

CITATION: *Milinhos Nominees Pty Ltd v ZPM Pty Ltd and Anor* [2023] NTLC 28

PARTIES: MILHINHOS NOMINEES PTY LTD (ACN 009610744)
Plaintiff

v

ZPM PTD (ACN 636212032 T/AS NT PIZZA CO)
First Defendant

Maria CHARINOU
Second Defendant

Panteleimon TALIAS
Third Defendant

Zharoula TALIAS
Fourth Defendant

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 2023-00144-LC

DELIVERED ON: 4 January 2024

DELIVERED AT: Darwin

HEARING DATE(s): 11 October 2023

DECISION OF: Acting Judge Murphy

CATCHWORDS:

Contract - commercial lease - director's guarantee - misleading or deceptive conduct - promissory estoppel - parole evidence rule.

Practice and Procedure - strike out pleadings - summary dismissal - defects in pleadings.

Competition and Consumer Act 2010 (Cth)

Law of property Act 2000 (NT)

Evidence (National Uniform Legislation) Act 2011 (NT)

Local Court Civil Jurisdiction Rules 1998 (NT)

RTA v Brinko Pty Ltd [2011] NTSC 103

REPRESENTATION:

Counsel:

Applicant: Melissa Yates

Defendant: Ryan Sanders

Solicitors:

Applicant: Piper Grimster Jones Lawyers

Defendant: HWL Ebsworth Lawyers

Decision category classification: B

Decision ID number: [2023] NTLC 28

Number of paragraphs: 55

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2023-00144-LC

BETWEEN:

MILHINHOS NOMINEES PTY LTD (ACN 009610744)

Plaintiff

AND:

ZPM PTD (ACN 636212032 T/AS NT PIZZA CO

First Defendant

Maria CHARINOU

Second Defendant

Panteleimon TALIAS

Third Defendant

Zharoula TALIAS

Fourth Defendant

REASONS FOR DECISION

(Delivered 4 January 2024)

ACTING JUDGE MURPHY

Introduction

1. This proceeding involves a statement of claim filed by the Plaintiff against all four Defendants for damages arising out of breach of a commercial lease over a Pizza Shop. Under the lease the Plaintiff was the landlord, the First Defendant was the tenant and at all material times the Second, Third and Fourth Defendants were directors of the First Defendant.
2. The First Defendant ran a business from the Pizza Shop under the lease. The business failed and the First defendant breached the lease resulting in the Plaintiff incurring damages.
3. The Plaintiff asserts that it leased the Pizza Shop to the First Defendant under the terms of a commercial lease which was never signed or executed by the First Defendant. Furthermore, the terms of the commercial lease over the Pizza Shop included a director's guarantee. The director's guarantee, like the lease, was not signed by any of the directors including the Fourth Defendant.

4. The Fourth Defendant asserts that the Plaintiff's case against the Fourth Defendant is foredoomed to fail due to section 58 of the *Law of Property Act 2000* (NT) (the **LPA**), which states:

58 Guarantees to be in writing

- (1) *No proceeding may be commenced on a promise to guarantee a liability of another unless the promise on which the proceeding is commenced, or some memorandum or note of the promise is:*
- (a) *in writing; and*
 - (b) *signed by the party to be charged, or by some other person lawfully authorised by the party.*
- (2) *A promise in writing, or a memorandum or note of a promise, is not to be treated as insufficient for the purpose of this section only because the consideration for the promise does not appear in writing or by necessary inference from a written document.*

5. The Plaintiff in its statement of claim asserts that the Second, Third and Fourth Defendants should be estopped from relying upon section 58 of the LPA because of the promises made by them to execute the directors guarantee and subsequent failure to have done so. That the breached promise triggers the doctrine of promissory estoppel, and a contravention of section 18 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the **ACL**) which, pursuant to section 236 of the ACL, should sound in damages incurred as a result of that conduct.

Procedural background

6. On 20 January 2023 the Plaintiff filed a statement of claim for damages totalling \$119,739.94 against all four Defendants (the **First SOC**).
7. On 15 March 2023 the Fourth Defendant filed an application and supporting affidavit.¹ The application sought the following orders:
- a. That the requirement of the Fourth Defendant to file a Notice of Defence be suspended pending determination of its application.
 - b. That the Plaintiff's statement of claim be struck out,
 - c. That the proceedings as it pertained to the Fourth Defendant be summarily dismissed;
8. The Fourth Defendant's application was then listed for hearing at the Darwin Local Court on 23 May 2023.
9. On 22 May 2023 the parties by consent sought to have the hearing vacated. Austin J then vacated the hearing of 23 May 2023 and made the following in-chambers orders:
- 1. *The Plaintiff to file and serve an amended List of Documents by Monday 5 June 2023.*
 - 2. *The Fourth Defendant to file and serve any evidence in support of its application dated 15 March 2023 (the Application) by Wednesday 21 June 2023.*

¹ Affidavit, Ryan Paul Sanders, HWL Ebsworth Lawyers, 15 March 2023.

3. *The Plaintiff to file and serve any evidence in response to the Application by Wednesday 5 July 2023.*
 4. *The Fourth Defendant to file and serve an outline of submissions in support of the Application by Wednesday 19 July 2023.*
 5. *The Plaintiff to file and serve an outline of submissions in response to the Application by Wednesday 26 July 2023.*
 6. *The Application will be listed for hearing on a date and time suitable to the Court.*
 7. *The matter is adjourned and referred to the Judicial Registrar for any further directions hearing.*
10. On 06 June 2023 the Plaintiff filed its amended list of documents.
 11. On 21 June 2023 the Fourth Defendant filed a further affidavit in support of her application.²
 12. On 05 July 2023 the Plaintiff filed an affidavit in support of its opposition to the Fourth Defendant's application.³
 13. On 02 August 2023 there was a pre-hearing conference before the Local Court Registrar which resulted in the following orders:
 1. *The Plaintiff to file and serve any application to amend the Statement of Claim on or before Friday 4 August 2023.*
 2. *The Fourth Defendant to file and serve an outline of submissions in support of the Application to strike-out/summary dismissal and in answer to Plaintiff's application to amend by Friday 25 August 2023.*
 3. *The Plaintiff to file and serve an outline of submissions in response to the application for strike-out/summary dismissal and in response to the Fourth Defendant's submissions regarding the Plaintiffs application to Amend by Friday 08 September 2023.*
 14. On 04 August 2023 the Plaintiff filed an amended statement of claim (the **Second SOC**) and supporting affidavit.
 15. On 11 August 2023 the Plaintiff filed an application seeking the Court's leave to file a further amended statement of claim (the **Third SOC**) and an affidavit⁴ in support of it.
 16. On 25 August 2023 with the consent of the parties the Judicial Registrar made the following order:

By consent the time for filing pursuant to Order 1 of Orders dated 2 August 2023 is extended to Close of Business 29 August 2023 and the time for filing pursuant to Order 2 of Orders dated 2 August 2023 is extended to Close of Business 12 September 2023.
 17. On 29 August 2023 the Fourth Defendant filed her outline of submissions.

² Affidavit, Anna Elizabeth Lowrie Lindsay, HWL Ebsworth Lawyers, 21 June 2023.

³ Affidavit, Alana Grimster, Piper Grimster Jones Lawyers, 04 August 2023.

⁴ Affidavit, Alana Grimster, Piper Grimster Jones Lawyers, 04 August 2023.

18. On 15 September 2023 the Plaintiff sought a further extension to file and serve its outline of submissions.
19. On 22 September 2023 the Judicial Registrar, with the consent of the Fourth Defendant granted an extension to the Plaintiff for filing of its submissions to 25 September 2023.
20. On 25 September 2023 the Plaintiff filed its submissions.
21. On 11 October 2023 the Fourth Defendant and Plaintiff's applications were heard before me at the Darwin Local Court.

The facts

22. The following facts have been derived from the Plaintiff's pleadings in the Second SOC as were accepted by the Fourth Defendant in her submissions, the affidavits filed in this proceeding, namely, the affidavits of; Ryan Paul Sanders, filed 15 March 2023, Anna Elizabeth Lowrie Lindsay, filed 21 June 2023, Alanna Grimster, filed 05 July 2023 and Alanna Grimster, filed 04 August 2023.
23. In November 2019 the Plaintiff was the owner of shop 27 at the Nightcliff Shopping Centre (the **Pizza Shop**).⁵
24. In November 2019 the Second, Third and Fourth Defendants were the directors of ZPM Pty Ltd (the First Defendant).⁶
25. From August to November 2019 the Plaintiff and the First Defendant were in negotiations with each other over the lease of the Pizza Shop.⁷
26. On 21 November 2019 the First Defendant via numerous emails as between their respective lawyers entered into a commercial lease with the Plaintiff for the Pizza Shop. Those emails included:
 - a. An email sent at 10.34am from the Plaintiff's lawyer (Tsoukalis) to the First Defendant's lawyer (Papazoglou) wherein the Plaintiff's lawyer confirmed:⁸

I have instructions that the landlord is willing to grant a lease for Tenancy 27 Nightcliff Shopping Centre (plan attached) for your client on the following terms:

....

9. Landlord requires a personal guarantee from each director.

...
 - b. An email sent at 11.36am from the First Defendant's lawyer (Papazoglou) to the Plaintiff's Lawyer (Tsoukalis) wherein the First Defendants lawyer wrote:⁹

Thank you Yiota,

⁵ Second SOC filed 04 August 2023 at [1].

⁶ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-1, at p9.

⁷ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-4, to AELL-13 at pp18-101.

⁸ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-7, at pp27-28.

⁹ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-9, at pp32-33.

Can you please send me your costs disclosure letter (as mentioned below).

Further, please confirm the following

- 1. A six week rent free period is included in the lease:*
- 2. The first year's rent of \$49,400.00 is payable as follows:*
 - 1. 1st 6 months (after rent free period ends) - \$23,400.00*
 - 2. 2nd 6 months - \$26,000.00*

I am meeting with the clients later this afternoon and will raise the below with them.

Regards,

- c. An email sent at 11.48am from the First Defendant's lawyer (Papazoglou) to the Plaintiff's Lawyer (Tsoukalis) wherein the First Defendant's lawyer wrote:¹⁰

Thanks Yiota,

One more thing.

In relation to the security deposit. It was never discussed when the lease terms were being negotiated which has meant that my client has not budgeted for this amount. My client is prepared to pay the security deposit but only on the commencement of the second year of the first term of the lease. Can you please seek instructions and let me know before this afternoon.

...

- d. An email sent at 1.50pm from the Plaintiff's lawyer (Tsoukalis) to the First Defendant's lawyer (Papazoglou) wherein the Plaintiff's lawyer confirmed:¹¹

Hi Pipina,

Further to your earlier emails, the Landlord has confirmed as follows:

- 1. A six week rent free period will commence when you client has signed the lease and returned all copies to our office. The rent free period is also subject to the tenant complying in all respects with its obligations under the lease.*
- 2. Rent for the first year of the lease is confirmed to be \$23,400.00 plus GST for the first 6 months and \$26,000.00 plus GST for the second 6 months.*
- 3. The Landlord requires some sort of security on the signing of the lease. Can you client pay \$5,000.00 now and the balance at the commencement of year 2?*

- e. An email sent at 5.32pm from the First Defendant's lawyer (Papazoglou) to the Plaintiff's Lawyer (Tsoukalis) wherein the First Defendant's lawyer wrote:¹²

Hi Yiota,

¹⁰ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-10, at p35.

¹¹ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-117, at p38.

¹² Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-12, at pp40-41.

In relation to your email below:

1. *Noted and agreed.*
2. *Noted and agreed.*
3. *My client agrees to pay \$5,000.00 by way of security deposit on signing the lease with the balance of \$9,000.00 to be paid at the commencement of year 2.*

Please now forward me the proposed lease as soon as possible.

Based on the agreed lease terms, my client is happy to settle on the Sale Agreement tomorrow.

27. At some time prior to 5.32pm on 21 November 2019, the First Defendant's lawyer (Papazoglou) met with the Second, Third, and Fourth Defendants to discuss the lease. During that discussion the Fourth Defendant told Papazoglou and the Second and Third Defendants that she was not comfortable in giving a personal guarantee and did not agree to do so.¹³
28. On 22 November 2019 the First Defendant took possession of the Pizza Shop.¹⁴
29. On 16 December 2019 the Plaintiff's lawyer (Tsoukalis) emailed a copy of the lease for the Pizza Shop to the First Defendant's lawyer (Papazoglou). In that email the Plaintiff's lawyer made the following request: ¹⁵

Dear Pipina

...

Please print and have the Tenant sign:

1. *3 x copies of the lease; and*
2. *2 x Copies of the Tenants Disclosure Statement;*

And return all signed documents to our office along with payment of our fees. We will then arrange for the landlord to sign the lease obtain the mortgagee's consent and attend to register the lease at the LTO

...

30. On 14 February 2020 and 15 March 2020 the Plaintiff's lawyer (Tsoukalis) contacted the First Defendant's lawyer (Papazoglou) making further requests for the lease documents to be executed.¹⁶
31. On 05 April 2020 the First Defendant, via its director Maria Charinou (the Third Defendant) wrote to the Plaintiff advising that it was unable to pay the rent for the next 6 months.¹⁷

¹³ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, at paragraph 7.6 and 7.6 (ii)(A).

¹⁴ Second SOC at [7].

¹⁵ Second SOC at [9]. And, Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-13, at p43.

¹⁶ Second SOC at [10]. And Affidavit, Alana Grimster, Piper Grimster Jones Lawyers, filed 05 July 2023, Annexure AG-1.

¹⁷ Affidavit, Alana Grimster, Piper Grimster Jones Lawyers, filed 05 July 2023, Annexure AG-2.

32. The First Defendant maintained possession of the Pizza Shop until about 04 April 2022.¹⁸
33. The First Defendant did not sign and return the lease, the Tenant's Disclosure Statement or the executed director's guarantee to the Plaintiff.¹⁹

The Parties applications

The Fourth Defendant's application

34. On 15 March 2023 the Fourth Defendant filed an application to:
- a. Suspend the requirement for the Fourth Defendant to file a notice of defence in this proceeding.
 - b. Have the statement of claim struck out.
 - c. Have the proceedings against the Fourth Defendant summarily dismissed.
 - d. Be awarded costs on an indemnity basis.

The Plaintiff's application

35. On 11 August 2023 the Plaintiff filed an application seeking leave to file an amended statement of claim.

Considerations

36. The purpose of this proceedings is to determine whether the Plaintiff and Fourth Defendant's applications should be granted.

The Fourth Defendant's application for summary dismissal

37. Local Court Rule (LCR) 27.06 mandates that only defendants who have filed a defence may apply for summary judgement:

27.06 Summary judgment for defendant

On application by a defendant who has filed a defence to a claim or part of a claim, the Court may at any time give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits.

(my emphasis)

38. Summary dismissal is the form of summary judgement granted to a successful defendant. As the Fourth Defendant is yet to file a Notice of Defence to the First or Second SOC she is, pursuant to LCR 27.06, precluded from applying for summary dismissal of the Plaintiff's statement of claim. Consequently, the Fourth Defendant's application for summary dismissal of the proceedings against her is denied.

¹⁸ Second SOC at 12.

¹⁹ Second SOC at [10].

39. Furthermore, as an order for summary dismissal is not interlocutory in nature, hearsay evidence is not admissible when determining the Plaintiff's application for summary dismissal.²⁰ Consequently, the Fourth Defendant's third hand hearsay account of her meeting with the First Defendant's lawyer (Papazoglou) and the Second and Third Defendant regarding the director's guarantee over the First Defendant's lease of the Pizza shop as filed in this proceeding²¹ is not admissible evidence with regards the Plaintiff's summary dismissal application.
40. That evidence is highly relevant with regards the extent, if any, of Ms Papazoglou's authority to make representations for the Fourth Defendant about the directors guarantee in her (the Fourth Defendant's) capacity individually as a guarantor and/or as a director of the First Defendant and therefore its guiding mind and will. In either capacity, the Fourth Defendant was engaged in trade or commerce and the representations (by omission) made by Ms Papazoglou regarding the Fourth Defendant's refusal to execute the directors guarantee, are integral to the question of whether the Fourth Defendant has engaged in misleading or deceptive conduct under the ACL, particularly given the following factors:
- a. Negotiations had taken place regarding the lease in which the Plaintiff (through its lawyer Ms Tsoukalis) had, by way of email to Papazoglou, specifically particularised as a term of the lease that "*the Landlord requires a personal guarantee from each director*" ;²²
 - b. Papazoglou by way of emailed response confirmed that "*I am meeting with the clients later this afternoon and will raise the below with them.*"²³ The reference to "*clients*" being a reference to the First, Second, Third and Fourth Defendants. The reference to "*below*" and "*with them*" being a reference to the terms of the lease, including the director's guarantee, and the Second, Third and Fourth Defendants respectively;
 - c. Papazoglou, after having been instructed by the Fourth Defendant that she would not execute the directors guarantee did not inform the Plaintiff that the term of that lease had not been accepted by the First Defendant;
 - d. Papazoglou's basis for declining to provide information regarding her interactions with the Fourth Defendant *vis a vis* the director's guarantee, namely that, "*the details of any discussions I may have had with ZPMs Directors about the lease in 2019 are protected by client attorney privilege. ... The Directors are the guiding mind and will of ZPM which can only manifest its acts through the acts and declarations of the Directors. ... In the circumstances, client legal privilege will attach to the entirety of the instructions I received and advice I gave to ZPM through its Directors about the lease and I am unable to provide you with a form of statement that may detail the discussions I had with the Directors about the terms of the lease during negotiations;*"²⁴ and
 - e. The potential waiver of that privilege by the Fourth Defendant in disclosing what was said during the meeting with Papazoglou and the other directors of the First Defendant.

²⁰ Evidence (National Uniform Legislation) Act, section 75.

²¹ See paragraph 27 (above).

²² See paragraph 26.a (above).

²³ See paragraph 26.b (above).

²⁴ Affidavit, Anna Elizabeth Lowrie Lyndsay, 21 June 2023, Annexure AELL-3 at pp15-16.

41. Those factors denote a case, at least with regards misleading or deceptive conduct under the ACL, which is not foredoomed to fail or is beyond doubt, hope or argument. Consequently, even if LCR 27.06 did not preclude the Fourth Defendant from seeking summary dismissal of the Plaintiff's statement of claim, I would not summarily dismiss the statement of claim in any case. In support of that position, I refer to the decision of *RTA v Brinko Pty Ltd* [2011] NTSC 103, in which His Honour, Master Luppino (as he then was), said:²⁵

"...The exercise of the power to summarily deal with an action is to be reserved for actions that are absolutely hopeless and where the likely decision is beyond doubt if the matter proceeded to trial. The onus is on a defendant to establish it has a good defence on the merits and that there are no triable issues. A defendant is entitled to judgment only if it is inevitable that the Court would find for the defendant after a full hearing on the evidence. Lastly an order should not be made if there are important and difficult questions of law or issues of facts to be determined at trial

(Citations removed)

The Fourth Defendant's application to strike out the Plaintiff's Statement of Claim

42. As is apparent from the "Procedural Background" (above), the Plaintiff has filed two Statements of Claim and now makes an application to file the Third SOC. It is the Second SOC that is currently on foot, and as a consequence the Fourth Defendant's application to strike out the statement of claim is an application to strike out the Second SOC.
43. Notwithstanding this, the Fourth Defendant's submissions as to the "standing Statement of Claim" do not address the Second SOC. To the contrary, the Fourth Defendant's submissions address the purported deficiencies of the pleadings in the Third SOC. So much is clear from paragraph 13 of the Fourth Defendant's submissions which particularise the specific paragraphs of the Third SOC, as opposed to the Second SOC, that she asserts are deficient.
44. As previously stated the Third SOC is yet to be filed and won't be filed until and unless leave is granted to the Plaintiff to do so. Given the absence of any submissions by the Fourth Defendant as to why the Second SOC should be struck out, the Fourth Defendant's application to strike out the statement of claim is denied.

The Plaintiff's application to file the Third SOC

45. The Plaintiff seeks to file a further amended statement of claim (the Third SOC). The Plaintiff's application is opposed by the Fourth Defendant. The Fourth Defendant has provided comprehensive submissions in support of her opposition to the Plaintiff's application to file the Third SOC. Those submissions include purported deficiencies in the Plaintiff's pleadings. The Plaintiff concedes many of the deficiencies referred to by the Fourth Defendant and at paragraph 44 of its submissions, states:

Further the Plaintiff contends that it will now further amend the proposed Statement of Claim to address many of the concerns rightfully pointed out by Mr Sanders in his client's submissions to ensure the matter proceeds in a fashion which is properly and clearly pleaded and to remedy the matters raised.

²⁵ *RTA v Brinko Pty Ltd* [2011] NTSC 103 at [9].

46. Given the Plaintiff's concession as to the inadequacy of the Third SOC and the need to further amend it, I deny the Plaintiff's application to file the Third SOC and order the Plaintiff to make the necessary amendments to the Third SOC and submit a fresh application to file an amended statement of claim within 14 days.

The Fourth Defendant's application to suspend the requirement for filing a Notice of Defence

47. The Fourth Defendant has sought an order suspending the requirement to file a Notice of Defence pending the determination of her application as filed on 15 March 2023. The Plaintiff has not opposed that application and to date the Court has not required the Fourth Defendant to file a notice of defence notwithstanding LCR 8.01, which requires a defendant who intends on defending a claim, to file a notice of defence within 28 days of being served with that claim. Consequently, I grant the Fourth Defendant's application to suspend the requirement for her to file a notice of defence.
48. I further order that the Fourth Defendant is to file a Notice of Defence within 14 days of receiving the Plaintiff's amended statement of claim referred to in paragraph 46 (above).

Court orders

49. The Fourth Defendant's application to strike out the Plaintiff's statement of claim is denied.
50. The Fourth Defendant's application to summarily dismiss proceedings as against the Fourth Defendant is denied.
51. The Plaintiff's application to file an amended statement of claim is denied.
52. The Plaintiff is to file an amended statement of claim within 14 days.
53. The Fourth Defendant is to file a notice of defence within 14 days of being served with the Plaintiff's amended statement of claim (referred to at paragraph 52 (above)).
54. The matter is adjourned and referred to the Judicial Registrar for case management.

Costs

55. I will hear the parties as to costs.
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