VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RETAIL TENANCIES LIST

VCAT REFERENCE NO. R83/2010

CATCHWORDS

Retail Tenancies List; Provision in lease permitting premises to be used as *'hotel, restaurant and bar'*; No accommodation being provided at time lease entered into; Covenant of lease prohibiting use of premises *'for any residential purpose whether temporary or permanent'*; Whether proposed use of first floor for short term accommodation for 29 persons permitted by lease.

APPLICANT	Bay Street Rose Pty Ltd (ACN 135 504 095)
1ST RESPONDENT	Harris Christopoulos
2ND RESPONDENT	Christina Christopoulos
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	22 March 2011
DATE OF ORDER	30 March 2011
CITATION	

ORDER

1. Application for declaratory relief by the applicant dismissed.
2. Costs reserved.
3. **Adjourned to directions hearing 9.30 am, 15 April 2011.**

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M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	Mr Paul Duggan of Counsel
For Respondents	Mr J. Ross of Counsel

REASONS

BACKGROUND

1 In 1987 Mr & Mrs Christopoulos the respondents in this proceeding bought a hotel known as The Rose and Crown at 309 Bay Street, Port Melbourne. They and then their son, Mr George Christopoulos traded from the premises until 2000. In 1998 Mr George Christopoulos began operating the business under the name *'The Rose'*, the name under which it still trades. According to Mr George Christopoulos no accommodation has been offered at this establishment since the 1970s.

2 Mr & Mrs Christopoulos senior let the premises to Stefhay Pty Ltd for a term of five years commencing 1 April 2007. The lease reserved options for three further terms of five years each making a total potential letting period of 20 years. The lease deed itself was executed on 31 August 2007. Stefhay transferred its lease to VMN Pty Ltd which by a further deed dated 5 April 2009 transferred the lease to Bay Street Rose Pty Ltd as trustee for the Bay Street Rose Family Trust. This company is the applicant in the proceeding.

3 Ms Dikstein is the principal of Bay Street Rose Pty Ltd. She wrote to the Christopouloses stating:

> I have had businesses over 40 years. I have been through the Keating recession. I have found this is the hardest business I have ever tried to pick up. It seems to have a lot of ghosts.
>
> I never gave up and am struggling to pay the hefty overheads so I am inclined to find other ways to pay the rent. I tried to rent rooms out for office space – impossible in this climate. I created and ran a 50 bed backpacker for five years very successfully and the obvious solution for this building is backpackers.
>
> I really need your permission to be able to continue.

4 In another letter she stated inter alia:

> I have received registration of prescribed accommodation which I would like to use for short term accommodation to accommodate 29 people.

5 Ms Dikstein's plan was to *'return upstairs to accommodation'*. The Christopouloses refused their consent and opposed Ms Dikstein's plan. As a result of the opposition by the Christopouloses, Ms Dikstein's company commenced this proceeding, initially in the Civil Claims List. It was transferred to this List and in Points of Claim dated 2 July 2010 Ms Dikstein sought orders that the Christopouloses be directed to sign a building permit application, that they consent to the use of the premises for short stay accommodation, damages and costs.

6 On 4 February 2011 I directed that the proceeding be listed for hearing to determine *'issues of liability only'*.

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7 When the matter came on for hearing Mr Duggan of Counsel representing Bay Street Rose said that he sought determination by way of declaratory relief of a single question, namely whether his client's proposal to use the upstairs of the premises for short stay accommodation for 29 persons was prohibited by Clause 3(a) of the lease. He did not seek to agitate any of the other issues raised by the points of claim, in particular the question of lessor's consent to a proposal for certain building works.

8 Mr Ross, Counsel for the respondents submitted in the circumstances it would be wrong further to split the proceeding. He submitted that all issues of liability should be heard and determined there and then. Given that the applicant wished to agitate a single issue only and that the respondents had no operative counterclaim, I decided it was appropriate to determine at this stage the sole question which was raised by Mr Duggan on behalf of Bay Street Rose.

THE PROVISIONS OF THE LEASE

9 Clause 3.3(a) of the lease, the matter at present in dispute provides as follows:

> Not to use or permit the premises to be used for any purpose other than as set out in Item 10 of the Third Schedule having a standard of occupation and use and a general appearance as are appropriate to a business and commercial area and as will preserve the amenity of the Building and will not permit the premises to be used for any illegal or unlawful or immoral use or for any residential purposes whether temporary or permanent **PROVIDED THAT** any storage space forming part of the premises shall not be used for any purpose other than for storage.

10 Item 10 of the Third Schedule provides as follows:

> Use
>
> Hotel, restaurant and bar

CONTENTIONS ON BEHALF OF BAY STREET ROSE

11 Mr Duggan, Counsel for Bay Street Rose submitted that the view adopted by the Christopouloses that Clause 3.3 of the lease prohibited his client's proposed use was inconsistent with the text of the clause itself. The Christopouloses' view of the operation of this clause entailed a number of fallacies, he said, first it gave no independent meaning to the word *'hotel'* making it merely a tautologous reference to bar and restaurant. Next he said the Christopouloses' construction entailed giving the word *'residential'* the meaning that it pertained to any place of sleep *'rather than a place of conventionally understood residence'*. He submitted that the word *'residential'* imported long term occupancy rather than short term accommodation. He said residential would appropriately be applied as a description to an establishment such as a rooming house rather than to an

ordinary hotel. He referred to paragraph 23 of Ms Dikstein's statement where she said:

> The tenant does <u>not</u> propose to offer permanent or long term overnight accommodation on the premises to any one (whether paying guests nor staff). To demonstrate its bona fides in this regard, it is prepared to consent to an amendment of the lease expressly prohibiting the premises from being used for overnight accommodation by any individual for more than, say, 31 consecutive nights.

12 He referred to the definition of hotel in the *Shorter Oxford English Dictionary* (3rd Edition) which gave as its most pertinent meaning in the present context:

> Inn; esp. one of a superior kind 1765.

13 As to the word *'inn'* which is given as a synonym for the word *'hotel'* the third and most pertinent meaning in this dictionary according to Mr Duggan is as follows:

> A public house for lodging and entertainment of travellers, wayfarers, etc; a hostelry or hotel; a occas., erron., tavern which does not provide lodging.

14 Next Mr Duggan referred me to the definition appearing in the *Macquarie Dictionary* 3rd Edition which gives the following as the meaning of hotel:

> A building in which accommodation and food and alcoholic drinks are available.

15 It gives the word hostel as being a synonym.

16 As to the adjective *'residential'*, the *Macquarie* gives as its third meaning (of a hotel, etc) catering for guests who stay permanently or for extended periods.

17 According to Mr Duggan therefore the provision of accommodation was an essential and core concept for a *'hotel'*. He went so far as to say that in failing to offer a residential component at present his client was not acting in conformity with its obligations under the lease.

CONTENTIONS FOR THE LESSOR

18 Mr J. Ross of Counsel appeared on behalf of the Christopouloses. He responded with his own series of dictionary references. He relied first on the *New Shorter Oxford English Dictionary* giving as its most relevant meaning for the word *'hotel'* the following:

> An establishment esp of a comfortable or luxurious kind, where paying visitors are provided with accommodation, meals and other services.

19 An alternative meaning according to that dictionary was:

> A public house or other place serving alcoholic drink Canad, Austral and NZ colloq.

20 Next he referred me to the definition in the same dictionary of the word *'resident'* which is defined as:

> A person who resides permanently in a place, a permanent or a settled inhabitant or a town, district etc also, a guest staying one or more nights at a hotel etc.

21 He took me next to the online *Macquarie Dictionary* which rendered hostel as having this meaning:

> A supervised place of accommodation, usually supplying board and lodging, provided at a comparatively low cost, as one for students, nurses etc.

22 As to the word residential, he relied on the following meaning in the online *Macquarie Dictionary*

> (of a hotel, etc) catering for guests who stay permanently or for extended periods

23 Finally he took me to some definitions of land use terms in the relevant local planning scheme where the term *'residential building'* is defined as follows:

> Land used to accommodate persons, but does not include camping and caravan park, corrective institution, dependent person's unit, dwelling, group accommodation, host farm, residential village or retirement village.

24 He noted that the table of land use terms showed this one as including *'backpackers' lodge'*.

25 Mr Ross said that even if in accordance with Mr Duggan's submissions the adjective *'residential'* imported an element of long term or permanent occupancy, its meaning in clause 3.3 was modified or qualified so as to extend not merely to permanent residents but also to *'temporary'* residential purposes. The use of the word temporary meant that Bay Street Rose's proposal was squarely within the prohibition established by the clause.

SUBMISSIONS IN REPLY ON BEHALF OF BAY STREET ROSE

26 Mr Duggan submitted that someone could be regarded as a temporary resident even if he or she was resident for an extended period. He noted that the definition of *'residential'* in the online *Macquarie Dictionary* relied on by Mr Ross made specific reference to guests staying permanently or for extended periods. He submitted a number of the defined terms relied upon by Mr Ross should be disregarded because those words themselves were not employed in the clause in the lease. This was true also of the definition relied on from the Planning Scheme.

CONCLUSION

27 The first question for consideration is what is the purport of the word *'hotel'* where used in Item 10 of the lease schedule. In *Coolstore*

Corporation Pty Ltd v Haybor Investments Pty Ltd I had to consider amongst other things the application of the *Retail Tenancies Reform Act* 1998. One of the criteria for the operation of the statute was that the floor area of the relevant tenancy must not exceed 1,000 sq m. The rules for measuring this floor area in accordance with Ministerial guidelines varied according to the characterisation of the building. Dr Croft SC and Mr Hanak (as they then were) appeared for the respondents and contended inter alia that the premises in question should be regarded as an hotel. I take the liberty of quoting my summary of this part of the submissions and the views which I expressed with respect to them including a short consideration of the concept of *'hotel'* in Victorian licensing law (2003) V Con R ¶ 58-571

> [37] In support of his contention that these premises which admittedly did not provide any accommodation were nevertheless to be regarded as a hotel, he referred to the dictum of Wilde CJ in Daken v Hartford Fire Insurance Co Limited [1972] NZLR 971, 979 quoted in Words and Phrases Legally Defined Third Edition, Volume 2 at page 370 where His Honour said:
>
> > "Upon consideration I think that in normal New Zealand parlance the word 'hotel' is not necessarily restricted to premises that supply accommodation. In ordinary usage I think it is quite commonly applied to a tavern where only liquor and not accommodation is supplied."
>
> He noted that in one of his reports the administrator of Coolstore Corporation described its business as that of a *"hotel"*. He also referred to the definition of *"inn"* in the **Carriers and Innkeeper's Act 1958** Section 26 where the following definition appears:
>
> > " 'Inn' means any hotel or motel and includes any establishment held out by the proprietor as offering food, drink and, if so required, sleeping accommodation without special contract, to any traveller presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit state to be received."
>
> [38] He also referred to Halsbury's Laws of Australia paragraph [40-585] Service 131 where the learned editors refer to the definition in the Victorian statute already quoted and continue:
>
> > "At common law an 'inn' is a house where the traveller is furnished with everything which he or she has need for whilst upon his or her way and common inns are instituted for passengers or wayfarers, though it is not necessary, in order that a person may be a guest, that the person must have come for more than temporary refreshment.

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> If accommodation is provided under some special contract, for example to a lodger, and the host is not prepared to provide accommodation to any and all reasonable comers the host is not an innkeeper."

> [39] In popular Australian parlance the words *"pub"* and *"hotel"* are synonymous. The old licensing laws did not generally permit the conduct of public liquor bars except in association with the provision of accommodation. The **Licensing Act 1958** provided that a victualler's licence should not be granted in the City of Melbourne unless the *"house"* contained *"at least six bedrooms for public accommodation"* or for establishments built after 1 March 1954 *"such greater number of bedrooms as the licensing court thinks necessary ... "*. Establishments outside the City of Melbourne were required to have not less than three bedrooms or in the case of those built or re-built after 1 March 1954 *"such greater number of bedrooms as the licensing court thinks necessary"*. The **Liquor Control Act 1968** replaced the *"Victualler's licence"* with an *"Hotelkeeper's Licence"*. The requirement to provide accommodation was retained but could be waived in the case of a *"restricted licence"*. See Sections 48 and 49. Without tracing all the legislative changes that have taken place since those far off days, the **Liquor Control Reform Act 1998** no longer provides for *"hotel"* licences or *"victualler's licences"* but rather (a) general licences and (b) on-premises licences. These licences do not require the provision of accommodation. It would also seem that the word *"hotel"* is not one which has a fixed legal meaning. I accept Dr Croft's submission that this establishment including as it does two bars for the consumption of liquor and as I was told from the bar table, a packaged liquor licence for the *"Wooden Bar"* could properly be regarded as either a tavern or an hotel.

28 I should add that I have since discovered that the provisions in the *Licensing Act* which required an increase in the accommodation component for hotel built after 1 March 1954 were introduced to increase the availability of visitor accommodation for Melbourne's staging of the 1956 Olympic Games.

29 For the reason explained in that passage I believe that whatever might have been the case a generation or two ago, the word hotel in ordinary parlance in Victoria is now apt to refer to an establishment serving alcohol but not providing accommodation. Of course it clearly does also describe and perhaps more frequently such an establishment that does provide accommodation.

30 The dictionary definitions relied on by Mr Ross seem to be of more recent vintage than those relied on by Mr Duggan. The original *Shorter Oxford English Dictionary* appears to indicate that referring to an establishment as an inn when it does not provide accommodation is *'erroneous'* yet the new *Shorter Oxford English Dictionary* as relied on by Mr Ross seems to accept

that in Australian colloquial speech at least the word hotel can refer to a public house serving alcoholic drink even without any element of accommodation being offered.

31 The history of these premises is supportive of the view that hotel is used in the looser sense which does not require accommodation as being an essential element. The parties described the premises as being used as a hotel even although accommodation had not been offered there for 30 years.

32 Insofar as the applicant submits that the concept of *'hotel'* as part of the permitted use necessarily imports an entitlement to accommodation in accordance with its proposal I reject that submission. Given that the word *'hotel'* is clearly apt to describe an establishment which does offer accommodation however, if the word hotel as a permitted use then Bay Street Rose's proposal would clearly be permitted but the word hotel does not stand alone, rather it is allied with a prohibition on the use of the premises *'for any residential purposes whether temporary or permanent'*.

33 It may be conceded that in the context say of taxation law or private international law a person merely on a short stay for instance on holiday, would not be regarded as a resident of the country in which the short stay was taking place or of the accommodation establishment providing the accommodation. In my view however the context in which we find the adjective *'residential'* in Clause 3.3(a) of the lease is quite different. It would be quite proper and usual to regard a person even on a short stay at a hotel as being a resident. See for instance the definition of residential from the *Macquarie Online Dictionary* relied on by Mr Ross. Nevertheless, the point is made clearer by the reference in Clause 3.3(a) to *'temporary'* residential purpose. The effect then of Clause 3.3(a) in my view is to prohibit the tenant from conducting The Rose as a traditional hotel with accommodation.

ORDERS

34 The application for declaratory relief by Bay Street Rose will be dismissed. I have heard no submissions on the question of costs and so costs will be reserved.

MFM:RB