[2003] QSC 052

State Reporting Bureau

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 11806 of 2002

WORLD BY NITE PTY LTD
(ACN 100 098 164) Applicant

and

JAMES MICHAEL and
ANNE MICHAEL Respondents

BRISBANE

..DATE 31/01/2003

..JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: The respondents are the registered proprietors of land at 25 Warner Street, Fortitude Valley, Brisbane, on which stands a building at present occupied by the applicant company. On 20 August 2002 the respondents granted a lease of the land to the applicant for a term beginning on 1 May 2002 to expire on 30 April 2005 with options for two renewals of three years each. The permitted use of the premises provided for in the lease was "Cabaret/nightclub, wine bar or adult entertainment venue". The applicant conducts an establishment on the premises that falls within that description. The rent was $72,000 per annum plus goods and services tax.

Clause 2.1 of the lease provided for the payments the applicant as tenant was to make to the respondents as landlords. They included the rent of course (clause 2.1(a)), and a number of other payments including "the Agreed Proportion of Outgoings" (clause 2.1(b)). In paragraphs (1) and (17) of clause 1.2, the definitions clause, the terms "Agreed Proportion of Outgoings" and "Outgoings" were defined:

> "(1) 'Agreed Proportion of Outgoings' means in respect of all other Outgoings, a proportion determined attributable to the premises as agreed between the parties or as determined by the proportion that the area of the Premises bears to the Area of the Land.
>
> ...
>
> (17) 'Outgoings' means the Landlord's reasonable expenses directly attributable to the operation, or maintenance of the Building and charges, levies,

premiums, rates or taxes payable by the Landlord because it is the owner or occupier of the Building or the Land, where those expenses are not paid for directly by the tenant, and such expenses include, but will not be limited to, all costs associated with the following:

(a) rates, taxes and charges payable to any government or other authority

(b) cleaning costs and materials

(c) rubbish removal

(d) light and power charges

(e) air-conditioning and ventilation

(f) fire protection and prevention

(g) security

(h) maintenance

(i) costs for the control of pests, vermin or insects or other similar infestation

(j) costs of maintaining gardens; and

(k) building insurance."

The agreed proportion of outgoings was 100 per cent.

Clause 2.2 of the lease provided for the manner of payment:

"2.2 Manner of Payment

(1) The Tenant must pay the Rent:

(a) by equal monthly instalments in advance on the first day of the month

(b) the first payment must be made on the Commencement Date

(c) if necessary the first and last instalments must be apportioned on a daily basis.

(2) The Tenant must pay the Agreed Proportion of

> Operating Expenses for each Financial Year in the manner notified in writing by the Landlord and in the absence of notification in the same manner as Rent. A certificate by the Landlord or authorised representative of the Landlord is prima facie evidence of the Operating Expenses for each Financial Year.
>
> (3) The Tenant must make all other payments promptly to the relevant assessing authority if assessed directly against the Tenant but otherwise to the Landlord upon receipt of an invoice.
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> (4) Payments must be made as the Landlord directs.
>
> (5) Within ninety (90) days after the expiry of each Financial Year the landlord must provide the Tenant with a statement containing the actual Outgoings for the Building or the Land for the immediately preceding Financial Year. Within fourteen (14) days of being provided with a statement, the Landlord must refund any overpaid Outgoings and the Tenant must pay any shortfall."

It is common ground that in 2002 the applicant failed to pay the rent for June, July, August, October, November, and December on time. It also failed to pay the stamp duty on the lease and rates as it was required to do. On behalf of the respondents, notices to remedy breaches of covenant pursuant to s.124 of the Property Law Act 1974 were served on the applicant beginning with one in July:

> 24 July 2002, rent and GST due for June and July 2002, $13,200;
>
> 5 September 2002, rent and GST due for August 2002, $6,600;
>
> 1 October 2002, rent and GST due for October 2002, $6,600;
>
> 23 October 2002, rent and GST due for October 2002, $6,600;

5 November 2002, stamp duty $856.80, rates $3,937.15, and rent and GST due for November 2002, $6,600;

13 November 2002, unpaid insurance, $11,229.51; and

20 November 2002, unpaid insurance, $11,972.36.

The respondents also asserted that a notice dated 10 December 2002 in respect of rent and GST due for December 2002, $6,600, was served, but there was a dispute as to whether it was in fact served. As the hearing progressed Mr Hackett, on behalf of the respondents, informed me that the respondents did not rely upon that notice. In each case sums for compensation or costs were claimed. The defaults alleged in the notices, apart from those dated 13 and 20 November 2002, have all been remedied.

There is an issue between the parties concerning the failure by the applicant to pay a sum paid by the respondents by way of an insurance premium. In the notice dated 20 November 2002 the respondents asserted $742.85 was owing for insurance in September 2002 and $11,229.51, previously claimed in the notice of 13 November 2002, for insurance for twelve months. The $11,229.51 was made up of $2,607 for public liability insurance as shown in an invoice no. 16013 dated 19 September 2002 from Redcliffe Insurance Brokers to the respondents, and $8,622.51 for business-commercial insurance shown in invoice no. 16102 dated 26 September 2002 also from Redcliffe

Insurance Brokers to the respondents. The premium for business-commercial insurance was payable by 28 September 2002. The cover referred to in the latter invoice was $750,000 for the building at 25 Warner Street, $50,000 for all contents other than stock, $100,000 for removal of debris, $25,000 for accidental damage, $72,000 for business interruption in the form of loss of rent for twelve months, and glass at replacement value. The cover for business interruption is at the heart of the present dispute between the applicant and the respondents. The applicant has not paid the $8,622.51 for reasons I shall explain. It was not, however, in dispute that the respondents had paid the premium.

On 20 December 2002 the respondents re-entered the premises and excluded the applicant from them, relying on the applicant's failure to pay the $11,229.51 and the rent for December 2002.

Mr Peter Marinelli, the sole director and secretary of the applicant, swore in an affidavit filed by leave on 27 December 2002 that breaches of the applicant's obligations under the lease occurred because of a cash flow shortage, but that it is reasonable to expect the applicant's income from trading to grow so that it will become prosperous by the middle of 2003. He swore further that he is willing to support the applicant with his own funds

for the duration of the term of the lease should that become necessary. He swore that the applicant will comply promptly with the terms of the lease in relation to reimbursing the respondents for building insurance costs "as soon as the proper meaning of that expression is determined by the court".

Searches carried out on 13 January 2003 by the solicitors for the respondents reveal, however, that there were then no land titles in Queensland registered in the name of the applicant or that of Mr Marinelli.

On 27 December 2002 the applicant began this proceeding by way of originating application seeking relief against forfeiture of the lease, an interim injunction requiring the respondents to give access to and possession of the premises to the applicant, recovery of possession of the premises, and declarations as to the proper construction of clause 1.2(17)(k) of the lease. On 27 December 2002 the application came before Byrne J., who ordered that, pending final determination of the application or until further order and upon the applicant's paying $2,607 (for the liability insurance) immediately and $6,600 (for the December rent) on or before 2 January 2003, the applicant should, together with its servants and agents, be entitled to access to the premises and to remain in possession of the premises until 4 p.m. on 14

January 2003. The originating application was adjourned to 10 a.m. on 14 January 2003.

On 14 January 2003 the application came before me. At first the applicant merely sought an extension of the order made by Byrne J. to a further date when submissions on the final determination of the application could be heard, but in the course of the hearing the parties agreed that there was no impediment to my proceeding to hear the submissions of the parties as to the final determination of the application since the central issue was one of construction of the lease. Accordingly, I heard those submissions and extended the order made by Byrne J. pending my determination.

On 14 January 2003 the applicant sought and obtained leave to file and read an amended originating application claiming the following relief:

> "1. Time for service of this application be abridged pursuant to r7 of the Uniform Civil Procedure Rules.
>
> 2. That pursuant to s124 of the Property Law Act 1974, the applicant be relieved from forfeiture of the lease comprising exhibit 'A' (the 'lease') to the affidavit of Peter Marinelli sworn 24 December 2002 and to be filed herein by leave.
>
> 3. Pending final determination of this originating application, by way of interim relief, an injunction requiring the respondents and their servants and agents to give access to and possession of the premises (as described in the lease) to the applicant, its servants and agents.

4. Further and alternatively, that the applicant do recover possession of the premises described as lot 8 on RP 806838 County of Stanley Parish of North Brisbane title reference 18151123, and as described in the lease.

5. Declarations that:

(a) the proper construction of clause 1.2(17)(k) of the lease obliges the tenant to reimburse the landlord for insurance premiums relevant to building insurance.

(b) the proper construction of the expression 'building insurance' in clause 1.2(17)(k) does not include insurance cover in the nature of business interruption insurance or loss of rent insurance.

6. Further and alternatively, declarations that:

(a) the proper construction of the first sentence of clause 2.2(2) of the lease requires, if a notice is to be given by the landlord notifying a manner of payment of the 'Agreed Proportion of Operating Expenses', that such notice be given before the commencement of the financial year to which the 'Operating Expense' relates;

(b) the proper construction of the first sentence of clause 2.2(2) of the lease requires, if no notice is given by the landlord before the commencement of the financial year notifying a manner of payment of the 'Agreed Proportion of Operating Expenses', the 'Agreed Proportion of Operating Expenses' for that financial year shall be paid in the same manner as rent; that is - by equal monthly instalments in advance of the first day of each month (clause 2.2(1)(a)).

7. That:

(a) the respondents' costs of and incidental to this application be paid by the applicant to be assessed on a standard basis; or

> (b) alternatively, there be no order as to costs;
>
> (c) alternatively, that the respondents pay the applicant's costs of and incidental to this application, to be assessed on a standard basis."

The relief sought in the originating application was, it may be seen, amended by adding an application for relief as set out in paragraph 6. In the course of the hearing the applicant abandoned its application for the order set out in paragraph 4. The relief sought in paragraphs 2, 5, and 6 is that for my consideration. It is convenient to begin with 5 and 6, and then to consider 2.

The applicant's contention is that it is not obliged to pay the $8,622.51 first because if the correct construction of clause 1.2(17) is as asserted in paragraphs 5(a) and (b) of the amended originating application, that sum includes cover for a risk not referred to in clause 1.2(17), viz business interruption or loss of rent, although it includes cover for a risk referred to in that clause, viz building insurance. Until an apportionment of the premium between the risk not covered and the risk covered is provided, so the argument runs, the applicant is not obliged to pay the sum demanded. Mr Gynther's argument for the applicant focussed on paragraph (k) of clause 1.2(17), contending that it was the end of the matter if the sum sought was not for insurance

for the building itself.

While the expression "building insurance" could be construed in that narrow way, I am not persuaded that it is necessarily so restricted. Building insurance could, I think, embrace insurance to cover losses such as business interruption by way of loss of rent inevitably associated with damage to or destruction of the building. For that reason I am not persuaded that the applicant is entitled to the declaration sought in paragraph 5(b) of its amended originating application, although it would clearly enough be entitled to the declaration sought in paragraph 5(a), about which there could be little contention. But in any event, a premium for insurance cover which included cover for business interruption or loss of rent comes within the ambit of the general definition of outgoings. It is a reasonable expense directly attributable to the operation or maintenance of the building. The list in paragraphs (a) to (k) of clause 1.2(17) was not, it should be noted, an exhaustive one.

The declarations sought in paragraph 6 of the amended originating application concern clause 2.2 of the lease. Clause 2.2(2) provided for the manner of payment for the agreed proportion of operating expenses for each financial year. There was no definition of "agreed proportion of operating expenses" or "operating expenses" in clause 1.2,

but there was a definition of "agreed proportion of outgoings", as I have related. The argument for the applicant proceeded on the premiss that the insurance premium in dispute came within the category of agreed proportion of operating expenses for each financial year. Although there was no definition of operating expenses in the lease, the expense in question here is, in my view, an operating expense of a building as ordinarily understood.

With one reservation the construction of clause 2.2(2) contended for on behalf of the applicant appears to me to be correct when one reads it in the context of clause 2.2(5), as one must. What was provided for was a certified estimate by the landlord or authorized representative of the landlord of the operating expenses for a financial year given before the beginning of a financial year (clause 2.2(2)) and then a statement of the actual outgoings after the end of that financial year (clause 2.2(5)). That what is certified must be an estimate of operating expenses given before the beginning of a financial year is demonstrated by the effect of the absence of the written notice provided for in clause 2.2(2). If no notice is given, the agreed proportion of the certified sum must be paid by equal monthly instalments on the first day of each month, as clause 2.2(1)(a) provided rent must be. For a financial year that payment regime can only mean twelve equal monthly instalments, so that that regime

could apply only if it were triggered by an event that must occur before the beginning of the financial year. It follows that the written notice provided for in clause 2.2(2) must also be given before the beginning of the financial year if it is to be given at all.

Since the evidence does not show that any certificate or any notice of the kinds referred to in clause 2.2(2) had been given to the applicant, the respondents cannot rely on the tenant's obligations provided for in that clause in requiring payment of the insurance premium in dispute. The applicant would then be entitled to the declaration sought in paragraph 6(a) of the amended originating application, and to that sought in paragraph 6(b) with the proviso that a certified estimate must have been given before the beginning of the financial year.

But I do not read clause 2.2 to have provided in paragraph (2) an exclusive payment regime for outgoings. If the landlord so chooses, invoices may be sent to the tenant under paragraph (3). That is what happened in this case. In other words, the lease gave the landlord the option of requiring payment for all operating expenses as estimated by the landlord or the landlord's authorized representative, or waiting until invoices arrive and then passing them on to the tenant.

It follows that the applicant's refusal to pay a sum equal to the insurance premium paid by the respondents was contrary to its obligations under the lease. The respondents were entitled to re-enter the premises, but should relief against forfeiture be granted to the applicant?

A tenant is not entitled to relief against forfeiture as a right. The Court has a discretion in the matter. The test is one of unconscionability. In a recent case in which there had been a forfeiture for non-payment of rent Barrett J. put the test in this way: "whether, in the light of the tenant's remedying of the default in the payment of rent, resort by the landlord to his strict legal right of re-entry would be unconscionable; or, if I may put this another way, whether the tenant has been guilty of conduct over and above the remedied default in payment of rent which is of such gravity that, even accepting that the default for which the right of re-entry is security has been satisfied, it would not be unconscionable on the landlord's part to insist on his strict legal right." (Tannous v. Cipolla Bros Holdings Pty Ltd (2001) 10 BPR 18,563, at p.18,568). "If arrears of rent, costs and interest are paid and the lessor can be put into the same position as before forfeiture or re-entry, the lessee will ordinarily be entitled to relief absent 'very special

circumstances'.": Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 4th ed., 2002, para. 18-025, p.581. Those statements of principle apply mutatis mutandis to the circumstances of this case in which the default relied on is in the payment for something other than rent and about which there was a genuine dispute, but which default the tenant has undertaken to remedy.

In resisting the granting of relief to the applicant the respondents would, of course, be entitled to rely on the applicant's history of failing to pay the rent on time, but, as Ormiston J. said in Jam Factory v. Sunny Paradise Pty Ltd [1989] V.R. 584 at p.591:

> "The power to refuse relief is clearly reserved for cases of consistently lengthy defaults which may fairly lead to an inference that, even if relief be given, there is a reasonable likelihood that the rent will not be paid in future, at least for some considerable time after the due date for payment."

See also on this subject the words of McLelland C.J. in Equity in Hace Corp. Pty Ltd v. F. Hannan Pty Ltd (1995) 7 BPR 14,326 at p.14,329:

> "The general principles on which an application for relief against forfeiture is dealt with may be briefly stated as follows. The court treats a power to forfeit a lease for non-payment of rent as a security for the rent and, generally speaking, on payment of any outstanding rent the court will grant relief against any such forfeiture on such conditions as it may consider appropriate in the particular circumstances, which will usually involve payment of the lessor's costs and expenses.

> Although relief against forfeiture is a discretionary remedy, the burden of establishing that a forfeiture for non-payment of rent should not be relieved against, where all arrears of rent have been paid and where no interests of third parties have intervened, is a very heavy burden and normally involves demonstrating that by reason of the conduct of the lessee or for some other reason, the grant of relief against the forfeiture would be inequitable (see generally Pioneer Quarries (Sydney) Pty Ltd v. Permanent Trustee Co of NSW Ltd (1970) 2 BPR 9562, Steiper v. Deviot Pty Ltd (1977) 2 BPR 9602, Tutita Pty Ltd v. Ryleaco Pty Ltd (1989) 4 BPR 9635, Hayes v. Gunbola Pty Ltd (1986) 4 BPR 9247, and Cicinave v. Jasco Pty Ltd (1989) 5 BPR 11,139).
>
> In the present case there has been a long history of untimely payment of rent, but it must be said that the delays in payment could not be described as having been particularly gross. One can understand the frustration of a lessor where payments of monthly rent are almost invariably delayed for periods of at least two or three weeks, as in most cases here, but that is not the sort of default which would normally lead to a refusal of relief against forfeiture."

And see MacDonald, McCrimmon, Wallace, and Stephenson, Real Property Law in Queensland, 1998, pp.587-588.

This case could be regarded as on the borderline. The applicant defaulted in payment of the rent and other required payments for six of the eight months in the currency of the lease last year. There could have been no doubt about the respondents' insistence on timely payments. They issued at least seven notices to remedy breaches of covenant before they re-entered. It is not suggested, however, that although the applicant was short of money last year, it is on the brink of insolvency. The reason for the

applicant's defaults have been explained in Mr Marinelli's affidavit. It cannot be said, on my assessment of the evidence before me, that there is a reasonable likelihood that the rent will not be paid in future, and no interests of third parties have intervened. The fact that there are no land titles registered in the names of the applicant or of Mr Marinelli is of no great consequence in the light of the evidence that all of the breaches not in dispute have been remedied. If relief against forfeiture is refused, the applicant will lose a considerable asset when one takes into account the term of the lease and the options to renew. In those circumstances I shall grant the relief against forfeiture sought, but on conditions upon which I shall invite further submissions.
