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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 10 of 2002

PUNCHI DASANAYAKE and
DEEPA DASANAYAKE — Applicants

and

AUST PACIFIC DEVELOPMENTS PTY LTD
(ACN 074776211) — First Respondent

and

MICHAEL JOSEPH McEVOY — Second Respondent

CAIRNS

..DATE 06/06/2002

JUDGMENT

As corrected

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06062002 T18-19/NA M/T CNS2/2002 (Jones J)

HIS HONOUR: This is an application on the part of the applicants for an injunction to restrain the two respondents, one of which is a corporation, and the other the director or controlling mind of that corporation. The injunction seeks to restrain any actions on the part of the respondent which would interfere with the quiet enjoyment by the applicant as lessees of premises known as shop 16, "Le Cher Du Monde", 9 Grant Street, Port Douglas. The application also seeks the return of certain items of property, which are specifically described in the application.

The proceedings stem from the applicants' claim that they are the lessees of premises pursuant to a written lease executed on the 25th of October 2001. The original typewritten form of that lease indicates that the commencement date of the rental is the 1st of July 2001. It provides for an annual rent of $36,000. The lease document is in the standard form 7, and contains the usual terms and conditions.

To that typewritten lease has been attached a document which was executed on the 24th of October 2001, which is headed "Special conditions to be added to restaurant lease". I am satisfied that the handwritten document does refer to the lease which was executed a day later on the 25th of October 2001. A reason has been given for that delay in the execution of the typewritten lease, as being because of the unavailability of a Justice of the Peace at that time.

The significant special condition is as follows: "Instead of

the rental of $36,000 per annum plus outgoings, the lessor will accept 50 per cent of any profits. The lessees will provide their labour free in return." That handwritten document on its face appears to be duly executed by each of the parties.

The lease document which was tendered as Exhibit DD1 to the affidavit of the second named applicant shows a number of alterations to the typewritten words. For example, it shows that the commencement date of the lease would be the 20th of December 2001. The alteration changes the annual rent from $36,000 to $24,000, and changes other provisions such as the periodic review dates.

An issue has arisen as to when the alterations were made to the typewritten document, and as to the effectiveness of those alterations. In her affidavit the applicant, Deepa Dasanayake, in paragraph 12 asserts that it was the second respondent who asked her to make those alterations. She said in her evidence that the alterations were made by her solicitor in his office at Port Douglas, that when she produced the typewritten documents bearing those alterations, the second respondent refused to acknowledge them or accept them. Consequently, the alterations have not been initialled by any of the parties to the original lease, and they, in my view, are not effective to change the original terms of the lease.

Mr Jensen, counsel on behalf of the respondents, raised this

as suggesting that the presumption relating to the alteration of documents, namely that they are deemed to occur before execution, would indicate that there was a repudiation by the applicants of the original lease, or perhaps that they were attempting to deceive the Court by tendering the lease in the form bearing those alterations.

I do not accept either of those propositions. The presumption about the alterations occurring before execution is clearly rebutted in this case by the evidence, and similarly by the fact of the showing the date of commencement of the lease as the 20th of December. The evidence clearly shows that the applicants were in occupation of the premises from mid-year, and that the typewritten lease document was requested by the respondents to formalise that relationship.

The more likely explanation, in my view, is that the solicitors who prepared the affidavit were not careful in providing a chronological description of the events which led to the alterations. I should mention that Mr McEvoy gave evidence that he did not suggest that the alterations be made, certainly did not authorise them, and says also that the document as altered was not shown to him.

These conflicts and credibility do not have to be resolved on this application. I am satisfied that there was in existence in December 2001 and in January 2002 a lease pursuant to which the applicants occupied the premises. Whether it was the written lease in form 7, or if that document had in fact been

repudiated, a monthly tenancy or a weekly tenancy, or whatever, is not a matter that is necessary for me to determine.

I am satisfied that the applicants were in lawful occupation of the premises at the relevant times, and that they had the right of quiet enjoyment of those premises. Whether there have been breaches of the lease, as there is certainly prima facie evidence to indicate, then that is a matter which might be the subject of other proceedings, but it is not material for me to determine here. The clear situation is that the lease, whatever kind, enjoyed by the applicants had not been determined or, in my view, repudiated as of in December 2001 and January 2002.

The events which prompt the application for the injunction are set out in paragraphs 16 to 23 of the affidavit of Deepa Dasanayake. Mr McEvoy does not deny that he attempted to change the locks on the premises. He does not deny that he did in fact remove from the premises various items of equipment which were being used by the applicants in the business they conducted on the leased premises. He had no right to do that, and it is action which the applicants are entitled to have restrained. There is no suggestion in the material that such behaviour on the part of the second respondent has continued since the period referred to in the applicants' affidavit. Nonetheless, whilst the feeling of conflict exists between these parties, there ought, in my view, be an order in appropriate terms restraining the two

respondents from interfering with the applicants' quiet enjoyment of the said premises.

The other form of relief by the second respondent is to return plant and equipment, which in the application is described as "12 tables, 34 chairs, plates, cutlery, glasses, pots, pans, a blender, a bar stool, and food warmers, and outdoor plants". Mr McEvoy claims that most, if not all, of the property which he took was his.

Despite this, when the matter first came before me and interlocutory orders were made by consent, he undertook to the Court to return the goods described in paragraph 3 of the application. In breach of that undertaking, he did not return any of the goods. The reason he did not he says was on the advice of solicitors who he said advised him that his compliance with that undertaking was conditional upon the applicants complying with an undertaking which they gave to provide financial records. The order makes no reference to that being conditional, and the undertaking ought to be complied with.

It is a sad fact that both applicants and the respondents in this case have quite arbitrarily, it would seem, ignored the undertakings which they have given to the Court, and were those breaches more serious, I would be compelled to deal with each of them for each breach.

The second named applicant, when giving evidence, has now

indicated that in any event she did not own that list of property referred to in paragraph 3, but only some part of it. She referred particularly to four tables not 12. She referred to some 59 plates, seven or eight pots, 30 glasses, cutlery, wall pictures, and plants.

It is not possible for me to determine the ownership of property of this kind in these proceedings. The only attempt to address the ownership of property, apart from the assertion and denial by the second named applicant and the second respondent, is some hearsay evidence introduced into the evidence of Mr McEvoy that a third party owned pot plants. I refuse to act upon that hearsay evidence.

In the end result, I will simply order that the property, which is conceded by the second respondent as being the property of the applicants, be returned to them forthwith. I will direct that disputed items of property be identified, and thereafter the parties may take whatever remedy in connection with those items as they may be advised. It is a matter that is properly in the Small Claims Tribunal and not the Supreme Court of Queensland.

It is my regret that these proceedings, which have resulted in the incurring of considerable expense by the parties, has not really gone any way to resolving what is the essential dispute between them. But that is largely their own fault or a fault of their earlier legal advisers. There needs to be a resolution of the real issue of dispute between the parties.

Whether thus relates particularly to the circumstances in which the written lease was entered into, whether its purpose was fraudulent, and if not, whether it is yet a valid lease, whether it has been repudiated.

Also the fact that the applicants have not paid any rent over the period of some seven months, as alleged, may constitute a very significant breach. There is an obvious obligation where rent is to be determined by reference to profit, that there be complete openness and honesty in accounting for the receipts and outgoings of the business. That certainly seems to be lacking in this case.

I mention those matters not because they are germane to my decision, but simply to explain that the manner in which the evidence of all parties has been presented to this Court leaves a lot to be desired, and would in some instances have caused me not to grant the equitable relief which is sought here. However, I do propose to grant the equitable relief, because it seems to me that the parties need to remain at arms' length, to use the proper facilities of the law to deal with the disputes between them, and not to take matters into their own hands.

My orders will be then that:

1) Subject to any rights which the respondents may have in respect of the applicants' noncompliance with the terms of the lease, the first and second respondents,

whether by themselves or their agents or servants or any of them, or otherwise, are restrained from doing or permitting or omitting to do any act or acts the effect whereof would, or might, interfere with the quiet enjoyment by the applicants as lessees of premises known as shop 16, "Le Cher Du Monde", 9 Grant Street, Port Douglas.

2) I order that the second respondent return to the applicants all property which is acknowledged as being their property.

3) I direct that disputed items of property be identified.

4) I order, in the circumstances in which this matter has been presented to the Court, that each party pay their own costs.

MR JENSEN: Can I just raise one point with the form of the order, your Honour?

HIS HONOUR: Yes.

MR JENSEN: The order I submit, your Honour, should make it clear that that restraint is in relation to any events that have occurred in the past, because obviously if there are breaches tomorrow, we don't want the applicants arguing they're some how protected by your Honour's order to remain in quiet possession.

HIS HONOUR: It's got nothing to do with their identified breaches, which - about which notices of remedy are to be-----

MR JENSEN: Well, perhaps it's enough if - if it - if this discussion is on the record, but it's - it's obviously implicit that your Honour's restraint giving them quiet possession is only in relation to events that have happened to date.

HIS HONOUR: Yes, indeed.

MR JENSEN: Yes.

HIS HONOUR: Yes. Sorry, perhaps I should clarify that. The - I'll just pass this by you before I do. Is - the whole of the order should be subject to any rights which the respondents have in respect of noncompliance with the terms of the lease, they have quiet enjoyment.

MR JENSEN: Well, I think that might be unduly generous to my client, your Honour, because I think your Honour has decided as at today, and until the next breach-----

HIS HONOUR: Breach by the applicants.

MR JENSEN: No doubt, your Honour.

HIS HONOUR: Breach of the terms of the lease you're referring to. See, they've - as I understand it, your client is alleging that there have been past breaches of the terms of the lease-----

MR JENSEN: Yes.

HIS HONOUR: Which you would want to have remedied, and that might indicate that he might have to serve notices on them, so he's surely - he'd be entitled to do that without interfering with their quiet enjoyment.

MR JENSEN: Yes, I understand what your Honour is saying.

HIS HONOUR: So, I will do this formally as part of the order. I will preface the order by the phrase, "Subject to the lawful exercise of their rights in respect of any breach or breaches of the lease," - and then the order will go on.

MR JENSEN: Yes, I think that's-----

HIS HONOUR: Do you understand that, Mr Fergus?

MR FERGUS: I do, your Honour.

HIS HONOUR: Yes, thank you.
