

CITATION: *Executive Director of Township Leasing v Munupi Wilderness Lodge Pty Ltd* [2023] NTLC 31

PARTIES: Executive Director of Township Leasing
v
Munupi Wilderness Lodge Pty Ltd

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 2021-03282-LC

DELIVERED ON: 15 September 2023

DELIVERED AT: Darwin

HEARING DATE(s): 5 and 22 April 2022

DECISION OF: Acting Judge Ben O'Loughlin

CATCHWORDS:

Business tenancy - Extension of time - Good faith negotiations - Notice to quit Authorised in writing

REPRESENTATION:

Counsel Applicant: Mr T Liveris
Solicitors Applicant: Australian Government Solicitor

Counsel Respondent: Mr Cutterbuck
Applicant: Turnbull Mylne

Decision category classification: B

Decision ID number: [2023] NTLC 31

Number of paragraphs: 31

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA
No. 2021-03282-LC

BETWEEN:

Executive Director of Township Leasing
Applicant

AND:

Munupi Wilderness Lodge Pty Ltd
Respondent

REASONS FOR DECISION
(Delivered 15 September 2023)

ACTING JUDGE O'LOUGHLIN

Introduction

1. The Applicant has served a notice to quit on the Respondent and now applies for a warrant of possession pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act 2003* ("BTFDA").

Background

2. The Respondent has been operating the Munupi Wilderness Lodge on Melville Island for a number of years. Two earlier proceedings have made determinations in respect of the Respondent's tenure, the first being *Tiwi Aboriginal Land Trust & Anor v Munupi Wilderness Lodge Pty Ltd*¹, where Hiley J. made the following relevant findings:
 - a. Originally there was a duly granted lease between the Tiwi Aboriginal Land Trust (TALT) and the Respondent;
 - b. Following expiry of the legal lease, the Respondent held an equitable lease essentially on the same terms;
 - c. The Respondent breached that lease and the then lessor was entitled to apply for possession of the premises;

¹ [2014] NTSC 5.

- d. However, the Respondent was entitled to relief against forfeiture and was entitled to be granted a lease at law once it paid arrears in rent.
3. On 26 June 2017 TALT entered into a township lease with the Applicant such that the Applicant became the landlord² for the relevant land.
4. The Respondent paid rent for a short while, but has not paid rent since October 2016. Despite efforts to negotiate a new lease, the parties also failed to reach agreement and the Applicant issued a notice to quit dated 11 December 2020.
5. The Respondent then applied for judicial review of this action in *Munupi Wilderness Lodge Pty Ltd v Exec. Dir of Township Leasing* [2022] FCA 216. Relief was refused and in doing so, Charlesworth J relevantly determined the following:
 - a. TALT is the proprietor of the land;
 - b. TALT and the Applicant are respectively lessor and lessee under and subject to the terms of the Township Lease;
 - c. The Respondent's interest in the Land under and by virtue of the Equitable Lease is preserved;
 - d. the Applicant is taken to have granted to the Respondent its interest in the Land; and
 - e. accordingly, the Executive Director must be taken to enjoy the rights and obligations of TALT under the Equitable Lease;
 - f. The equitable lease expired on 1 July 2015 as the option to renew had not been exercised; and
 - g. Since that time the Respondent occupied the land on a quarterly periodic basis.

The Issues

6. With the above judicial review application dismissed, the Applicant now seeks a warrant of possession over the land. The issues raised by the parties are as follows:
 - a. Should an extension of time be granted to the Applicant;
 - b. Has the Applicant complied with COVID-19 good faith requirement;
 - c. Has the Applicant properly consulted with traditional owners before seeking possession;
 - d. Is the Applicant merely an agent and therefore requires authorisation in writing before applying for a warrant of possession;
 - e. Has the Applicant otherwise complied with section 131 of the *BTFDA*.

Law

7. Part 13, Division 2 of *BTFDA* sets out a number of provisions relating to taking possession of a business tenancy.

"124 No entry without order

² Pursuant to section 19A of the Aboriginal Land Rights Act.

A person must not, except in accordance with an order of a court, enter business premises of which a person has possession as a tenant under a business lease, or as a former tenant holding over after termination of a business lease, for the purpose of recovering possession of the premises, whether entry is effected peaceably or otherwise.

125 Notice to quit to be in writing

- (1) A notice to quit given by a landlord is to be in writing and signed by the landlord or the landlord's agent authorised in writing.*

131 Application for warrant of ejectment

- (1) Where a landlord has given to a tenant a notice to quit which complies with this Division, the landlord or an agent authorised in writing may, at any time within 60 days after the expiry of the term of the notice, apply to the Local Court for a warrant of possession.*
- (2) The Court must specify the day on which an order for the issue of a warrant of possession takes effect."*

8. Section 11B of BTFDA gave the relevant Minister power to amend the operation of the BFTDA during the public health emergency. This power was exercised during the COVID-19 pandemic where the *Business Tenancies COVID-19 Modification Notice* was issued which included the following:

"3. Mandatory negotiation before giving notice to quit during emergency period

- (1) During the emergency period, a landlord must not give a tenant a notice to quit unless the landlord has, for a period of at least 30 business days, made good faith efforts to negotiate with the tenant to allow the tenant to remain in the premises."*

9. Section 44 of the *Limitation Act 1981* allows a court to extend the time prescribed to institute an action or take a step in an action. The court can extend time if new material facts discovered within 12 months of initiating the action, and it is just to grant the extension in all the circumstances of the case.

Extension of Time

10. Section 131 of the *BTFDA* requires the landlord to apply to the Local Court for a warrant of possession within 60 days of the expiry of the term stated in the notice to quit.
11. Here the notice specified it was to be complied with by 5 May 2021, such that the Applicant should have applied for the warrant of possession on or before 5 July 2021. The application was not made until 20 October 2021 which is approximately three and a half months beyond the time allowed.
12. However, not long after the notice to quit was served, the Respondent commenced the Federal Court proceeding seeking judicial review. This occurred on 7 April 2021 and is a reasonable explanation as to why the Applicant delayed making its application to the Local Court. The judicial review proceeding would be a new material fact for the purposes of section 44 of the *Limitation Act 1981*.

13. The Respondent has not identified any prejudice caused by the delay and I will allow the extension of time for the application for the warrant of possession.

Good Faith Negotiation

14. The Defendant alleged the Applicant did not make the 30 days of good faith negotiating efforts in accordance with the instrument referred to above in paragraph [8].

15. To answer this argument, the Applicant filed two substantive affidavits which annexed nearly all the correspondence between the parties on the issue of negotiating a new lease.

16. The relevant chronology of that exchange is as follows:

10/2016	Respondent ceases pays rent;
11/17-6/18	Parties negotiate terms for a new lease;
18/6/18	Respondent requests a template lease;
6/7/18	Applicant provides a template lease;
7/18-6/19	Further exchanges regarding terms of lease;
19/6/19	Applicant provides a proposed lease saying <i>"Please advise of your client's position with regard to the sublease as soon as practical. We would appreciate a response before 30 June 2019 if possible."</i>
11/12/19	[Six months later] the Respondent says they are having difficulty getting instructions due to illness of a director's father, and raises other issues, but says <i>"Whilst the writer has not reviewed the lease immediately prior to the dictation of this letter, when it was previously viewed there were no major issues that arose from the lease itself or the terms and conditions contained therein. On that basis we reasonably assume that matters could be concluded pretty quickly."</i>
20/12/19	Applicant promptly responds, noting the \$80,000 arrears in rent, and states <i>"Please confirm as soon as practical whether the sublease is in an acceptable form .. (and we will forward execution copies) or if there are any other issues. Please respond before close of business .. 24 December 2019"</i> .
24/3/20	[3 months later] The solicitors for the Respondent state that the lease has been unable to progress due to illness of the father of a director;
20/11/20	[8 months later] The Applicant writes <i>"We welcome a response on your client's position on the proposed sublease for the Munupi Wilderness Lodge. Can we ask that you provide the response by close of business Wednesday 25 November 2020."</i>
11/12/20	Having received no response to the above, the Applicant served the notice to quit.

17. In *Bankstown City Council v Alamo Holdings Pty Ltd*³ Gleeson CJ, Gummow, Hayne and Callinan JJ referred to an earlier authorities and noted that there are:
“various examples in the law where “good faith” is used as a criterion requiring some state of mind or knowledge other than the personal honesty and absence of malice of the relevant actor. Moreover, given the range of advice, acts and omissions to which [the relevant statutory provision] may apply, what is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute.”
18. The above comment is probably a sufficient basis not to attempt to explore the meaning of good faith in this particular context, but the better reason is simply that there is no evidence pointing to a lack of good faith.
19. The Applicant was clearly attempting to execute a lease with the Respondent and recover arrears in rent, and these are legitimate commercial motives.
20. The Applicant was obliged, to “use its best endeavours to formalise existing tenure arrangements in the Township within 12 months after the commencement date”⁴ of its lease with TALT. For three years the Appellant made reasonable and fair efforts to achieve a lease with the Respondent. The Respondent failed to properly engage in that negotiation, while rent arrears grew to more than \$100,000. It was perfectly reasonable for the Applicant to issue a notice to quit in these circumstances.
21. There is no suggestion any ulterior motives or malice, and no suggestion the Applicant took advantage of the Respondent. I find the Applicant has more than met the 30 days good faith negotiations required by the COVID-19 Modification Notice referred to above.

Authorised In Writing

22. In closing submissions, the Respondent raised a new issue alleging the Commonwealth was the “true” landlord and the Applicant was merely an agent who did not have authorisation *in writing* to issue the notice to quit (see sections 125 and 131 of the BTFDA).
23. The Applicant is established and governed by the provisions of Part IIA of the *Aboriginal Land Rights (Northern Territory) Act 1976* where section 20C gives the Applicant a considerable amount of independence. That section gives the Applicant the power to administer subleases in accordance with their terms and conditions. There is no constraint in ALRA on the Applicant’s power to issue a notice to quit and no provisions which suggest the Applicant is merely an agent of the Commonwealth.
24. Charlesworth J. in *Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing*

³ (2005) 223 CLR 660.

⁴ pursuant to clause 13.2 of the township lease.

found that Township Lease meant the Applicant “enjoyed the rights and obligations of TALT under the Equitable Lease”. Her Honour did not suggest that these rights arose from an agency.

25. I find the Applicant applied for the warrant of possession on its own behalf a not as an agent, and therefore did not require authorisation in writing from any other entity.

Consultation

26. The Township Lease referred to above in paragraph 4 requires the Applicant to consult with traditional owners via a body called the Consultative Forum. The Respondent called evidence from 4 traditional owners who said they wanted the Respondent to remain on the island and that there had not been consultation in respect of the tenancy.
27. The Respondent argued that the decision *Santos NA Barossa Pty Ltd v Tipakalippa*⁵, dealing with consultations required by the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* somehow came to its aid. This deals with a very different factual situation, and a very different statutory regime, and I have struggled to find any applicable principles that assist the Respondent.
28. In any event, the Applicant has tendered emails from the Consultative Forum which records the consultation with, and the concerns of traditional owners, including those who gave evidence, about unpaid rent and a lack of a lease.
29. I am satisfied there was appropriate consultation leading up to the issuing of the notice to quit.

Conclusion

30. I find the Applicant has given the Respondent a notice to quit which complies with Division 2 of the Act. Written authorisation is not required for the application for a warrant of possession, and I will extend time for the reasons given above. There are no grounds established to *not* order a warrant of possession in favour of the Applicant. The warrant of possession will take effect is to be 21 days from the date of this order.
31. My preliminary view is to order costs in favour of the Applicant at 100% of the Supreme Court scale but I will give time for the parties to attempt to agree this issue.

Orders

1. The time for the Applicant to apply for a warrant of possession is extended to 20 October 2021;

⁵ [2022] FCAFC 193.

2. The application for a warrant of possess is granted and the Respondent is ordered to vacate the premises within 21 days, namely 6 October 2023;
 3. Any application for costs is to be made within 30 days.
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