MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Michael Joseph Biedrzycki v Francis W A Bird & Cheryl I Smith**
Citation:	**[2019] ACTMC 8**
Hearing Dates:	20 – 23 March 2018
	22 May 2018
Decision Date:	7 March 2019
Before:	Magistrate Fryar
Decision:	See [45] – [49]
Catchwords:	**CONTRACT** – Breach of contract.
	COMMERCIAL LEASES – premises unfit for purpose – termination of lease – proper service of Termination Notice – estoppel – conversion – detinue – damages.
Legislation Cited:	*Leases (Commercial and Retail) Act 2001* (ACT), sections 81, 84 – 85, 122
	Legislation Act 2001 (ACT), section 247
Cases Cited:	*Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17
	Ripka Pty Ltd v Maggiore Bakeries Pty Ltd [1984] VR 629
Parties:	Mr Michael Biedzrycki (Applicant)
	Mr Francis Bird & Ms Cheryl Smith (Respondents)
Representation:	Mr Buckland of Counsel (Applicant)
	Mr Arthur of Counsel (Respondents)
	Solicitors
	Bradley Allen Love Lawyers (Applicant)
	KJB Law (Respondents)
File Number:	CL 17/2016

MAGISTRATE FRYAR:

Introduction

1. This is a claim pursuant to the *Leases (Commercial and Retail) Act 2001* (ACT) ('the Act') for compensation on several different bases. There is no dispute that the Act applies to this particular lease. The Applicant has made a claim for:
    a. Damages associated with the premises being unfit for the purpose of the business as a result of the ingress of water and the inoperable roller door;
    b. Damages associated with the unlawful termination of the lease and the resulting lack of access to the premises;
    c. Compensation as a result of reliance on the representations concerning lease to buy; and
    d. Damages for conversion and/ or detinue of goods and repayment of the security bond.

History

2. On 18 November 2013 the Applicant, Michael Biedzrycki, signed a lease in relation to the premises described as Unit 1, 9 Whyalla Street Fyshwick ACT 2609 which were owned by the Respondents. The lease was for a term of 2 years commencing on 1 December 2013, with an option to renew. Rent was payable in the sum of $44,220 plus GST per annum (and increased annually by CPI each year thereafter), payable by equal monthly instalments in advance.
3. At the conclusion of the term of the lease the Applicant did not exercise his option to renew, so he continued to occupy the premises on a periodic month to month tenancy basis. The Applicant operated his plumbing/ trade based business from the premises and during his tenancy he made substantial alterations to the premises. He also sublet part of the premises from approximately July 2014.
4. During the tenancy the premises were periodically subject to some flooding, and twice a roller door was, for an extended period, inoperable.
5. The Applicant began to withhold rent from March 2016, and on 11 August 2016 the Respondents purported to terminate the lease by service of a Notice of Termination.

On 19 September 2016 the Respondents proceeded to lock the Applicant (and his sub-tenant) out of the premises. The Applicant's tools of trade, equipment and personal belongings remained in the premises until after negotiations he was allowed back in to the premises to recover his goods and make good the premises.

Evidence

6. At the hearing the witnesses gave oral evidence supported by affidavit evidence. The Applicant gave evidence in what can only be described as a forthright and detailed manner. Although there may have been concerns about some exaggeration, the main components of his evidence were supported in substance by documents and contemporaneous evidence. He was not moved in cross-examination. Other witnesses were called on behalf of the Applicant, their evidence not being seriously challenged.
7. The Respondents both gave evidence. I find that Ms Smith was a fundamentally honest witness and when her evidence or understanding was challenged in cross-examination she made appropriate concessions. It is clear from her evidence, in the light of Mr Bird's evidence, that there were some failures in communication between the two Respondents.
8. Mr Bird's evidence was more problematic in that there were some direct contradictions between his evidence by affidavit and the evidence he gave orally in court. He had some lapses of memory which seemed convenient, and his recollection of crucial aspects of the evidence was otherwise poor, although he did make some concessions during cross-examination.
9. One particular problem was the evidence concerning the excessive electricity consumption following the applicant being locked out of the premises. The documentary evidence is irrefutable about the consumption of the electricity. However Mr Bird who seemed to be the only person who could give an explanation did not, and seemingly could not, give one. His reliability as a witness was questionable.
10. Accordingly where the Respondent's evidence is at odds with the evidence of the Applicant, I prefer the evidence of the Applicant.

Termination of Lease

11. Division 12.5 of the Act deals with the termination of a lease by the lessor. Section 122 states:

122 Procedure for termination of lease by lessor etc

*(1) If the lessor has a right to terminate the lease, the lessor may give written notice of termination to the tenant (the **termination notice**).*
Note For how documents may be given, see the Legislation Act, pt 19.5.
*(2) Within 14 days after being given the termination notice (the **allowed period**), the tenant may—*
(a) contest the termination by application to the Magistrates Court; or
(b) agree to the termination by written notice to the lessor.
(3) The termination takes effect in accordance with the terms of the termination notice if, within the allowed period, the tenant—
(a) does not contest the termination by application to the Magistrates Court; or
(b) agrees to the termination by written notice to the lessor.
(4) If the tenant contests the termination by application to the Magistrates Court within the allowed period—
(a) the termination does not have effect unless it is confirmed by the Magistrates Court; and
(b) if the termination is confirmed—it has effect on the day ordered by the court.
(5) The lease may be terminated by the lessor only in accordance with this section.
(6) If the tenant is in possession of the premises, the lessor may enter the premises to recover possession of the premises only—
(a) under a court order or warrant; or
(b) if the lease has been terminated in accordance with this section.

12. The Respondents submitted that they had valid grounds for terminating the lease on the following bases:

a. The payment of rent was the whole of the consideration for the Applicant's use and occupation of the Premises;
b. The Applicant was constantly in arrears with rental payments, often being two months behind. Ms Smith had to write to him on eighteen occasions to request payment of rent, four of which involved the service of a Notice of Termination expressed to have effect if he did not pay in the meantime;
c. The Applicant ceased to pay rent entirely from 1 April 2016. The result of this was that by the time the lease was terminated on 15 September 2016 the

Applicant was six months in arrears. That amounted to a substantial breach of the Applicant's obligations under the lease;

d. Clause 6 of the Lease Agreement stated: "*The Tenant shall not make any alterations, additions or improvements to the premises without the prior written consent of the Landlord."* However, the Applicant made extensive alterations over a period of many months without seeking such prior approval, verbal or written. Although the Applicant relies on Mr Bird's lack of objection to the alterations (in that he saw them and did not tell the Applicant to stop at the outset) the Respondents say that does not excuse the Applicant's failure to comply with the terms of the lease.

e. In relation to the issue of subletting, the lease says: "*11. The tenant shall not sublet or assign the Premises nor allow any other person or business to use or occupy the premises without the prior written consent of the Landlord, which consent may not be unreasonably withheld.*" There is additional provision for the Tenant to sublet for the purposes of storage only. The Applicant sublet part of the premises to Mr Hetherington without the prior approval of the Respondents and they say that he cannot rely on Mr Bird's lack of objection as an excuse for breaching the terms of the lease.

13. It was not in contention that the Applicant deliberately withheld rent from March 2016, he says because of the problem with the roller door and the occasional flooding of the premises. The Applicant submits he is entitled to relief arising from the poor condition of the premises. He submits the premises were unfit for use for a significant period of time due to the broken roller door and flooding.

14. The relevant sections of the Act are as follows:

84 Damaged premises unable to be used

(1) This section applies if—
(a) leased premises are, or the building containing the premises is, damaged; and
(b) the premises cannot be used for their normal purpose because of the damage.
(2) The tenant is not required to pay rent or outgoings under the lease while the premises cannot be used unless the Magistrates Court decides otherwise.
(3) The lessor may apply to the Magistrates Court for an order for payment (in full or in part) of rent or outgoings if—
(a) the damage to the premises or building was caused (fully or partly) by an act or omission of the tenant; or

(b) the lessor is unable to claim insurance for the damage because the tenant has invalidated the lessor's insurance.

(4) This section does not apply to the extent (if any) to which the lessor and tenant agree to the payment, or reduced payment, of rent or outgoings after the premises are, or the building is, damaged.

85 Damaged premises able to be used

(1) This section applies if—

(a) leased premises are, or the building containing the premises is, damaged; and

(b) the tenant can use the premises (fully or in part) for their normal purpose despite the damage.

(2) The tenant must not refuse to pay rent or outgoings while the premises are, or the building is, damaged unless the Magistrates Court decides otherwise.

(3) The tenant may apply to the Magistrates Court for an order for payment of a lower amount of rent or outgoings than is required by the lessor.

(4) This section does not apply to the extent (if any) to which the lessor and tenant agree to the payment, or reduced payment, of rent or outgoings after the premises are, or the building is, damaged.

15. The Respondents submit that the Applicant is not entitled to withhold rent as section 85 of the Act states that a tenant must not refuse to pay rent when damaged premises are still capable of use. Further, the law is settled to the effect that a lessor is not responsible for the fitness of the premises for any of the tenant's intended uses in the absence of an express contractual obligation, and that was not the case here.
16. The following further submissions on behalf of the Applicant were made:
    a. Regarding the failure to repair the roller door to the Premises:
        i. The Respondents accepted that the maintenance of the roller door was their responsibility;
        ii. The roller door was inoperable for 76 days and this had a significant adverse impact on the Applicant's business. In fact the Applicant gave evidence (not traversed in cross-examination) that the inoperability of roller door caused him to lose work worth $55,100.
    b. Regarding the failure to remedy the flooding at the Premises:
        i. The Respondents accepted the flooding of the Premises was their responsibility and conceded that they took no steps to effect necessary repairs;

ii. Both Ms Smith and Mr Bird gave evidence that the warning given to the Applicant (prior to him entering into the Lease Agreement) concerning the flooding was incomplete and did not give him sufficient notice of the condition of the Premises or the extent of the ingress of the water;

iii. The ingress of water interfered with use of the Premises for a commercial purpose to a significant extent, in particular given the inability to use electrical equipment during periods of flooding.

17. It is unclear from the evidence whether the ingress of water occurred because of "damage" (in line with the provisions of the Act) or simply an inadequacy of drainage. The actual cause for the ingress of the water is not, in my view, something that I can assume. Further, I am not satisfied that the legislative threshold of "use for its normal purpose" was entirely flouted. It seems from the evidence that the Applicant also used the premises as his residence, and although the flooding caused considerable problems for the regular conduct of his business which may have entitled him to make an application to the court pursuant to section 85 of the Act, he did not do so.

18. Although the damaged roller door caused substantial inconvenience, the Applicant agreed that he was still able to use the Premises in part. Therefore the Applicant was not entitled to simply withhold rent, and there was no relevant application made to the Court pursuant to section 85.

19. It is relevant to note that section 81(c) and (e) of the Act provides that the lessor is liable to pay the tenant reasonable compensation for loss/damage if the lessor otherwise adversely affects the trade of the tenant by the lessor's conduct without reasonable cause, whether by act or omission. Although there is no direct provision in the Lease Agreement placing responsibility for repairs on the landlord, the Respondents agreed they were in fact responsible (and indeed they did ultimately repair the roller door). On that basis the Applicant may have been entitled to some compensation under section 81, however I cannot be satisfied that all elements have been made out on the evidence (eg. 'as soon as practicable', 'without reasonable cause'), nor the connection with the Respondents' apparent lack of action and any damage suffered by the Applicant.

20. Ordinary principles of contract law apply to leases, including termination for repudiation, fundamental breach and breach of a fundamental or essential term: see *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 ("*Progressive Mailing House*") Mason J held at 31: "[*F]undamental breach [is] in the sense of breach of a condition or breach of another term or terms which is so serious that it goes to the root of the contract, and thus deprives the other party of substantially the whole benefit of the contract*."
21. Examples of where courts have held that repudiation occurred include:
    a. The tenant refused to pay rent in accordance with its groundless claim that it was under no liability to pay the rent until certain work was carried out satisfactorily. The tenant also committed other breaches of covenant (including causing physical damage to the building, subletting without consent and breaching laws regulating the use of premises): *Progressive Mailing House.*
    b. The tenant paid only half of the rent due over an eight month period, owed the landlord a considerable sum for rates, taxes and stamp duty, and had stated that it was unable to pay the rent due and other charges. Such action demonstrated an inability to perform the contract and made further commercial performance impossible: *Ripka Pty Ltd v Maggiore Bakeries Pty Ltd* [1984] VR 629.
22. As the Applicant was not entitled to withhold rent under the Act, I find that the non-payment of rent was indeed a fundamental breach which entitled the Respondents to terminate the lease. Certainly that, together with the breaches concerning the subletting and alterations without prior written approval, provide a basis for the termination of the lease. In relation to the last two breaches of specific clauses in the Lease Agreement, I am of the view that the issue of estoppel does not arise. A tenant simply cannot breach a clause of the lease agreement and then seek to rely on lack of complaint by the Landlord to justify his position.

The Termination Notice

23. The next issue then is whether the lease was correctly terminated in accordance with the Act. The Applicant submitted that the purported Notice to Quit did not constitute a valid termination notice and that it had not been correctly served on the Applicant. It was submitted on behalf of the Applicant the Notice to Quit was ineffective as a Termination Notice due to two reasons:
    a. It did not purport to be a Notice of Termination but, rather, a Notice to Quit, and
    b. It did not state any grounds upon which the Respondents relied to justify termination of the Applicant's tenancy (ie, it contained no allegation that the Applicant had repudiated the lease).
24. However the Respondents submitted that section 122 does not require that a ground for termination be stated in the Notice, only that the lessor give notice that they have a ground. The actual Notice stated: "*Take notice that the Lessor requires you to quit and deliver up Premises with effect from midnight… on 15 September 2016… This notice terminating your periodic tenancy has been issued to you as the Tenant in accordance with the notice requirements set out in the Leases (Commercial & Retail) Act 2001 (ACT)*". It was also submitted that any notice given is to be read in the context of previous correspondence: eg. a previous letter of 2 August 2016 had stated that if the Applicant did not respond the Respondents would give notice to terminate "noting that your client has now failed to pay rent for April to August 2016".
25. I accept those submissions and find that the Termination Notice was valid. Any further information that the Applicant might need if he wished to pursue his right to contest the termination pursuant to section 122(4) could simply be remedied by particulars.
26. With regard to service of the Notice, it was purported to have been sent by express post to the Premises (being the business address of the Applicant) and by email to the Applicant, as well as the Applicant's solicitor. However, it seems that it may not have in fact been emailed directly to the Applicant, and it appears that the Applicant's solicitor did not have instructions to accept such service.

27. With regard to service by express post, the Applicant gave evidence that the mail addressed to him at the Premises was not received for an extended period of time, that the Premises shared a mailbox which was unsecured and accessible to a large number of third parties.
28. The evidence was that the Termination Notice was served by prepaid post addressed to the Applicant's business address and was delivered to the mailbox of the Applicant at 7.30am on 11 August 2016.
29. The termination notice must be served in accordance with section 247 of the *Legislation Act 2001* (ACT)*:*
    a. by giving it to the individual; or
    b. by sending it by prepaid post, addressed to the individual, to a home or business address of the individual; or
    c. by faxing it to a fax number of the individual; or
    d. by emailing it to an email address of the individual; or
    e. by leaving it, addressed to the individual, at a home or business address of the individual, with someone who appears to be at least 16 years old and to live or be employed at the address.

    A document served by post under this part is taken to be served when the document would have been delivered in the ordinary course of post: section 250(1).
30. Accordingly the evidence supports that the Termination Notice was validly served by the express post method. The purported behaviour of Mr Bird is, in my view, irrelevant as to whether service had been effective. Further I am of the view that even though the Applicant says that he did not give his solicitors instructions to accept service, it is very likely that he would have been aware of the contents of the Notice given the ongoing negotiations between the parties' solicitors. Accordingly the lease was validly terminated, notice was correctly given, and the Respondents were lawfully able to "enter the premises to recover possession of the premises" when they in fact did on 19 September 2016 (see section 122(6)).

The "lease to buy" representation

31. The issue is whether the Respondents made representations to the Applicant regarding an option to buy the Premises which resulted in him improving the fit-out of the Premises.
32. The Applicant contends that during conversations with Mr Bird there was an agreement that following the conclusion of the lease he could buy the property from the Respondents. The Applicant may have thought or assumed he had an agreement in relation to that matter, but whether there in fact was any such agreement is, on the evidence, problematical.
33. The Applicant deposed in his affidavit that in October or November 2013 he told Mr Bird that he was after a lease to buy option, and Mr Bird mentioned retirement plans and said that the proposal sounded good. There were no details in the conversation and that seems to have been the only such conversation about the matter prior to the signing of the lease on 18 November 2013. The Applicant and Mr Bird did have some conversation about potential changes to some clauses in the lease agreement to which Mr Bird responded that he should talk to Ms Smith because "she handles that side of things". In my view that was an indication that Mr Bird had no authority to make any representations regarding the lease such that he could bind the partnership.
34. On 22 April 2015 the applicant texted Ms Smith about purchasing her share of the premises where, inter alia, he said: " *… what I also wanted to know is would you be interested in selling the block or is it locked in a superfund frank and fay have expressed they would be interested in selling in the future and I have organised Colin Davies to assess and value the block the reason I ask is I have Andrew Ho willing to put together a lease to buy agreement projected for 3 to 4 years something to think about! If it's a no go let me know and will save me the mucking about, if there was an agreement we would make provisions to upgrade outdoor areas*."
35. Again in June 2015 the Applicant had an email exchange with Ms Smith where he proposed a "lease to buy agreement' and the response he received was that she was not interested in selling her share of the property.

36. It is clear to me from those exchanges that prior to the lease being signed and the Applicant renovating the premises there was no agreement regarding a lease to buy, nor indeed a representation that there would be such an agreement. Nearly two years later the Applicant was still attempting to persuade the respondents to come to such an agreement, and they clearly did not agree to that course. If there had been a prior agreement the content and timing of these communications would have been different.
37. Accordingly any claim for damages in relation to this aspect must fail.

Conversion & Detinue

38. The Applicant claims that, in locking up the Applicant's tools and materials within the Premises on 19 September 2016 and refusing to deliver possession of those goods unconditionally to the Applicant until 10 February 2017, the Respondents are guilty of converting/detaining the Applicant's goods. I was referred to a number of authorities on the issue by the parties, many of which can, in my view, be distinguished on their facts.
39. It is not in dispute that at the time of the lockout the Applicant still had substantial tools and equipment/ goods in the premises which he was entitled to possess. The evidence is that from 19 September 2016 to February 2017 there were numerous and significant attempts to negotiate between the parties "appropriate" access for the Applicant to retrieve his possessions.
40. In the textbook Law of Torts (5th edition, Balkin & Davis, 2013) at page 83 the authors write, with reference to a number of authorities: "*A refusal to surrender goods upon lawful and reasonable demand is a conversion. … If the defendant refuses to surrender in circumstances where it would be unreasonable to do so immediately on demand, this is not conversion. The defendants may postpone surrender pending a reasonable time in which to confirm the title of the claimant, or, if an employee, to consult the employer. This reasonableness is a question of fact; many factors may be relevant – the time of the demand, the expense and inconvenience of immediate compliance, the knowledge on the part of the defendant of the claimant's title, and identity, and whether the defendant had adequately conveyed to the plaintiff the grounds for the temporary refusal.*"

41. In this case I do not find that the Respondents converted the Applicant's goods that were ultimately retrieved by him to their own use, nor was the Applicant refused access permanently or for an indefinite time. When considering the reasonableness of the demand for the return of the goods, and the reasonableness of the refusal of surrender of the goods there must be a balanced approach. In the circumstances that led to the termination of the lease and the lockout, a demand by the Applicant for immediate and unfettered access was, in my view, unreasonable. In the circumstances where there were those continued negotiations between the parties, I do not consider the reasons for each of the parties viewpoints during those negotiations, nor the time taken to finalise such negotiations (albeit unfortunately lengthy) as due to the strident unreasonableness of either party.
42. Generally I cannot find the torts of conversion or detinue made out. However, concerning the 85 items/ goods that the Applicant said in his evidence were missing from the premises when he was again allowed access in February 2017 ('the missing items'), I do find the Respondents liable. I have previously referred to the evidence that Mr Bird was supposedly the only person who had access to the premises during the period of the lockout, and the evidence concerning the excessive power consumption during that period, and from that evidence it can in my opinion be inferred that either the Respondent allowed other parties access to the premises during that period, or he was reckless as to whether other parties had access.
43. The Applicant's evidence, that I accept, is that the missing items were in the premises before the lockout, but not there in February, and so the only available inference is that they must have been stolen, and that must have been attributable to the recklessness of Mr Bird in failing to keep the premises secure. Accordingly I find the Applicant is entitled to recover from the Respondents the replacement costs of such missing items in accordance with his evidence. In relation to the value of the missing items, I do not accept the submissions on behalf of the Respondents either that the Applicant's evidence is inadequate concerning such replacement costs, or that he should only be entitled to nominal amounts. However I do agree that the difference between the costs of purchase and the current replacement value (on the basis of those set out in Schedule A and Exhibit 5) is significant and it would be fair and reasonable to make an adjustment accordingly. I therefore find the Applicant

should be entitled to recover the sum of $150,000 as compensation for the missing items.

44. There is no dispute that the Applicant is entitled to the return of the security bond.

Orders

45. In relation to the cross-claim for rental arrears there is judgment in favour of the Respondents against the Applicant in the sum of $23,015.30 plus pre-judgment interest from 15 September 2016.
46. The Applicant's claims for damages with regard to the value of lost work as a result of the condition of the premises, the cost of the fitout and generally for conversion/ detinue are dismissed.
47. In relation to the missing items there is judgment for the Applicant against the respondents in the sum of $150,000 plus pre-judgment interest from 10 February 2017.
48. The Applicant is also entitled to the return of the security deposit together with pre-judgment interest from the date of the completion of the making good of the premises.
49. There is no order as to costs.

I certify that the preceding 49 [forty nine] numbered paragraphs are a true copy of the Reasons for Decision of her Honour Magistrate Fryar.

Associate: Emma Bayliss

Date: 7 March 2019