. But as a recent English case shows, where the breach is failure to complete a contract for sale of land, that principle can lead to unfairness, and so a variation of the principle is often applied to ensure that damages are truly compensatory.

The case is *Hooper v Oates* [2014] 2 WLR 743; [2013] EWCA Civ 91. This case has already been the subject of a short note by the General Editor (see "Recent cases" (2014) 88 ALJ 549 at 549), but a longer discussion may also be of interest. The vendors validly terminated a contract for the sale of land when the purchaser failed to complete. The contract price was £605,000. At the date for completion, the property was worth £600,000. For 14 months after the default, the vendors attempted to resell the property – progressively reducing the price – but without success. In order to help defray continuing mortgage commitments, they eventually leased the property to a tenant. When the lease expired, in late 2010, the vendors again attempted to sell the property, but without success. Eventually they gave up, and moved back into the property. By then, because of a drastically falling property market, the value had fallen to £495,000. Were their damages to be assessed at the date of the breach, or at the date (in 2010) on which they gave up trying to market the property?

The Court of Appeal drew attention to statements in leading texts on the law of damages to the effect that damages for breach of contract are assessed as at the date of the breach. However, as Lloyd LJ pointed out in the leading judgment, some of cases cited by these texts hardly bore out so inflexible a principle. Rather, the correct principle was to be taken from Lord Wilberforce's judgment in *Johnson v Agnew* [1980] AC 367 at 399-400. In essence, that principle was that (1) the role of damages is compensatory, that is, to put the innocent party into the same position as if the contract had been performed; (2) that principle *normally* leads to assessment of damages at the date of the breach (as in the common form of Sale of Goods legislation); but (3) if the innocent party reasonably continues to have the contract completed, it is more logical and just to assess damages at the date "when the contract is lost". Or, as Lloyd LJ put it (at [32])):

> Specific rules, such as the breach date rule … are individual examples of how the general principle [of damages being compensatory] is to be carried into effect, of putting an innocent party in the same position as he would have been in if the party in breach had performed his contractual obligations, instead of breaking them.

Also, the breach date rule assumed that there was a ready market for the property at the date of the breach. That might be the case in the sale of (for example) goods or commodities or listed shares; but it would rarely be the case in the sale of land, where marketing and preliminary legal work is needed before a binding contract can be entered into, and where so much depends on prevailing

economic conditions – the delay could be some months, or more. To fix the date for damages at the date of the breach ignores these factors, and in fact assumes a prior period of marketing, which by definition will not have happened (at [34]).

In the light of these matters, the Court of Appeal held that the date for assessment was the date when the vendors gave up their attempts to resell and moved back into the property. The reason for the failure to sell was not a failure to mitigate their loss; rather it was the lack of a buyer at an appropriate price, as a result of a drastically falling property market. And so damages were to be assessed having regard to the value of the property at that date – because that showed what loss the sellers had suffered. If the property market has declined during that time, this should be laid at the defaulting purchaser's door: had he completed as required by the contract, he would have suffered that decline in value, and so this is the loss for which he must compensate the sellers (at [38]).

The logic of the decision seems, with respect, compelling. Had the purchaser completed, the vendors would have had the benefit of the full contract price. The falling market after that breach had deprived them of that price. They had done all they could have done to mitigate their loss, but had not been able to resell. They should be entitled to the difference between the contract price and the value at the time they gave up efforts to resell. Only by that measure could they be placed into the same position, so far as money can do it, as they would have occupied had the contract been performed.

Whether this decision will be followed in Australia is somewhat unclear. A recent Western Australian decision follows it: *Lords v von Thomann [No 2]* [2014] WASC 320 (Beech J). The vendor validly terminated the contract for the purchaser's failure to pay the deposit. The vendor then tried to resell, but despite best efforts could not find a buyer for two and a half years, and then at a price substantially below the original contract price. The court held that the vendor's damages were the difference between the original contract price and the resale price. The "general rule" that damages are assessed at the date of breach or termination was to be departed from whenever necessary to ensure adequate compensation (at [150], [160]).

On the other hand, a yet more recent decision of the New South Wales Court of Appeal seems distinctly unimpressed by *Hooper v Oates*. That decision is *Ng v Filmlock Pty Ltd* [2014] NSWCA 389 (Emmett and Gleeson JJA; Tobias AJA agreeing). The vendor terminated the contract for the purchaser's failure to comply with a notice to complete, and eventually (after what appear to have been diligent but unsuccessful attempts) resold the land some 13 months later. The vendor claimed damages calculated at the difference between the contract price and the resale price.

The Court of Appeal seemed concerned to uphold the usual measure of damages, namely the difference between the contract price and the value at the time of the breach (or, more precisely, the value at the time of the termination in response to the breach). I say "seemed concerned" to uphold the usual measure of damages, because the practical issue in the case was that there was no sufficient evidence before the court of the value of the land at the time of the breach (termination); and the court's eventual order was to send the case back to the trial judge for argument about that value. But the clear implication from the judgments of Emmett JA (at [26]-[27], [40]) and Gleeson JA (at [49]-[50]) is that the court much preferred the normal rule that damages are assessed at the date of the breach (termination) even where the vendor is unable to resell because of a fall in the market. There was, said Emmett JA, "good reason" for the usual rule where a vendor seeks damages for loss of bargain – for the critical date is when the bargain is lost (at [27]), that is, when the breach (termination) occurs. Nevertheless, Gleeson JA (at [52]-[56]) in particular declined to "exclude the possibility that, in an appropriate case", the "interests of justice" might favour assessing damages by reference to a later date than the breach (termination), "such as the contract price on resale". These obiter statements will indeed make life difficult for those advising vendors about the appropriate quantum of damages.

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