

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Southport Memorial Club Inc v Returned and Services League of Australia (Queensland) Southport Sub-Branch Inc [2023] QCA 146

Supreme Court of Queensland - Court of Appeal, McMurdo, Bond, Dalton JJA, 21 July 2023

An appeal about a service association transferring land, including a lease, to a club that permitted the service association to use some of the facilities, to a third party, but wishing to retain benefits of the use of facilities at the club.

Key words: Club, Queensland, Appeal, Landlord, Tenant, Licensed Club, s 62 of the Land Title Act, Personal Interest

1. Bond J delivered the judgment, to which McMurdo and Dalton JJA agreed.
2. This matter was an appeal from [Returned & Services League of Australia \(Queensland Branch\) Southport Sub-Branch Inc v The Southport RSL Memorial Club Inc](#) [2022] QDC 20.
3. The Returned & Services League of Australia (Queensland Branch) Southport Sub-Branch Inc (RSL) is a sub-branch of the Returned and Services League of Australia (RSLA).
4. RSL was the owner of land, and the building and other improvements on it (the property), in Southport, Queensland. It leased the property to The Southport RSL Memorial Club Inc (the Club) under a registered lease.
5. The Club is not affiliated with RSL or the RSLA, but is a separate body that operates a licensed club, authorised by the RSLA to use the name 'RSL' in its own name and the name of its club.
6. The lease included clause 29 that obliged the Club to allow RSL to use two offices and other spaces within the building, and to display its memorabilia within the building, as well as providing other services to RSL and its members.
7. In 2019, RSL sold the property to an unrelated party, subject to the lease. This meant that the new property owner is the lessor, and the Club remains the lessee.
8. The Club told RSL that by selling the property, RSL had extinguished its right to continue its occupancy. The Club changed the locks on the doors to the offices that RSL had occupied and moved RSL's furniture, equipment and records, together with some memorabilia, into a storage facility.

9. RSL sought damages of \$192,820 for breach of the covenants in clause 29 of the lease.
10. The Primary Court found that the Club had breached its contractual licence to the RSL under clause 29 and awarded damages to the RSL for the rent to the end of the lease period, and for storage of its property.
11. The grounds of appeal were that the Primary Court had:
 - erred by not concluding that on the proper construction of cl 29 the lessor for the time being of the land was the party contractually entitled to such rights as were created by cl 29, and once the RSL transferred title to the land, it ceased to be the lessor and ceased to have any such rights;
 - erred by not concluding that the rights created by cl 29 were not personal to the RSL, and instead touched and concerned the land, and were transferred with it;
 - erred by not finding that by operation of s 62 of the [Land Title Act 1994](#) (Qld) (the Act), the rights which the respondent had held under cl 29 had vested in the new owner; and
 - erred in failing to find that the RSL had only proved damage to the extent of storage fees totalling \$10,820.
12. The Court of Appeal found that the intention of cl 29 was to express obligations owed to the RSL personally and not merely to the corporation that occupied the position of the lessor for the time being. There was no reason in the lease to think that the lease contemplated that the personal obligation would be extinguished if the RSL transferred the freehold, and in fact, the contrary was the case, as another clause only expressed a release in favour of the RSL, not in favour of the Club.
13. The Court of Appeal found that section 62(1) of the Act did not operate to vest in the new owner the RSL's rights under cl 29 of the lease. Personal obligations or liabilities of the transferor of an interest in land can be vested in the transferee by operation of s 62 or similar provisions, but that will only occur when the personal obligation or liability is intimately connected with the rights of property arising out of the transfer, or normally incident to the interest in land which is transferred. An accrued personal liability of a transferor of land for damages consequent upon a completed breach of a lease covenant is not within the scope of the section.
14. The Court of Appeal also found that the Primary Court applied the correct test for the assessment of damages. The Primary Court was right not to regard the mere fact of the disparity between the area of the office space provided pre-breach and the area obtained by the RSL post-breach as proving the RSL had acted unreasonably. The Court of Appeal noted that (at [60]):

If the Club wanted to contend that less space and a lesser rental would have still been sufficient to achieve that outcome, then it was for the Club to advance that proposition. Such a proposition would have been a failure to mitigate proposition. The onus would have been on the Club to show that the RSL had failed to mitigate its damage. (reference omitted)
15. The appeal was dismissed.

COMMENT



This was a case of a lessor seeking to continue to enforce covenants in its favour after the transfer of the leased property to a third party buyer had been registered. The RSL's argument was that the relevant lease provision, clause 29, created personal rights in its favour, and that because they did not 'touch and concern the land', such rights did not transfer to the new owner of the property. Nor were they extinguished.

The Primary Court agreed. The benefits and obligations of clause 29 did not transfer to the new owner upon the sale of the building because they were of no benefit to an owner per se, but only the RSL while it was the owner of the property. Therefore, they were not extinguished by the transfer and remained contractual obligations of the Club to the RSL.

The primary judge was of the view that the RSL's right was more than a mere licence. It was a contractual obligation to require the club to cooperate and assist the RSL to carry out its functions, and to provide part of the premises to it for that purpose. This obligation persisted until the end of the term of the lease, which is August 2024.

The Court of Appeal agreed with the court below, finding no reason to disturb its substantive findings, including damages of \$193,000.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA//2023/146.html>

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