

SUPREME COURT OF QUEENSLAND

CITATION: *Jodaway Pty Ltd v Langton* [2003] QSC 079

PARTIES: **JODAWAY PTY LTD ACN 099 765 036**
(applicant)
v
ANNETTE MARIE LANGTON AND NOEL JOHN SEALEY
(first respondents)
and
KRISTIAN RAYMOND SCHLYDER and DEREK ALFRED SCHLYDER
(second respondents)
and
M G LOCKE, REGISTRAR OF TITLES
(third respondent)

FILE NO/S: S1333 of 2003

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 28 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 28 February 2003

JUDGE: Mullins J

ORDER: **1. That the first respondents as personal representatives and the second respondents sign any necessary documents to procure the surrender of Lease No 601290827 on the certificate of title for Lots 6 and 7 on SP 150828 County of Stanley Parish of Tingalpa and thereafter deliver the documents to the office of John M O'Connor & Company, the solicitors for the applicant.**

2. It is declared that the applicant as the owner of the Palm Springs Retirement Village is liable pursuant to s 71(1)(c)(ii) of the *Retirement Villages Act 1999* to the first respondents as personal representatives and the second respondents for the repayment of the loan in the sum of \$76,800 due under clause 3 of Lease No 601290827.

CATCHWORDS: REAL PROPERTY – GENERAL PRINCIPLES – REGISTRATION – s 62 *Land Title Act 1994 (Q)* – where registered lease had terminated but right of lessee to enforce an obligation against lessor under lease to repay loan made

under the lease had accrued – where lessor sold the land – lessee cannot rely on s 62 *Land Title Act* 1994 (*Q*) as obligation to repay the loan not a covenant that ran with the land

RETIREMENT VILLAGES - *Retirement Villages Act* 1999 – where original proprietor of retirement village land sold to a new owner – where personal representatives of deceased lessees sought declaration that the new owner was liable to repay a loan made under the lease by the lessees to the original proprietor – liability to repay the loan had accrued before the sale to the new owner and before the commencement of the *Retirement Villages Act* 1999 (*Q*) – where lease including the provisions relating to the loan was a “residence contract” – *Retirement Villages Act* 1999 (*Q*) applies to residence contracts entered into before or after commencement of the *Act* – representatives of deceased lessees can enforce repayment of loan by new owner pursuant to s 71 (1) *Retirement Villages Act* 1999 (*Q*)

Acts Interpretation Act 1954

Land Title Act 1994

Real Property Act 1861

Retirement Villages Act 1988

Retirement Villages Act 1999

Measures v McFadyen (1910) 11 CLR 723

COUNSEL: K S Howe for the applicant
M J Byrne for the first and second respondents

SOLICITORS: John M O’Connor & Company for the applicant
Hatzis Lawyers for the first and second respondents

- [1] **MULLINS J:** Jodaway Pty Ltd (“the applicant”) is the registered proprietor of the real property on which a retirement village is situated known as the Palm Springs Retirement Village (“the village”). The original proprietor of the village was Palm Springs Village Pty Ltd (“Palm Springs”). Palm Springs transferred its interest in the village to the applicant on 19 April 2002. At that time there remained registered in respect of the real property comprising the village Lease No 601290827 (“the lease”).
- [2] The lease was originally registered in favour of Mr Robert Archibald Sealey and Mrs Iris Lorna Sealey as tenants in common in the shares of two thirds and one third respectively for the term commencing on 19 September 1991 and terminating on 19 September 2090 in respect of the area known as Unit Nos 6 and 7 being part of the ground floor of the building erected on the subject land.
- [3] The first respondents are the children of Mr Sealey. The second respondents are the children of Mrs Sealey. Although the Registrar of Titles is named in the proceeding as the third respondent, there was no appearance on his behalf on the hearing of the application, as he had indicated to the parties that he intended to abide by the

decision of the court. When I refer to the first and second respondents collectively, it will be as “the respondents”.

Facts

- [4] The lease was granted in connection with a scheme for a retirement village that was regulated by the *Retirement Villages Act* 1988. Some three weeks after the lease was registered, the Registrar of Retirement Villages revoked approval of the scheme and receivers and managers were appointed to Palm Springs. On 17 December 1994 approval was given to the receivers and managers to operate a scheme for a retirement village in respect of the village. Ultimately Mr B P Milner was appointed as receiver and manager of Palm Springs on 25 March 1998 and he maintained approval to operate a scheme for a retirement village. As a result of an order made by this court on 8 December 2000, Mr Milner ceased to act as receiver and manager of Palm Springs on 14 December 2000. It appears that the village was then conducted by representatives of the mortgagee in possession of Palm Springs. In June 2001 St Thomas Property Trust took over the operation of the village. Ultimately the applicant purchased the village from Palm Springs under a contract dated 18 April 2002 in which the present use of the property was described as “retirement village”.
- [5] Clause 3 of the lease deals with an interest free loan in the sum of \$96,000 from the resident which is defined in cl 29.1 of the lease to mean Mr and Mrs Sealey or the survivor of them to the owner which is defined in cl 29.1 of the lease to mean Palm Springs and its successors and assigns. Clause 3.1 of the lease states the resident shall make the loan to the owner “in return for the grant of the Lease”. Clause 3.3 of the lease provides for the loan to be free of interest. Clause 3.5 of the lease deals with the liability to repay the loan where the lease is determined. Clause 3.6 of the lease provides that the loan shall be repayable to the resident in part only and to an extent dependent upon the period of residence. Clause 3.7 provides the method of calculating the part of the loan repayable by the owner to the resident. It is common ground that the amount of the loan calculated to be repayable under cl 3.7 of the lease is \$76,800.
- [6] Mr Sealey died on 23 June 1993. The first respondents are the personal representatives under his will and the sole beneficiaries of his estate. In order to preserve their interest in two-thirds of the part of the loan repayable under the lease, a transmission by death of Mr Sealey’s interest in the lease was registered in favour of the first respondents on 27 April 1994.
- [7] Mrs Sealey died on 26 August 1998. The second respondents were appointed personal representatives under Mrs Sealey’s will and were the sole beneficiaries of her estate. A transmission by death of Mrs Sealey’s interest in the lease was registered on 14 November 2002 which transmitted Mrs Sealey’s interest in the lease directly to the second respondents as beneficiaries and each is registered as holding a one-sixth interest as tenant in common with the first respondents as personal representatives of a two-thirds interest in the lease.
- [8] The applicant proceeded with registration of a community management scheme in respect of the village. As a result the real property description for the village is now Lots 1 to 82 on Survey Plan 150828, County of Stanley, Parish of Tingalpa. The area of the ground floor of the building which was the subject of the lease appears to

be described now as Lots 6 and 7 on Survey Plan 150828. It is common ground between the parties that the lease was terminated on 26 August 1998 on the death of Mrs Sealey, as a result of the operation of cl 19.3 of the lease. Under cl 3.8 of the lease the loan became repayable within 6 months of the termination of the lease, ie by 26 February 1999.

Issues

- [9] By its originating application filed on 12 February 2003 the applicant seeks an order that the respondents sign any necessary documents to procure the surrender of the lease on the certificate of title for Lots 6 and 7 on Survey Plan 150828, and deliver the documents to the offices of the solicitors for the applicant.
- [10] By an application filed in the same proceeding on 18 February 2003 the respondents seek a declaration that the applicant as proprietor of the village is indebted to the respondents pursuant to the loan by Mr and Mrs Sealey under the lease.
- [11] The correspondence between the parties' solicitors reveal that the surrender of the lease has been executed by the respondents, but is being withheld pending repayment of the loan under the lease and that the applicant claims that the surrender of the lease is not dependent upon the payment of the balance payable under the loan.
- [12] The issues raised by these applications are:
- (a) what is the effect of registration of the lease on the obligation under the lease of the owner of the village to repay to the resident that part of the loan which is repayable?
 - (b) does the *Retirement Villages Act* 1999 ("the Act") give rights to the respondents against the applicant in respect of that part of the loan which is repayable under the terms of the lease?
- [13] After the hearing of the application, the parties were invited to make further submissions on whether the lease is a residence contract for the purposes of s 23 of the Act, when at the time that the Act commenced, the lease (despite remaining registered) had terminated on 26 August 1998 and a right to enforce the payment of the relevant part of the loan had accrued to the respondents against Palm Springs. The further submissions of Mr Howe of counsel on behalf of the applicant will be Ex 3. The further submissions of Mr Byrne of counsel on behalf of the respondents will be Ex 4.

Registration of the lease

- [14] Although it was common ground between the parties that the lease had terminated, the respondents seek to use the continuing registration of the lease as the means to ensure payment to the respondents of the sum of \$76,800.
- [15] The respondents rely on s 62 of the *Land Title Act* 1994 ("*LTA*") which provides:
 "(1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.

(2) Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.

(3) Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.

(4) In this section –

“**rights**”, in relation to a mortgage or lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease.”

- [16] It was argued on behalf of the applicant that any debt under the lease was owed by Palm Springs and the obligation to pay it had accrued, before the transfer of the subject land to the applicant. It was put that the lease had terminated prior to the transfer of the land to the applicant and the obligation to repay the relevant part of the loan under the lease did not run with the land.
- [17] It was not (and could not be) suggested on behalf of the respondents that the obligation of Palm Springs to repay the relevant part of the loan ran with the land. It is not the type of covenant under a lease that can be characterised as touching and concerning the land.
- [18] The argument was put on behalf of the respondents that the effect of s 62(1) of the *LTA* was to make the applicant liable to repay the relevant part of the loan and to enable the respondents to remain on the register to enforce that repayment.
- [19] Section 62 of the *LTA* is a provision which has a long history in that it can trace its genesis to ss 43, 65 and 66 of the *Real Property Act* 1861. It cannot be construed in isolation from this history. Provisions in similar terms to ss 65 and 66 of the *Real Property Act* 1861 were considered by the High Court in *Measures v McFadyen* (1910) 11 CLR 723 which held that on the transfer of the reversion those provisions did not enable the transferee to sue in respect of a breach of a clause in the lease that was completed prior to the assignment of the reversion. There appears to be no authority to support a construction of s 62(1) of the *LTA* that the expression “the rights, powers, privileges and liabilities of the transferor in relation to the lot” covers rights, powers, privileges and liabilities which do not run with the land. Section 62(1) of the *LTA* does not have the effect which the respondents seek to give it in respect of imposing on the applicant as the assignee of the reversion the obligation to make the repayment of the relevant part of the loan under cl 3.5 of the lease.
- [20] To the extent that the respondents seek to rely on s 62(1) of the *LTA* as conferring on them the rights which Mr and Mrs Sealey had under the lease to obtain repayment of the loan, those rights are personal, do not run with the land and registration therefore does not assist the respondents in seeking to enforce those rights. As the lease has been terminated, the respondents have no entitlement to remain on the register as a means of improving their bargaining position in respect of the repayment of the loan.
- [21] The respondents did not dispute that the applicant was entitled to an order in the terms sought in paragraph 1 of the originating application, if the respondents were unsuccessful in establishing an entitlement to remain on the register to enforce their

interests under the loan agreement contained within the lease. It is therefore appropriate to make an order in the terms sought by the applicant.

Whether applicant has any liability to repay the loan

- [22] The loan was enforceable by the respondents from the time it was repayable on 26 February 1999. At that stage the obligations of the parties under the lease and in respect of the village were regulated by the *Retirement Villages Act* 1988 (“the 1988 Act”). Section 25 of the 1988 Act provided:

“25. Enforcement of residence contracts. (1) Subject to section 26 in relation to refundable in-going contributions, a residence contract, whether made before or after the commencement of this section, is enforceable against –

- (a) a party to the contract;
- (b) a person who is not a party to the contract if at the time the contract is made that person is –
 - (i) a person controlling the operation of the scheme; or
 - (ii) an owner of the retirement village land;
- (c) a person who is not a party to the contract if at the time the contract is to be enforced that person is –
 - (i) a person controlling the operation of a scheme for that retirement village;
 - or
 - (ii) an owner of the retirement village land.

(2) A person referred to in paragraph (c) (ii) of subsection (1) who is not also a person referred to in paragraph (b) (ii) of that subsection is liable to have a residence contract enforced against him only if, at the time enforcement is sought, the land in question is being used for the purposes of a retirement village.

(3) A residence contract may be enforced, pursuant to this section, against a person who is not a party to the contract as if he were such a party, and for this purpose he shall be deemed to be a party to the contract having the same obligation thereunder as the person who under the contract has the obligation that is sought to be enforced.”

- [23] The relevant part of the loan that was repayable under the lease was a “refundable in-going contribution” within the meaning given to that term in s 6 of the 1988 Act. By the time the 1988 Act was repealed on 1 July 2000 with the commencement of the Act, the applicant had not purchased the village, so that s 25 of the 1988 Act never applied to the applicant. The only right which had accrued under s 25 of the 1988 Act and was therefore preserved by s 20(2) of the *Acts Interpretation Act* 1954 was the right to recover the relevant part of the loan from Palm Springs which, in any case, was no greater than the existing contractual right of Mr and Mrs Sealey which was enforceable by the respondents.

- [24] Section 10 of the Act defines what is a “residence contract” for the purpose of that Act. The lease including the provisions relating to the loan falls within that definition of “residence contract”. Under s 23 of the Act, the Act applies to a

residence contract entered into before or after the commencement of s 23 of the Act, unless the Act states otherwise. The applicant accepts for the purposes of argument that the lease is a residence contract within the meaning of the Act to which s 23 makes the Act applicable. That is clearly an appropriate concession, as although the lease had terminated and the right of the respondents to recover the relevant part of the loan from Palm Springs had accrued prior to the commencement of the Act, the enforcement of that right of recovery which arose out of the provisions of the lease remained outstanding at the time of the commencement of the Act. It underlies the submissions of the respondent and is implicit in the further submissions of the applicant (Ex 3) that the village is still conducted as a retirement village under the Act.

[25] The provisions of s 25 of the 1988 Act were replicated in the Act in s 71 which provides:

“Enforcing residence contract

71.(1) A residence contract is enforceable against the following persons for the recovery of all or part of the exit entitlement –

- (a) a person who is a party to the contract;
- (b) a person who is not a party to the contract but who, when the contract was entered into –
 - (i) was the scheme operator for the retirement village to which the contract relates; or
 - (ii) owned the retirement village land;
- (c) a person who is not a party to the contract but who, when the contract is to be enforced –
 - (i) is the scheme operator; or
 - (ii) owns the retirement village land

(2) For the purpose of enforcing a contract against a person mentioned in subsection (1)(b) or (c), the person is taken to be the scheme operator under the contract.

(3) A court may make an order under this section against a person mentioned in subsection (1)(b) only if the court is satisfied -

- (a) an order against a person mentioned in subsection (1)(a) or (c) would be ineffectual; and
- (b) in the particular circumstances, it is just to make the order.

(4) Subsection (1)(b)(ii) and (1)(c)(ii) are subject to section 72.”

[26] If the 1988 Act had continued and not been replaced by the Act, s 25 of the 1988 would have imposed a statutory liability on the applicant to make the repayment of the relevant part of the loan for which Palm Springs was liable under the lease on the basis that the applicant would have been the owner of the retirement village land at the time the obligation arising under the lease was sought to be enforced. The exception to such liability set out in s 26 of the 1988 Act would not have been applicable. That would not have been an odd result, having regard to the protection intended to be afforded to residents of retirement villages under the 1988 Act.

- [27] The commencement of the Act has prevented the respondents from seeking to enforce the liability pursuant to the 1988 Act which would have been statutorily imposed on the applicant upon becoming the owner of the village, when the debt had accrued under the lease and was still capable of being enforced against Palm Springs.
- [28] The issue is whether s 71 of the Act can be relied on by the respondents to enforce the repayment of the relevant part of the loan due under the lease against the applicant. On a literal reading of s 71(1) of the Act, the applicant is a person who was not a party to the lease, but is a person who, when the provision in the lease in respect of the repayment of the loan is sought to be enforced, owns the retirement village land and is therefore liable for repayment of the loan. The exception from liability in s 72 of the Act has no application.
- [29] It is argued on behalf of the applicant that the lease did not bind the applicant, the debt had accrued prior to the acquisition of the village by the applicant and there is nothing in the Act which creates privity of contract between Mr and Mrs Sealey (or the respondents) and the applicant. It is also submitted that if s 71 of the Act were to apply to the applicant, “such an operation would have far reaching implications”.
- [30] There is every reason to give s 71(1) of the Act its literal meaning. The Legislature has expressed the intention that the provisions of the Act will apply to a residence contract that was entered into before the commencement of s 23 of the Act, unless the Act states otherwise. There is no express exception from the operation of s 71 of the Act for contracts entered into before 1 July 2000. The Act, like its predecessor, also seeks to afford protections to residents of retirement villages. It would be an odd result if s 71 of the Act did not impose statutory liability on the applicant, when that liability would have been imposed had the 1988 Act remained in force.
- [31] No issue was taken by the applicant as to the appropriateness of the respondents seeking a declaration in their cross application. As I have been able to determine the issue raised by the respondents’ cross application on a summary basis, it is appropriate to make a declaration that the applicant is liable pursuant to s 71(1)(c)(ii) of the Act to the respondents for the repayment of the loan in the sum of \$76,800 due under clause 3 of the lease.
- [32] The respondents also advanced an argument that they were entitled to the benefit of the provisions of Division 5 of Part 3 of the Act dealing with the sale of the right to reside conferred by the lease. The definitions in s 56 of the Act show that the benefits of Division 5 are available to a residence contract that was terminated before the commencement of the Act. Division 5 applies only if each of the conditions set out in s 57 applies. One of the conditions in s 57 is that the scheme operator has the controlling right to sell the right to reside in the unit which is the subject of the residence contract. Under the lease, the resident’s right to recover any money upon termination was not dependent upon the sale of the right to reside in the unit that was the subject of the lease. Instead Mr and Mrs Sealey or their personal representatives had the right to recover the relevant part of the loan that was advanced by Mr and Mrs Sealey at the outset. The lease was therefore not one which relevantly conferred on the scheme operator the controlling right to sell the

right to reside in the unit in a way that affected the rights of Mr and Mrs Sealey or their personal representatives. Division 5 does not apply to the lease.

Orders

[33] The orders which I will make are:

1. That the first respondents as personal representatives and the second respondents sign any necessary documents to procure the surrender of Lease No 601290827 on the certificate of title for Lots 6 and 7 on SP 150828 County of Stanley Parish of Tingalpa and thereafter deliver the documents to the office of John M O'Connor & Company, the solicitors for the applicant.
2. It is declared that the applicant as the owner of the Palm Springs Retirement Village is liable pursuant to s 71(1)(c)(ii) of the *Retirement Villages Act* 1999 to the first respondents as personal representatives and the second respondents for the repayment of the loan in the sum of \$76,800 due under clause 3 of Lease No 601290827.

[34] It will be necessary to hear the parties on the question of costs. Each party has been successful in obtaining the relief sought by that party and unsuccessful in opposing the relief sought by the other party. It may therefore be appropriate for there to be no order as to costs.