



AUSTRALIAN ADVOCACY INSTITUTE

Case Study:

Middleton

v

Blanchard and Handy Bros

Opposed Injunction Application

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Revised by Professor The Hon. George Hampel AM QC.

13 October 2014

CASE STUDY: Middletoin v Blanchard and Handy Bros.

INSTRUCTIONS TO PARTICIPANTS

IF APPEARING FOR APPLICANT – MIDDLETON

You have been briefed as follows:

- Apply for an urgent interlocutory injunction
- There has not been sufficient time to prepare affidavit material. You have therefore given counsel for the Lessor a copy of these instructions and will undertake to put these instructions on affidavit.

IF APPEARING FOR RESPONDENT – BLANCHARD & HANDY BROS.

Has been briefed as follows

- Oppose injunction application

This morning's instructions from Jonathon Middleton:

I am a Lessee under a registered 5 year lease over a shop in the Swaying Palms Shopping Centre. The shopping centre is owned by Jane Blanchard and she is my Lessor. My lease has three more years to run. I sell surf-wear and sporting goods and my business has been exceptionally good from the day I opened the doors. It appears to me that the other shops are doing well. The shopping centre is quite old (I think it was built in the 1950's). Beside my shop is a hairdresser, a used bookstore, a second-hand furniture dealer and a food take-away.

Ms Blanchard approached me about three months ago to see if I would agree to an early termination of my lease and relocation to another shopping centre owned by Ms Blanchard, Mermaid Fair. As I mentioned, my business is booming so I declined her offer. She then told me that if I didn't agree to her offer, she would exercise the relocation clause in my lease. She is referring to clause 10.1 that provides:

Where the Lessor plans to construct additional buildings or extensions to existing buildings in the Centre or otherwise deal with the Centre, upon the Lessor giving (3) three months' notice to the Lessee, the Lessor may require the Lessee to surrender this Lease and vacate the said premises. Thereupon, the Lessee shall be offered a Lease in the Centre, or any comparable centre owned by the Lessor, for the balance of the term hereof upon the same terms and conditions as are herein contained.

She then served a notice pursuant to clause 10.1. I noted the date and it was exactly 89 days ago. I'm not a lawyer, but 89 days doesn't equal three months and anyway, when I signed the lease I thought that clause 10.1 only applied if the Lessor was going to renovate the existing Centre. I know from my discussions with Pritap Singh, the owner of the hairdresser shop, that Blanchard intends to demolish the Centre and put up a block of 24 units. Singh also told me that Blanchard is already marketing the block of units and has sold 8 off the plan. I understand that Pritap and the lessees of the other shops are not keen to relocate to Mermaid Fair.

I should have come to you earlier to see where I stood concerning the notice, but the day after I talked to Blanchard I left on a buying trip to Honolulu. An annual convention of the latest surf-gear is held there and I go every year. Blanchard knows this and I suspect that that's why she waited until the day before I left to serve the notice on me.

This year I also went to Los Angeles, Calgary, Toronto, New York, London and Munich on business. I just got back this morning. The reason I visited these other cities is that there has been a lot of interest from my customers in techno rap music provided that it is on vinyl. I signed major artists from each of these cities and intend using my shop and its customers to develop a low cost street-beach based distribution network for such music. In addition to its other advantages the current shop is particularly well-placed for this as it is just around the corner from the only vinyl pressing operation in Australia.

I checked in at the shop on my way back from the airport and was horrified to see that there was demolition machinery and workers outside the shopping centre in the carpark. My shop manager, Robin Sanders, told me that Handy Bros Demolition Pty Ltd was about to start knocking down the centre. Robin had tried to get in touch with me but I was in transit. She phoned Blanchard and asked her to hold off until I got back and apparently Blanchard told her to 'get stuffed'. I immediately called Blanchard but her secretary informed me that Blanchard had left for the long weekend and would not be back until Tuesday. She also said that Blanchard had not left a contact number. I then called Blanchard's house but there was no answer.

I then went out to talk to the foreman of the demolition crew. He said his name is Harlan Handy and that Handy Bros. is his firm. (Apparently there are no 'Bros'; he just likes the sound of the name). I told him that he couldn't demolish my shop. He replied that I'd better start packing up my goods because they were starting demolition tomorrow morning. When I asked him to wait until I had spoken to Blanchard he said he had his orders and he was going to carry them out. I immediately left him and telephoned your office.

I also spoke to three of the other shop owners who were concerned and do not want to relocate. They said that if I can stop the demolition they will join me in the case against Blanchard.

I had a short conversation with my accountant who told me he would be prepared to give evidence at the trial and that it is unlikely that the damages I suffer from relocation can be easily assessed as compensation.

While I was waiting for you to arrive I drew a sketch that depicts the state of the Centre when I left to come over here. I've also brought a copy of the Notice that Blanchard served on me.

I want you to stop Handy Bros from demolishing the centre and my shop.

The next three months are my busiest time of the year and I will lose a substantial amount of money if I'm forced to relocate now.

Further, I do not want to relocate to Mermaid Fair. A competitor, "Shaggy Harry's Surf, Sea and Sun" is located in that complex. The Centre simply cannot support two surf shops. There is also a supermarket at Mermaid Fair. Two surf shops will also undermine my marketing strategy for the techno rap music as it creates the possibility of the proposed customer market aligning itself with particular stores.

Finally to get the techno rap concept off the ground I have borrowed heavily. I can service these borrowings based on historical income from the Swaying Palms shop, but could not if that income fell. I also have no capacity to borrow any additional funds and I would need to do this to fit out a shop at Mermaid Fair and do advertising about the relocation etc.

I think that the lessor knows that I will be making this application and will appear to oppose it.

NOTICE

To: Jonathan Middleton
Proprietor, Middleton's Surf Shop
Swaying Palms Shopping Centre

You are hereby notified, pursuant to clause 10.1 of a Lease Agreement made between E Blanchard as Lessor and J Middleton as Lessee covering premises leased by the Lessor to the Lessee in the Swaying Palms Shopping Centre, to surrender the said lease and vacate the said premises.

E. Blanchard

E Blanchard
Lessor

Middleton v Blanchard & Handy Bros Demolition Pty Ltd

