**IN THE HIGH COURT OF AUSTRALIA** No. S58 of 2015

**SYDNEY REGISTRY**

**BETWEEN:** **JACEK GNYCH**

First Appellant

and

**SYLWIA GNYCH**

Second Appellant

and

10 **POLISH CLUB LIMITED**
(ACN 000 469 385)

Respondent



## APPELLANTS' REPLY

### Part I: Certification

1. This document is in a form suitable for publication on the internet.

### Part II: Argument

2. Contrary to [14] of the Respondent's Submissions (**RS**), ground 1 is not the foundation of the other grounds of appeal; each ground stands on its own.

20 3. RS [21], while not disputing the finding both at first instance and on appeal that the *Retail Leases Act 1994* (NSW) (**RLA**) applies to the lease in issue in this appeal (**the Lease**) with retrospective effect from the date of entry into possession,[1] challenges the contention that the five year Lease was created by operation of the RLA.[2] However, that was the effect of the finding at first instance[3] and in the CA.[4] The Lease is a statutory lease.[5] The submission at RS [30] that by virtue of s 127 of the *Conveyancing*

---

1 RS at [33].

2 RS at [16]

3 Appeal Book (**AB**) at 783 [35], 788 [48].

4 AB at 839 [76] (*by virtue of s16(1) of the RL Act the term of the Respondents' exclusive occupation was five years ...*") and [77] ("*once the Respondents entered into possession the term of their right to occupy was rendered certain by s16(1) of the RL Act*"). Cf. the last two sentences of [77]. However, either the RLA was of application or it was not; if it was not of application then the term of the Lease could not have "depended on the operation of the RL Act".

5 At RS [29] it is submitted that the entry into exclusive possession of the restaurant created a lease at *general law*. That characterisation is not correct. However, for purposes of this appeal, it is unnecessary to decide whether the RLA immediately applied, ab initio, as from 31 March 2012 (thus creating a statutory lease ab initio), or whether it only applied, as is submitted in RS [33]-[35] "*effectively retrospectively from the date of entry into possession*" when notice was given on 7 July 2013. The better view is that the RLA, in the circumstances of this case, applied ab initio from 31 March 2012 when the appellants commenced trading as a restaurant in the club, after having spent three months refurbishing that restaurant. Having regard to the definition of Lease in section 3 of the RLA (See in particular sub-paragraph (b) ("*implied*" agreement)) it is submitted that the agreement under which the respondent, for value, granted the appellants occupation of the premises for the

Filed on behalf of the appellants on:
Drexler & Partners Litigation Lawyers
Suite 11, Level 11
59 Goulburn Street
SYDNEY NSW 2000
DX 11526 Sydney Downtown

Telephone: 02 9211 3399
Fax: 02 9211 6032
Ref: Weldermer Drexler

*Act 1919*, the duration of the Lease was (prior to 7 July 2013) terminable at the will of either party by one month's notice, is incorrect - and irrelevant to this appeal.[6]

4. While the respondent recognises at RS [23] that "*a reservation to the landlord ... of a limited right of entry, for example, to view or repair, is consistent with the grant of exclusive possession,*" it submits that "*there was no such reservation claimed or asserted by the appellants in this case*". That is incorrect. As was made clear in the CA[7] (the issue did not arise at first instance) it is (and always was) the appellants' case that their rights under the Lease did ***not*** exclude the respondent from taking such steps as may be necessary to comply with its obligations under the *Liquor Act 2007* (NSW) (**the LA**), but was subject to such rights. The suggestion in RS [103] and [110] that the appellants did not run their case on this basis below is incorrect. Moreover, the emphasis placed on the phrase "exclusive possession" by both the CA[8] and the respondent [9] is misplaced. The CA wrongly concluded[10] that a right of "exclusive possession" necessarily excluded the right of the respondent to take such measures as may be necessary to ensure compliance with the LA. The adjective "exclusive" adds nothing to the concept of possession.[11] A lease may give "exclusive possession" to a lessee even if it contains exceptions, reservations or restrictions on the purpose for which the land may be used,[12] or if it gives the lessor [13] or members of the public[14] a limited right of entry on the demised premises.

5. The contention at RS [31] and [100] that "*as there was no agreed terms or conditions with respect to the duration of the tenancy, no application was made to the authority for consent for the Lease*" is misconceived. As held by the CA, there was an agreed term "*by virtue of s 16(1)*" of the RLA.[15] In any event, if the respondent was required by s 92(1)(d) of the LA to obtain the approval of the Authority, then it was required to do so irrespective of the term of the Lease.

---

purpose of the use as a restaurant, should not be construed as having been "for a term of less than six months" within the meaning of section 6A of the RLA: having regard to the "*significant work*" (**AB 773 at [8]**) done by the appellants to refurbish the restaurant over three months between December 2011 and March 2012, it is obvious that it was not the intention of the parties that the lease was to be for a short term of less than 6 months. Thus, s 6A(1) was not of application and, as found by the CA (AB 839 [76]-[77]), "once the Respondents entered into possession the term of their right to occupy was rendered certain by s16(1)" of the RLA. Moreover, contrary to RS [22], the wording of section 8(1) of the RLA, when read with the definition of "lease" in s 3, does have the effect of creating a "retail shop lease" when its terms are satisfied; those terms do not have to include either an agreement as to the term (which is necessary for an agreement for lease at general law) or the payment of rent (which is necessary before a "general law" lease can be implied). To conclude otherwise would be contrary to the intent of this beneficial legislation namely, in this regard, to give the benefit of the RLA to tenants when its terms are satisfied.

6 Section 127(1) of the *Conveyancing Act 1919* (NSW) does not apply where the prospective tenant has entered into possession and has begun paying rent on a weekly, monthly, or other periodical basis not referable to a year or an aliquot part of a year, without the landlord and tenant having yet reached a binding agreement for a Lease. See for example *Turner v York Motors Pty Ltd* (1951) 85 CLR 55; Land Law 6th Edition, Peter Butt, at 294-296 [15 32].

7 AB at 37.25-49; 38.29-30; 39.21-28 ("that subject, as I said before, to the lawful rights of a Lessor to ensure there is no breach of legislation").

8 AB 840 [79]

9 AB [27], [29], [88], [89], [90], [103] and [110]

10 Particularly in the light of the express submissions made on behalf of the Appellants in the CA that the Respondent had a right under the Lease to enter the Premises to ensure that the legislation was complied with- see AB 37.37 -38.12; 38.29-30; 39.23-29.

11 *Western Australia v Ward* (2002) 213 CLR 1 at 223 [503], 224 [507], 225 [510]

12 *Ward* at 224 [507]

13 Cf. s 85(1)(c) of the *Conveyancing Act 1919* (NSW)

14 *Western Australia* at 225 [510]; see Appellants' Submissions of 9 April 2015 (**AS**) at [87]

15 AB 839 [76]-[77].

6. At RS[45] it is submitted that "*the conflict in this case is between the existence of a Lease at law (albeit with terms to determined by statute) and a statutory provision restricting its lawful grant.*" In fact, the Lease in this case is a statutory lease pursuant to the RLA.[16] As recognised by the CA [17] "*given the wide definition of the term 'Retail Shop Lease' and 'Lease' in s 3 of the RL Act ..., a 'Lease' can come into existence for the purpose of that Act which would not qualify as a Lease under the general law*". A Lease cannot be a statutory lease for some purposes (the determination of the term of the Lease), but a general law lease for all other purposes. In any event, it is common ground (and it was so held at first instance[18] and by the CA[19]) that the Lease was a five year Lease by reason of the RLA. It follows, therefore, that the consequence of the decision of the CA was to extinguish vested proprietary rights of the appellants, and thus subvert the beneficial protection which Parliament sought to afford to Lessee by the RLA.

7. The Respondent concedes at [47] that "*there is no doubt that if conflicts between laws can be resolved by employing a harmonious construction of the relevant provisions then that is to be the preferred course*". In this case a harmonious construction of s16 of the RLA and s 92(1)(d) of the LA can and ought to be employed – particularly in the light of the fact that the LA does not make provision for rendering of the Lease to be unenforceable and void, but does provide a range of other potential consequences that are sufficient to safeguard the legislative purpose inherent in the statutory prohibition. It matters not that the LA is a more recent statute.[20] It simply re-enacted (albeit with some slight modifications in expression) what was s101(1)(e) of the *Liquor Act 1982* (NSW).[21] It is obviously the intention of the legislature that the two statutory regimes should both apply. They are not "plainly repugnant" to one another; effect can be given to both. Both statutes can easily operate harmoniously together.[22]

8. As to RS[52], if there is such a breach of s 92(1)(d) of the LA, it is a breach committed by the *respondent* and not by the appellants. [23]

9. At RS[63] the respondent submits that the AS failed to have regard to certain statements of this Court *Miller* [24] and *Equscorp.* [25] That submission is not correct: see AS at [35] and [69]. [26]

10. At RS[64] the respondent submits that the question that flows from whether an agreement is unlawful "*is not that which has been ... misstated by the Appellants at [43] of their submissions*". However, the question at AS[43] is a direct quotation from McHugh J in *Nelson.*[27]

11. At RS[82] the respondent submits that the contention in AS[63] that CA "*misconstrued the legislative purpose inherent in statutory prohibition*" is fundamentally flawed. For the reasons given in AS[64]-[68], AS[63] is correct. Furthermore, even if the legislative purpose was accurately stated by the CA, the Lease would not have prevented the

---

16 AB 839[76] and [77]
17 AB 838[75]
18 AB 783[35].
19 AB 839[76] and [77].
20 RS at [48].
21 See Tab 18 of Joint Legislative Provisions.
22 See for example AS at [56], [57], [58], [62], [67], [68], [69], [71], [73], [79], [81], [82], [87], [101]-[104], [108].
23 See AS at [74]-[84]
24 *Miller v Miller* (2011) 242 CLR 446 at 459
25 *Equscorp Pty Ltd v Haxton* (2012) 246 CLR 498
26 See AS at [35] [69]
27 *Nelson v Nelson* (1995) 184 CLR 538 at 604

respondent from supervising the conduct of the business of a Lessee insofar as it related to matters arising under the LA.

12. RS[83]-[85] emphases that the object of the LA is to regulate and control the sale, supply and consumption of liquor. (The full terms of the relevant object of the LA are cited in AS[65].) However, if, as was found to be the fact in this case, the respondent controlled fully the sale and the supply of liquor, then it follows that it *was* also able to control the consumption of liquor – particularly where: the CA found that the manager of the club was well able to supervise the sale and supply of liquor;[28] the Primary Judge found (uncontested) that patrons of the restaurant were told that the restaurant could not sell or serve liquor because it was not licensed;[29] s 7 of the LA prohibited the appellants from selling liquor; an undertaking was given by the appellants to the Primary Judge that they and their employees and agents will not deliver alcohol to customers attending as restaurant patrons or patrons of any functions conducted by the appellants;[30] the appellants' case is, as stated to the CA, that the Lease is to be construed so as to allow the respondent to enter the premises to ensure that the LA is being complied with[31] (and they are willing to provide an undertaking to that effect).[32] Accordingly, the conclusion in RS [98] is wrong.

13. At RS[88] the respondent makes the bald assertion that "*consent would not have been given*" by the Authority for the Lease.[33] Not only is there not a skerrick of evidence in support of that assertion, but it is contrary to the finding of the CA at AB 389 [79], and contrary to the plain words of s 92(1)(d) of the LA which plainly confers the power to give consent to such leases. The submissions at RS[88]-[90] appear to be based upon a misapprehension as to the meaning and effect of "exclusive possession".

14. At RS[94] the respondent submits that the CA carefully approached the question of the ultimate sanction to impose. However, the CA failed to have *any* regard to the legislative provisions in the LA which could have been invoked in the event of a contravention of s 92 (or to even review those provisions).[34] Neither the CA nor the respondent have grappled with the fact that although Parliament specifically and thoroughly addressed its mind to the consequences of a contravention of s 92, it did ***not*** legislate that a lease made in contravention of it is void – or even voidable – a drastic consequence which would lead to the extinguishment of vested proprietary rights (compare, in contradistinction to the LA, s 41Q(2) and (3) of the *Registered Clubs Act 1976* (NSW))[35]; and that those legislative provisions also demonstrate that the policy of the LA would ***not*** be defeated if effect was given to the Lease.[36] Moreover, as noted by the CA,[37] the prohibition contained in s 92(1)(d) can be overcome by the obtaining of approval from the Authority. The respondent's *speculative* response (in the absence of any evidence) to some of the legislative provisions in the LA which could result, in some circumstances, as a consequence of a breach by a licensee of its obligations under

---

28 See AS[67]
29 AS[67]
30 AB 436 [14].
31 AB at 37.25-49; 38.29-30; 39.21-28 ("that subject, as I said before, to the lawful rights of a Lessor to ensure there is no breach of legislation")
32 As noted in AS[68], where a party seeks equitable relief, whether in aid of a legal or equitable right, equity may impose terms: *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 231 per McHugh and Gummow JJ.
33 A bald assertion to similar effect is made in RS [100].
34 See AS[69].
35 AB 818.45-819.35
36 AS [69].
37 AB 839[79].

to s 92(1)(d) of the LA is simply not relevant. (It is assumed that the references in RS [95] to s 92(1)(c) of the LA is an error. That section is not in issue in this appeal.)

15. At RS[101] the respondent makes the surprising submission that whilst there was evidence that the appellants carried out certain works, there was no evidence of a "significant loss" being incurred by the appellants if the Lease were held to be void". In fact, the Appellants refurbished the premises over a three month period.[38] The uncontested finding of the Primary Judge was that "*it is clear that a* ***significant amount of work*** *was done by Mr and Mrs Gnych*". [39] Furthermore, the uncontested finding was that the Appellants operated the restaurant *successfully* during the period between 31 March 2012 and July 2013.[40] It is obvious that the conclusion that the Lease was unenforceable was entirely disproportionate to the seriousness of the illegality involved – particularly in circumstances where the illegality was that of the *respondent* and not the appellants and where the decision of the CA would lead to the extinguishment of vested proprietary rights.

16. In RS[103] the respondent asserts that the "*Bowmakers* principle is not good law. In *Bowmakers* it was held[41] that "*prima facie, a man is entitled to his own property, and it is not a general principle of our law ... that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can* ***never be allowed to recover those goods by an action***". [Emphasis added.] That statement is consistent with modern authority. It applies *a fortiori* in circumstances where there has been no unlawful dealings on the part of the appellants.

17. The contention in RS[103] and [110] that the appellants are seeking to run a case which they failed to run below, in relation to the right of the respondent to enter the premises to ensure that the LA is being complied with, is incorrect. That was the appellants' case below.[42] The appellants have never asserted that the Lease would prevent the respondent from entering the premises to ensure compliance with the lease. Furthermore, it is trite law that where a party seeks equitable relief, equity may impose terms. [43]

18. At RS[105] the respondent asserts that it defies common-sense to suggest otherwise that the appellants were aware at the time of entering into possession that there was no application to the Authority for consent. That submission is misconceived.[44] There was no obligation on the appellants to obtain consent. There is no basis to infer that the appellants suspected that the respondent failed to comply with its obligations under the LA.

Dated: 29 April 2015

**Counsel for the Appellants**

**G Segal**
Selborne Chambers
T: (02) 9223 5688
F: (02) 9231 3320
gsegal@selbornechambers.com.au

**M A Friedgut**
Selborne Chambers
T: (02) 9230 0466
F (02) 9231 3320
mfriedgut@selbornechambers.com.au

---

38 AB812[11]; 773[8]
39 AB773[8]
40 AB713[13]
41 *Bowmakers Limited v Barnet Instruments Ltd* [1945] 1 KB 65 at 70
42 AB at 37.25-49; 38.29-30; 39.21-28 (***"that subject, as I said before, to the lawful rights of a Lessor to ensure there is no breach of legislation"***). The respondent did not raise the issue of "exclusive possession" at first instance.
43 *Fitzgerald* at [231] per McHugh and Gummow JJ.
44 See AS [76]-[107].