USQ Law Society Championship Moot – 2018

The Championship Moot problem question is based on the judgement of Odin J in the Queensland Civil and Administration Tribunal. The judgement is of a minor civil dispute between Steve Rogers T/A S.H.I.E.L.D Inc (Applicant) and Stark Industries Pty Ltd (Respondent).

The moots will be argued in the Supreme Court of Appeal, pursuant to s149 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). Stark sought leave to appeal to the Court of Appeal from QCAT's decision. Leave to appeal has been granted. S.H.I.E.L.D. has sought leave to cross-appeal which has also been granted.

The appellant counsel will represent Stark Industries Pty Ltd. The respondent counsel is cross appealing and will represent Steve Rogers T/A S.H.I.E.L.D.Inc.

There are four grounds of appeal (see below) which must be addressed by both parties.

GROUNDS FOR APPEAL

Stark (Appellant):

1. The Tribunal should have found that there is no collateral contract.
2. The Tribunal erred in its assessment for damages based on expectation loss.

S.H.I.E.L.D. (Respondent):

1. The Tribunal should have found that promissory estoppel applied to Stark in respect of a promise to offer a renewal of the lease (in addition to the finding that there is a binding collateral contract).
2. The Tribunal should have found that Stark engaged in misleading or deceptive conduct or unconscionable conduct. (s18 *Australian Consumer Law*)

QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*S.H.I.E.L.D.INC v Stark Industries Pty Ltd* [2017] QCAT 71
PARTIES:	Steven Rogers T/A S.H.I.E.L.D. INC (Applicant) V STARK INDUSTRIES Pty Ltd (Respondent)
APPLICATION NUMBER:	LEE512-71
MATTER TYPE:	Minor Civil Dispute
HEARING DATE:	June 7th 2017
HEARD AT:	BRISBANE
DECISION OF:	**Justice Odin**
DELIVERED ON:	10 December 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE TRIBUNAL ORDERS THAT:** **1.** A Collateral contract is declared to exist between the parties. **2.** The collateral contract has been breached by the respondent. **3.** The respondent is liable to pay the applicant damages in the amount of $18 685 872.00

Introduction

1 The applicant ('S.H.I.E.L.D.') operate Safe Homes In Every Local District, a back to base home security service owned by Mr Steve Rogers. The respondent ('Stark') operates Stark Industries which supplies Heli Carriers (A flying aircraft carrier) used by S.H.I.E.L.D. in the operation of their business.

2 Stark wanted S.H.I.E.L.D. to undertake a significant refit of the Heli carrier and to lease it for a further period of four years. S.H.I.E.L.D. sought a longer period in light of the substantial financial outlay in refitting the carrier. Following lengthy negotiations, S.H.I.E.L.D. signed, executed and returned the lease which set the length of the lease at four years.

3 S.H.I.E.L.D. completed the fit out as per the lease agreement at a total cost of $43 796 470.00. Over the four year period of the lease, from 2012 to 2016, S.H.I.E.L.D.s profit from trade (not including the refit cost) totalled $31 143 120.00.

4 Following the expiration of the lease, Stark did not renew and S.H.I.E.L.D. returned the Heli carrier. S.H.I.E.L.D. are suing Stark in the Queensland Civil and Administrative Tribunal ('QCAT') over the non-renewal of the lease. S.H.I.E.L.D. alleges that Stark had told them that, if they entered into the lease and completely refitted the carrier at their expense, then the respondent would give them a further four year term of the lease.

Background

5 Between 2004 and 2016 Mr Rogers operated Safe Homes In Every District, a back to base home security service. The base of operations for this service was a Heli carrier, which S.H.I.E.L.D. leased from Stark Industries.

6 The lease for the carrier was due to expire in December 2012 and negotiations began in early 2012 for a renewed lease between Stark and S.H.I.E.L.D. for the carrier. In these negotiations, Stark told S.H.I.E.L.D. that it would only grant a four year lease term and that it required them to undertake a major refit of the carrier at their expense.

7 Mr Rogers gave evidence at QCAT that these requirements would have made the lease uneconomic, as four years was too short a period in which to recover the capital expenditure on the refit.

8 The lease provided by Stark to S.H.I.E.L.D. for execution contained terms to the effect set out in paragraph 5 above. The lease did not contain an option to renew, but a provision at cl 2.3 which required Stark to provide a notice to the applicants at least six months but no more than 12 months prior to expiry of the lease. That clause provided:

> 2.3 At least 6 months, but not more than 12 months before the Expiry Date (31 DECEMBER 2016), the Lessor must give notice to the Lessee stating whether:
>
> (a) the Lessor will review this Lease, and on what terms (this may include a requirement to refit the Carrier or to move to a different but comparable type carrier...);
>
> (b) the Lessor will require the Lessee to return the Carrier by the Expiry Date.

9 S.H.I.E.L.D. alleged that in order to induce them to enter into the lease, a series of statements were made orally to Mr Rogers by Stark's employees and agents over a period between 1 April 2012 and 18 August 2012 amounting to a promise that Stark would offer a renewed lease with terms of four years to S.H.I.E.L.D. if they entered into the lease on offer and undertook a major refit of the Carrier. Mr Rogers gave evidence that these statements were made to him by a number of different employees of Stark and included statements to the effect that Stark would never want to lose such valuable clients. S.H.I.E.L.D. called other witnesses – Ms Carter, a former employee of the applicant; Mr Fury, the applicant's banker; and Mr Coulsen, the applicants' project manager – who gave evidence supporting Mr Rogers' account. Mr Fury produced a note written in his hand writing which he said he made at around the time of one of the relevant conversations. The note said:

> "Starks offer of 4 year term- same as other clients. James Rhodes has confirmed that further terms will be provided as they have in the past. He (Rhodes) was talking to Steve and intimated that refit should be high quality as this would reflect well and not to worry as he would be taken care of at renewal time. This encouraged Steve to go ahead and not worry about the lease term. Steve has also advised that he has had a similar conversation with Pepper Potts and others so we (the bank) should be ok for the longer term."

10 Mr Coulsen gave evidence that Mr Rogers was holding up the refit by delaying the signing of the new lease. He said "Steve had been really jumpy about this new lease. He wanted to make sure that Stark would give him the longer term as he was sinking a huge amount of money into the refit. That's why he wouldn't sign it until he was satisfied Stark would give him the renewal when the time came."

11 Stark called to give evidence each of the employees who were alleged by S.H.I.E.L.D. to have made representations to Mr Rogers. Each of those witnesses denied making representations of the kind alleged by the appellants.

12 As I have already noted, Stark did not exercise its option to renew under cl 2.3 and S.H.I.E.L.D. were required to return the Carrier at the end of December 2016.

REASONS FOR DECISION

13 The applicant alleges that Stark has engaged in misleading or deceptive conduct and unconscionable conduct or alternatively was estopped from not offering a renewal of the lease. The applicants have sought injunctions, orders varying the lease so that they provided for a further term of four years commencing 1 January 2017, damages for misleading or deceptive conduct, damages based on unconscionable conduct and equitable compensation based on a claim for equitable estoppel.

14 The central claim put forward at the hearing was that there was a collateral contract between S.H.I.E.L.D. and Stark, that Stark would exercise its option to renew under cl 2.3(a). S.H.I.E.L.D. conducted their case on the basis of a number of alleged representations made by employees or agents of Stark to Mr Rogers. The applicants alleged that the statements amounted to a promise that formed part of the collateral contract and that by entering into the lease the applicants accepted the promise and concluded the formation of the contract. Stark contended that these representations were never made, and the lease document was clear as to the absolute discretion afforded to Stark in exercising its option to renew.

15 There are three elements that have to be established before the collateral contract itself can be established. First, there must be an intention by the maker of the statement that it should be relied upon. Secondly, there must be reliance upon the statement by the person alleging the existence of the collateral contract. Thirdly, there must be an intention, on the part of the maker of the statement, to guarantee its truth.

16 If the alleged foundation for a collateral contract is a promise rather than a statement of fact, the requisite intention of the promisor will be obvious if in truth there has been a promise, but the promisee must still establish reliance upon the promise.

17 “The reluctance of courts to hold that collateral warranties or promises are given or made in consideration for the making of a contract is traditional.... [A] chief reason for this is that too often the collateral warranty put forward is one that you would expect to find its place naturally in the principal contract.” S*hepperd v The Council of the Municipality of Ryde* (1951-51) 85 CLR 1

18 To take effect, a collateral contract must be consistent with the main contract. It must be the case that, notwithstanding the collateral contract, the parties have and are subject to all of the respective benefits and burdens of the main contract. Otherwise the collateral contract would become the dominant contract.

19 To have legal effect, the collateral contract must, like all contracts, be sufficiently certain. If the law requires a contract of the kind contended for to be in writing, it must be in writing.

20 After assessing the conflicting evidence, I hold a statement was made to Mr Rogers by a Stark employee, Mr Rhodes, that he would be ‘taken care of at renewal time’. Accordingly, I find that on a date which was probably 14 July 2012 at a place which was probably Stark’s office Mr Rhodes made statements to Mr Rogers to this effect: that if Mr Rogers spent the money that, under Stark’s lease, S.H.I.E.L.D. were required to spend to achieve a major refit of the carrier to a high standard, he would be ‘taken care of at renewal time’, and that the lease had been limited to a four year term only because they would thereby be aligned with other clients’ leases.

21 I further hold that the statements set out in above were made based on the evidence given by Mr Fury, the banker, who I found was present when the statements were made by Mr Rhodes. I hold that Mr Fury’s evidence about the conversation was broadly accurate, to the extent that his roughly contemporaneous note supported it and that the note was likely to have been a reasonably accurate record of the substance of what Mr Rhodes said to Mr Rogers at that meeting.

22 During the hearing, Stark contended that if QCAT were to find that certain representations were made, there were three defences available to it. First, Stark submitted that the representation was neither promissory nor sufficiently certain to give rise to an enforceable contract. Secondly, the alleged contract was inconsistent with the lease, specifically the discretion given under cl 2.3. Thirdly, S.H.I.E.L.D. did not rely on the representations.

23 On the issue of whether the statement was promissory, I hold that the statement made by Mr Rhodes was a promise that gave rise to a collateral contract between the tenants and Stark being that at the conclusion of the four year lease term, Stark would fulfil its obligation under cl 2.3 of the lease to give a notice, within the time specified in cl 2.3, stating that it would renew the lease for a further four year term.

24 Although the term 'taken care of' is, in isolation, a vague term it should not be considered in isolation. The term has to be understood in the context of negotiations and also the requirement that S.H.I.E.L.D. spend a significant amount in refitting the Carrier. What matters is how the phrase would be discerned objectively, in that context, by a reasonable person in the position of the party to whom the phrase was spoken, in the surrounding circumstances known to the parties. *Toll (FGCR) Pty Ltd v Alphapharm Pty Ltd*

25 In my opinion, a reasonable person with knowledge of those facts and circumstances would conclude that a promise that Mr Rogers would be taken care of at renewal time meant a promise that Stark would give a notice, when the time came, that it would renew the lease. Accordingly, I consider that the crucial statement was sufficiently clear and coherent to be capable of giving rise to a legal obligation upon Stark.

26 Stark contended that even if the representations were promissory and sufficiently certain in isolation, when analysed in the context of the lease they were uncertain and inconsistent. Stark submitted that the promise did not set out the terms and conditions of the offered lease renewal. Further, Stark argued that finding such a collateral contract was inconsistent with the terms of cl 2.3 which gave it the sole discretion as to whether to exercise its option to renew. S.H.I.E.L.D. submitted that the effect of the terms of the renewed lease should be the same as the existing lease. However, in closing submissions, counsel for S.H.I.E.L.D. changed course and suggested for the first time the renewal should be on terms mutatis mutandis.

27 I have rejected both contentions. A reasonable person having heard the representation from Stark to renew would have concluded that such a promise meant the terms and conditions of the renewed lease would be on the terms specified in the notice provisions in cl 2.3. Therefore, I find that the terms and conditions of the new lease would be at the sole discretion of Stark.

28 In relation to the alleged inconsistency between the collateral contract and the lease, I note that in *Maybury v Atlantic Union Oil Ltd,* where a main contract confers onto a party an absolute discretion and a collateral contract arises which limits that discretion, the collateral contract will be void on the basis of inconsistency. In this case, however, I hold that the collateral contract here did not fetter the discretion of Stark to give notice. This was because cl 2.3 did not give Stark a discretion, it imposed an obligation to give notice within a specified time.

29 The collateral contract for which the applicants have contended did not have the effect of removing from Stark a right of election or of fettering a discretion of Stark as to the giving of a notice. The lease did not create a right of election – Stark had that right, independently of the lease – and did not confer a discretion. The lease imposed an obligation: to give a notice within the required time range. So a collateral contract whereby Stark promised to give that notice with a specification of one only of the two possible things that it could do at the expiration of the lease in any event – i.e. a specification that it would renew the lease – did not impinge upon any right created by the lease, or contradict any part of the lease.

30 I also reject Starks final contention, that the tenants did not rely on the representations as the cost of the refurbishments were evidence of reliance.

31 There is no dispute that the measure of loss is the profit that the applicant would have expected to earn if it had been able to accept an offer of a renewed lease for four years (which offer would, in effect, have been made by Stark giving the notice under clause 2.3 that it would review the lease).

32 My decision is predicated upon the renewed lease being in fact on the same terms and conditions, mutatis mutandis, as the expired lease. I accept that Stark had no obligation to offer such terms and conditions when giving a notice of renewal but probably would have offered terms and conditions that had reasonable correspondence with those that had been in the expired lease. My calculations have incorporated a discount rate to take account of uncertainties and of the possibility that profits might not be earned at all. I have found that the appropriate discount rate to apply was 40%.

33 I have determined the issue of liability in favour of the applicants, by determining that Stark breached a collateral contract and thereby caused S.H.I.E.L.D. loss and damage. I determine, therefore, that Stark is liable to pay the applicant $18 685 872.00 as damages for loss of anticipated profits.