

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RETAIL TENANCIES LIST

VCAT REFERENCE NO. R41/2013

CATCHWORDS

*Retail Leases Act 2003 – s87 – whether Certificate from Small Business Commissioner required before application heard by the tribunal – order for delivery of Renewal of Lease and Deed of Assignment properly described as a mandatory injunction – exception in s87(2) applies – Certificate not required.*

APPLICANT	PB Hospitality Pty Ltd (ACN 126 725 666)
RESPONDENT	Peto Bros Pty Ltd (ACN 007 333 879)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Injunction Hearing
DATE OF HEARING	13 March 2013
DATE OF RULING	13 March 2013
DATE OF REASONS	22 April 2013
CITATION	

ORDER

The tribunal has jurisdiction to hear the application for an injunction without a Certificate from the Small Business Commissioner first being provided.



DEPUTY PRESIDENT C AIRD



APPEARANCES:

For Applicant	Mr T Sowden of Counsel
For Respondents	Mr S Hopper of Counsel

## REASONS

Due to time pressures, brief reasons were given at the injunction hearing for the Ruling that the tribunal has jurisdiction to hear the application. These Reasons are an edited and revised transcript of the Ruling expanded, as discussed with the parties at the time, to include background and context.

- 1 The applicant tenant operates a bar and pizza restaurant in St Kilda. A ten year and two months lease with two options of five years each had been entered into by the previous tenant commencing on 1 October 2001. The lease was assigned to the applicant in or around August 2007. The applicant exercised an option for a further five years by letter dated 8 June 2011 which was acknowledged by the respondent by letter dated 14 June 2011. The applicant alleges that despite an email it sent to the respondent on 27 September 2012 confirming that the respondent was to provide it with a Renewal of Lease, that the respondent has failed and/or refused to deliver a Renewal of Lease.
- 2 On or about 15 December 2012, the applicant entered into an agreement for the sale of the business subject to the applicant obtaining the consent of the respondent to a transfer of the lease. A draft transfer of lease was provided to the applicant's solicitors to the respondent's solicitors under cover of a letter dated 21 December 2012.
- 3 The applicant contends that by 12 January 2013 it, and the purchaser of the business had complied with their respective obligations for obtaining an assignment of lease under ss60 and 61 of the *Retail Leases Act 2003* ('the RLA'), and the provisions of the lease. And, that in breach of the lease and s60 of the RLA the respondent has unreasonably withheld its consent to the assignment of the lease, and further that the respondent had alleged the applicant is in default of the provisions of the lease in a number of respects which are not relevant to this Ruling. The applicant commenced this proceeding on 6 March 2013. Points of Claim were filed with the application, from which the above summary of the history as set out above, has been obtained.
- 4 The applicant contends that it is entitled to a mandatory injunction compelling the respondent to:
  - (a) produce a signed Renewal of Lease forthwith; and
  - (b) consent to the assignment of the lease.

It, *inter alia*, seeks the following orders as set out in the Prayer for Relief:

- A. An order compelling the respondent forthwith to deliver to the applicant a signed renewal of lease.'
- B. Further and alternatively an order compelling the applicant to consent to the assignment of the lease;

C. Alternatively, a declaration that the applicant is entitled to assign the said lease.

- 5 The application was listed for an injunction hearing on 13 March 2013 at which the applicant was represented by Mr Sowden of Counsel, and the respondent was represented by Mr Hopper of Counsel.
- 6 At the commencement of the injunction hearing, Mr Hopper challenged the tribunal's jurisdiction to hear and determine this application until the Small Business Commissioner has certified in writing that mediation has failed or is unlikely to resolve the matter. Under s87 of the RLA a certificate from the Small Business Commissioner is required before a proceeding can be commenced in this tribunal other than where the proceeding is in the nature of an injunction.
- 7 Mr Hopper submitted that the application should be properly identified as an application for an *order for specific performance* and *declaratory relief* and, as such, was not an application for a mandatory injunction. Mr Hopper referred me to a number of authorities which he said supported his submission.
- 8 For the reasons which follow, I am satisfied that the relief sought is properly described as a *mandatory injunction* and that accordingly, this proceeding is subject to the exception in s87(2) of the RLA.

#### RULING

- 9 During submissions from Mr Hopper I asked about the definition of a mandatory injunction. I went to the decision of the Court of Appeal in *Bradto Pty Ltd v State of Victoria; Tymbook Pty Ltd v State of Victoria*<sup>1</sup> where Maxwell P and Charles JA, in a joint judgement, restated with approval the following definition of a mandatory injunction:

A mandatory injunction is -

"an injunction which directly orders the person to whom it is addressed to do something, as opposed to the much more usual prohibitory injunction which restrains the person to whom it is addressed from doing something."<sup>2</sup>

- 10 Too often, parties are under the misapprehension that in granting an injunction a court or tribunal is making a prohibitory order: to stop or restrain someone from doing something that is going to cause significant injury or damage to another person. When I consider the provisions of the RLA, and in particular the purposes of the Act and the way in which s87 is framed, it is my view that the words in that section referring to *an order in the nature of an injunction* should be read widely to allow parties to bring to the tribunal situations which require urgent decisions because of pressing situations.

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<sup>1</sup> [2006] VSCA 89

<sup>2</sup> Meagher Gummow & Lehane's, "Equity Doctrines & Remedies", (4<sup>th</sup> ed., 2002) at 21-460.

- 11 I am not making any comments about the merits of this case. It is just circumstances I am concerned with: an application to compel the landlord to do certain acts is, in my view, a mandatory injunction, within the definition approved by the Victorian Court of Appeal. As such the tribunal has jurisdiction to deal with it. Mr Hopper, relying upon the English decision in *Tuohy & Ors v Bell*,<sup>3</sup> submitted that if a mandatory injunction was simply to compel a person to do something then that would mean that every order the tribunal made would fall within that category. I reject this.
- 12 In *Cathedral Place Pty Ltd v Hyatt of Australia Limited*<sup>4</sup> Nettle J entertained an application by a tenant seeking a declaration that the landlord's refusal to consent to an assignment of a hotel management agreement was unreasonable, and a mandatory injunction compelling it to execute the Deed of Novation and Consent. No issue was taken with, nor comments made by his Honour about, the nature of the relief sought.
- 13 In ordering an *injunction* courts and tribunals are concerned with 'acts or conduct' of another person; not the payment of money following an assessment of damages. An application for an *injunction* contemplates an order being made whereby the other party is *compelled to undertake or refrain from doing a specific act*. The relief sought by the applicant in this case clearly falls within the definition of a *mandatory injunction* as approved by the Victorian Court of Appeal.



DEPUTY PRESIDENT



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<sup>3</sup> [2002] EWCA Civ 423 – where Neuberger J of the Court of Appeal determined that the phrase ‘in the nature of an injunction’ should be read narrowly

<sup>4</sup> [2003] VSC 385