

## MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** Souvlaki Hut (Belconnen) Pty Ltd v Bunker Property Pty Ltd

**Citation:** [2018] ACTMC 16

**Hearing Date:** 15 August 2018

**Decision Date:** 22 August 2018

**Before:** Magistrate Theakston

**Decision:** See paragraph [27]

**Catchwords:** APPEAL – appeal from Registrar – application to amend originating claim and statement of claim – delay in proceedings – no reason for delay – appeal dismissed

**Legislation Cited:** *Court Procedures Act 2004* (ACT) s 5A  
*Court Procedures Rules 2006* (ACT) rr 21, 503 (4), 6256  
*Leases (Commercial and Retail) Act 2001* (ACT) ss 122, 145

**Cases Cited:** *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27  
*Chen v The College of Building Ltd* [2015] ACTSC 19  
*Commonwealth of Australia v Australasian Correctional Services Pty Ltd* [2013] ACTSC 37  
*Kaye v Woods* [2014] ACTSC 25  
*M v Australian Capital Territory* [2012] ACTSC 20  
*Meredith v Commonwealth of Australia* [2009] ACTSC 168  
*Weston v Publishing and Broadcasting Ltd* (2011) ACSR 206

**Parties:** Souvlaki Hut (Belconnen) Pty Ltd (Plaintiff)  
Bunker Property Pty Ltd (Defendant)

**Representation:** **Counsel**  
Mr D Robens (Plaintiff)  
Mr J Pappas (Defendant)

**Solicitors**  
Kamy Saeedi Law (Plaintiff)  
Bradley Allen Love Lawyers (Defendant)

**File Number:** CS 943 of 2012

**Decision under appeal:** Court: Magistrates Court  
Before: Deputy Registrar Edwards

Date of Decision: 18 April 2018  
Case Title: Souvlaki Hut (Belconnen) Pty Ltd v  
Bunker Property Pty Ltd  
Court File Number: CS 943 of 2012

## **MAGISTRATE THEAKSTON:**

### **Background**

1. In this matter, the plaintiff applied for leave to vary its pleadings. The application for leave to file an amended Originating Claim and Statement of Claim was initially heard before a deputy registrar and dismissed. The plaintiff has appealed against that decision and I have heard the appeal. I will dismiss the appeal and confirm the deputy registrar's decision. These are my reasons.
2. The right to appeal a decision of a deputy registrar is provided by r 6256 of the *Court Procedures Rules 2006*. Subparagraph (4) of that provision provides that the appeal is a hearing anew. Accordingly, I have considered the application based upon the evidence and the submissions before me, without necessarily forming a view about the earlier proceedings before the deputy registrar. I note this appears consistent with the approach taken by Penfold J in *Chen v The College of Building Ltd* [2015] ACTSC 19.

### **Situation**

3. Souvlaki Hut (Belconnen) Pty Ltd was a restaurant franchisee enjoying the use of retail premises located in Belconnen and owned by Bunker Property Pty Ltd. Souvlaki Hut was not on the lease of the property. Bunker Property had leased the premises to the separate entity, Greek Style Realty Pty Ltd. The Souvlaki Hut franchisor appears to have been a further distinct entity, associated in some way with Greek Style Realty. Within the lease, Bunker Property expressly consented to Greek Style Realty granting a licence or sub-lease for the purpose of operating a Souvlaki Hut franchise.
4. The lease commenced in 2009. By March 2011, the franchisor was in voluntary administration and rent payable under the lease was outstanding. In April 2011, Bunker Property issued a termination notice. There was no application contesting that notice and therefore, by operation of s 122 of the *Leases (Commercial and Retail) Act 2001*, the lease was terminated.
5. The lease contained provisions requiring Greek Style Realty to remove its fixtures and movable property. The time available to do that was before the termination of the lease or within 14 days thereafter, respectively. If such items were not removed, the fixtures would become the property of Bunker Property and the moveable property would be deemed abandoned.
6. Between January and August 2011, negotiations were conducted between Bunker Property and Mr Victor Stellos. Mr Stellos was originally an agent for Greek Style Realty. However, during later negotiations Mr Stellos also acted on his own behalf and possibly on behalf other entities, for example 40 Two Pty Ltd. Ultimately, the negotiations concluded without a further written lease being executed. On 12 August 2011, Bunker Property changed the locks on the premises. It appears that no business was trading at the premises at that time. There is a dispute about whether Bunker Property allowed Souvlaki Hut access onto the premises from 12 August 2011.

7. Proceedings were commenced in October 2012 by Originating Application with the associated Statement of Claim. A Defence and Counterclaim was filed in July 2014, with a Defence and Amended Counterclaim filed in August 2014. A Reply to Defence and Answer to Counterclaim was filed in December 2014. No further steps were then taken for three years until the Application in Proceedings was filed in February 2018 seeking the court's leave to file an amended Statement of Claim.
8. It was agreed between the parties that the application for leave was filed after the expiration of the relevant limitation period.

### **The claims**

9. The original pleadings claimed that the lease had not been terminated in early 2011. Souvlaki Hut sought damages for the conversion of property located at the premises when the locks were changed, and restitution for a bank guarantee it had earlier provided and which was called upon by Bunker Property.
10. The draft Amended Statement of Claim concedes the lease had been terminated, but claims that between April and August 2011:
  - (a) Bunker Property engaged in negotiations with Souvlaki Hut and 40 Two Pty Ltd for a new lease that would use the existing fixtures;
  - (b) Souvlaki Hut retained occupation and control of the premises; and
  - (c) Various payments were made on behalf of Souvlaki Hut.
11. The draft also claims Souvlaki Hut entered into an informal lease with Bunker Property in April 2011, and the latter subsequently breached its obligations under the Leases Act by entering the premises prior to the termination taking effect. It also claims that Bunker Property breached the terms of the informal lease by not allowing Souvlaki Hut further time to remove its property from the premises.
12. The draft also claims that the damages suffered were due to Bunker Property breaching the informal lease, the Leases Act and by conversion. Additionally, it claims that Bunker Property acted in a manner that was unconscionable, harsh and oppressive in contravention of the Leases Act.

### **Is There a New Cause of Action?**

13. Rule 503(4) of the Court Procedures Rules imposes limitations on the inclusion of a new cause of action in amended pleadings if the limitation period has expired. Leave may be granted only if:
  - (a) *the court considers it appropriate; and*
  - (b) *the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.*
14. Counsel for Souvlaki Hut argued that there was no new cause of action, as the amendments all run from the facts that were present in the original proceedings. They all relate to the leasing of premises and goods left in the premises. Counsel for Bunker Property argued that the amendments do introduce a new cause of action, due to the introduction of claims for damages due to the breach of the Leases Act, and the new suggestion of a second lease between the parties. Both parties referred to a test

proposed by Refshauge J in *Meredith v Commonwealth of Australia* [2009] ACTSC 168 at [23]. Reproduced simply, and without a number of qualifications, that test involved the following question: Would the plaintiff be entitled to relief if they failed to prove material facts in the original pleadings, but proved facts in the amended pleadings? If the answer is yes, then it is likely the new pleadings include a new cause of action.

15. In the instant case, were Souvlaki Hut not to prove that the original lease was not terminated, but did prove that there was a second lease and Bunker Property did restrict Souvlaki Hut's access to removing their fittings and movable property, then Souvlaki Hut may be entitled to relief. I also note that the amended pleadings would include a totally new allegation of unconscionable, harsh and oppressive conduct. In those circumstances I am of the view the amended pleadings would include a new cause of action.
16. Accordingly, before I could grant leave, I would need to be satisfied that it was appropriate to do so and the new cause of action arises out of substantially the same facts as described in the original pleadings. I am satisfied of the second limb, and will consider the first limb below.

### **Is it Appropriate to grant leave?**

17. In deciding whether it is appropriate to grant the leave I need to consider the need to do justice between the parties, and the principles described at s 5A(1)(b) of the *Court Procedures Act 2004*, namely the imperative to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. That latter consideration is amplified at s 5A(2), which reads:

*... the main purpose includes the following objectives:*

- (a) *the just resolution of the real issues in civil proceedings;*
  - (b) *the efficient use of the judicial and administrative resources available for the purposes of the court;*
  - (c) *the efficient disposal of a court's overall caseload;*
  - (d) *the timely disposal of civil proceedings;*
  - (e) *the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.*
18. *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 is frequently cited as authority confirming the significance of the predecessor to s 5A, namely r 21 of the Court Procedures Rules. That significance was summarised by French CJ at [5] when he observed:

*In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.*

19. The demonstrated strength or otherwise of the amended case is also a relevant consideration. In *Kaye v Woods* [2014] ACTSC 25, Master Mossop made the following observation at [38]:

*Where a pleading is amended many years after the commencement of proceedings, the prejudice assumed to arise out of the granting of the further indulgence and the further delay in the final disposition of the matter means that it is incumbent upon the plaintiff to provide some evidentiary support for the arguability of the claims. The extent of evidentiary support will be very much dependent upon the nature of the case and its procedural history. The strength or otherwise of the case demonstrated will be relevant to the exercise of discretion to permit the amendment.*

20. Souvlaki Hut did not put before me any evidence in support of the facts arising from the proposed amended pleadings. This would have been particularly important considering the number of different entities involved at the relevant time. In contrast, Bunker Property put on evidence that placed into doubt the existence of certain facts alleged in the proposed pleadings. That evidence included terms of the lease, as described above at [5], and correspondence from Bunker Property expressly indicating that there was no intention to create a legal agreement before they signed a written lease. That evidence suggested strongly that by Souvlaki Hut leaving its fittings and movable property at the premises after April 2011, such property either became part of the premises or was abandoned. It also cast significant doubt over the existence of the second lease. While I could not say that the amendment would be obviously futile, I was left with strong doubts about the strength of Souvlaki Hut's case.
21. The proceedings are at the stage where pleadings have closed some three years ago and no further steps have been taken, other than this application to amend the pleadings. It cannot be said that the court's valuable hearing time would be lost by granting the leave sought, or that other matters in the court's lists would be prejudiced by allowing the proposed amendment. However, granting leave to amend the proceedings would create additional delay in the finalisation of these proceedings in circumstances where there has already been considerable delay due to the inaction of the parties. There was no evidence before me about what other preparation, if any, the parties had undertaken in preparation for a trial.
22. I was referred to the decision of *Commonwealth of Australia v Australasian Correctional Services Pty Ltd* [2013] ACTSC 37. In that decision, Penfold J noted with approval a relevant consideration in relation to the discretion to strikeout a claim described in *Weston v Publishing and Broadcasting Ltd* (2011) ACSR 206. At [502(5)], Ward J made the following observation:

*A defendant who takes no steps to secure progress in the proceedings, or to activate an apparently inactive plaintiff or who stands by in the hope that the passage of time will ensure the quiet death of the proceedings or that the longer delay will strengthen the case for striking out, runs the risk that that very behaviour will operate to his/her/its disadvantage.*
23. Those two decisions were concerned with applications to strike out a claim, rather than an application for leave to file amended pleadings. However, the consideration must still be relevant. A defendant could not be heard to complain about delay, and in particular the consequences thereof, if they were passively complicit in allowing such a delay to occur. That logic would apply equally to an application for leave to amend pleadings, as to an application to strike out a claim.
24. However, I do not understand that such a consideration goes as far as negating the need for an applicant, seeking the indulgence of a court, to provide an explanation of any delay in making the application. A defendant may simply not know that such an application will or is in contemplation of being made. In such circumstances, their

tolerance of inactivity is in the context of the proceeding generally, as currently pleaded, rather than being aware of any delay in a plaintiff's subsequent attempt to change the nature of the plaintiff's case.

25. Souvlaki Hut put before me evidence that described a change in solicitor in late 2017. At best that evidence described why the application for leave arose when it did. However, it failed to provide any explanation about why the application was not made much earlier and who may be responsible for the delay. For example, it would be relevant to know if Souvlaki Hut were blameless in relation to such delay, and that any tardiness arose solely from the absence of advice or action by their previous legal representatives. Ultimately, there was simply no explanation for the three year delay in making the application, following the close of pleadings.
26. Ultimately, it is my assessment that the above considerations, when viewed together, do not weigh in favour of the exercise of the discretion to grant the leave sought.

### **Orders**

27. I make the following orders:
  1. The appeal by the plaintiff is dismissed.
  2. The decision of the deputy registrar of 18 April 2018 refusing leave for the plaintiff to file amended Originating Claim and Statement of Claim is confirmed.

### **Costs**

28. If necessary, I will hear from the parties further in relation to the issue of costs.

I certify that the preceding twenty-eight [28] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Magistrate Theakston.

Associate: Sam Lynch

Date: 22 August 2018