SUPREME COURT OF QUEENSLAND

CITATION:	*Dwyer v Corliss & Anor* [2003] QSC 149
PARTIES:	**BEVERLEY CLARE DWYER** (applicant) **v** **DENNIS BRUCE CORLISS and** **PAMELA ANN CORLISS** (respondents)
FILE NO/S:	SC No. 2485 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	21 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2003
JUDGES:	Holmes J
ORDER:	**1. The application is dismissed.** **2. The interim injunction is discharged.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTIONS TO PRESERVE STATUS QUO AND PROPERTY PENDING DETERMINATION OF RIGHTS – OTHER CASES Injunction sought by applicant to restrain the respondent from acting on notice to quit – whether serious question to be tried – whether agreement for further lease – whether acts of part performance – whether equitable estoppel – whether balance of convenience favours granting of injunction – strength of evidence as a factor in exercise of discretion. *Section 59 Property Law Act* 1974 *Cambridge Credit Corporation Ltd v Surfers Paradise Forests Ltd* [1977] Qd R 261 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 *Darter Pty Ltd v Malloy* [1993] 2 Qd R 615 *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 *Maddison v Alderson* (1883) 8 App. Cas. 467 *Meehan v Jones* (1982) 149 CLR 571

Sabre Corporation Pty Ltd v Laboratories Pharm-A-Care Pty Ltd (1995) 31 IPR 445
Seekers Nominees Ltd & Anor v Target Australia Pty Ltd & Anor (1995) 32 IPR 372
Shercliff &Anor v Engadine Acceptance Corporation Pty Ltd [1978] 1 NSWLR 729
Trade Practices Commission v Santos Ltd (1992) 110 ALR 517 at 427
Upper Hunter County District Council v Australian Chilling & Freezing Co. Ltd (1968) 118 CLR 429
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

COUNSEL: Mr Bowden for the applicant
Mr Martin for the respondents

SOLICITORS: Creswicks Lawyers for the applicant
Hynes Lawyers for the respondents

The application

[1] The applicant, Mrs Beverley Dwyer, seeks an interlocutory injunction, the effect of which would be to prevent the respondents from re-taking possession of hotel premises which she leased from them in August 2000. She argues that although a written lease agreement between the parties expired in February 2001, there existed another agreement between them, not reduced to writing, for a further three-year lease with an option to renew for a three-year period.

The applicant's version

[2] Mrs Dwyer and her daughter, Tracy Dwyer, have filed affidavits setting out what they say were their dealings with the respondents, Mr and Mrs Corliss, in relation to Mrs Dwyer's purchasing the business of, and taking over the lease of, the Grand Hotel at Childers. Mrs Dwyer said she had initially consulted Mr Corliss as a hotel broker, but he recommended that she consider taking a lease of his own hotel, the Grand Hotel at Childers. She and her daughter in response to that suggestion looked at the hotel in April 2000, and formed the view that it was in poor condition. Mr Corliss said that he would undertake re-carpeting and re-painting of the premises. He proposed a rent of $1,000 per week, an amount which, he said, would be covered by poker machine income. He offered a three-year lease for a payment of $60,000, and, when pressed, agreed to an option for a further three years. (Ms Dwyer gives, in broad terms, the same account of the discussion.) There was other conversation, but those were the essential elements of the arrangement, on which they eventually shook hands.

[3] There was some delay in Mrs Dwyer's taking over the hotel. In the interim Mrs Corliss advised her that the $60,000 was to be paid in cash, and she began withdrawing money, the proceeds of a legacy, from her bank account in order to comply. In July 2000 she was advised that the hotel was now available for lease

and travelled to Wondai, where the Corlisses were, to finalise the agreement. En route Mrs Corliss told her in a telephone call that the rent had been increased to $1,500. In a further discussion on Mrs Dwyer's arrival with her daughter at Wondai, Mrs Corliss said that the increased rental should not be of concern because the poker machine income was sufficient to meet it.

[4] It was decided that the Dwyers and the Corlisses should travel separately to Childers. Shortly after arriving there, Mrs Dwyer instructed a solicitor, Mr Stanton, who on her behalf obtained a copy of the proposed lease and contract from the Corlisses' solicitors in Brisbane. The business contract showed the purchase price as "nil – stock only at valuation". The lease prescribed a rental of $2,500 per week and was for an 18-month term, without provision for renewal.

[5] Mrs Dwyer says she had a conversation with Mrs Corliss about the discrepancy between the terms of the documents and what she perceived had been agreed. Mrs Corliss insisted that the rent be $2,500, representing 10 per cent of the takings, which were, she said, $25,000 per week. Mrs Dwyer asked what had become of the three-year lease with a three-year option. Mrs Corliss responded, "You can have your 3 x 3 at the end of the 18 months if you are OK and the rent at 10 % of takings". She went on to say that if there were a decision to sell the hotel at the end of the 18 months, Mrs Dwyer could have an option to buy at $500,000. Tracy Dwyer was a party to the discussion with Mrs Corliss. Her version was slightly different: Mrs Corliss said that the 18 month period represented a trial period, and "if everything works out after the 18 months you can have your 3 x 3". Later, Ms Dwyer confronted Mr Corliss about the issue. He agreed he had promised a minimum of six years.

[6] On 4 August 2000 the Corlisses' solicitors wrote to Mr Stanton advising that it was

> "in order for you to insert a first right of refusal provision in the material, on any new lease which our clients have a mind to grant, at the end of the 18 months being signed up with your client. "

The lease as later executed contained a clause headed "Right of First Refusal". It required the lessor, if electing to sell the property, first to offer it to the lessee at the intended list price. It seems likely that it was inserted in response to this invitation.

[7] On 7 August Mrs Dwyer gave further instructions to Mr Stanton, as a result of which he wrote a letter to the Corliss' solicitors seeking certain variations of the lease. His letter noted that the contract and lease contained no provision in respect of the payment of "the sum of $50,000" [sic] for the grant of the lease. It also pointed out that the lease was for an 18 month period only, with no option to extend, and observed:

> "In view of the purchase price being paid by our client, it would seem appropriate that 2 option periods be included in the Lease. Our client is unlikely to be in a position to purchase the freehold of the Lease and the right of first refusal provision in the original Lease is unlikely to be availed of by our client."

[8] The Corlisses' solicitors wrote back on 9 August 2000 advising, *inter alia*, that there was no purchase price except for payment for stock, and that no option term had been agreed. The letter commenced by apologising for an error in the lessee's name, and referred to providing, in consequence, a "fresh front page for attachment to the lease".

[9] Mrs Dwyer says that on 9 August Mrs Corliss came to her saying that the lease had arrived, that she was about to leave, and that it had to be signed. There was some discussion about the cash to be paid as the purchase price. Mrs Dwyer provided what she had on hand, about $33,000, and Mrs Corliss told her to provide a cash cheque for the balance. The Corlisses and Mrs Dwyer then went to a local Justice of the Peace who witnessed their signatures on the lease. It was only then, Mrs Dwyer says, that she took it to her solicitor and told him that it was executed. Later that day she met the Corlisses, by arrangement, at a local bank and gave them a cash cheque in the amount of $27,000. Tracey Dwyer generally confirms this account. Although she does not say who actually produced the lease for signature, she recalls her mother inquiring whether the option had been included in the lease and Mrs Corliss replying that her solicitor was "on to it".

[10] By letter of 11 August 2000 the Corlisses' solicitors wrote asking Mr Stanton to confirm that he held "signed documents" and would forward them for stamping of the lease. In response on 15 August Mr Stanton sent documents described as the original signed lease document and business contract, advising that these were the only originals of which his firm was aware and were sent for stamping purposes only.

The respondents' version

[11] Mr Dennis Corliss has put in an affidavit on his own and his wife's behalf in which he denies that any other rental figure than $2,500 per week was suggested; that any amount was received by way of payment for the lease; and that there was at any time an offer of a further lease or option to renew. He says also that rather than the Corlisses pressing the applicant to sign the lease and business contract, it was the applicant who brought them to the Corlisses, having been given them by her solicitor.

Events after the lease was executed

[12] The written lease entered on 9 August 2000 expired on 8 February 2002. Mrs Dwyer continued in possession of the hotel property thereafter, continuing to pay rent at the rate of $2,500 per week, but in January 2003 received a notice to quit. She instructed solicitors, Deacons, who responded to the notice on her behalf. In a letter dated 6 February 2003 to the respondents' solicitors, they purport to set out their instructions from Mrs Dwyer. The representations as to any further lease are said to be first, a representation by Mr Corliss that Mrs Dwyer could lease the hotel "for as long as she wanted", and second, a representation by Mrs Corliss that if Mrs Dwyer were a good tenant she could "remain for as long as you want to stay there" and that a new lease could be entered at the expiration of the 18 month term.

There is no suggestion in that letter of any representation as to a three-year term with three-year option. Indeed the demand by the solicitors, in respect of the numerous alleged misrepresentations by the respondents, is that a written lease be entered for a five-year period with a five-year option to renew.

[13] Mrs Dwyer says that while in occupation of the hotel she and her family worked seven days a week. In particular, she says, her daughter Tracey worked from the commencement of the lease to date without pay; although that may not be entirely accurate, since Mrs Dwyer also says that Tracey is dependent on her work at the hotel to pay rental for her house. Two others of her children worked without wage for unspecified periods, and she herself drew only $200 per week. She spent the balance of her legacy and the income from the hotel in improvements. She has committed herself to a mortgage in order to purchase a house in Childers, and has no other means of earning an income other than from the hotel. Mrs Dwyer offers the usual undertaking as to damages, although her counsel concedes that she is without assets other than a Ford motor vehicle (model unspecified) and the hotel stock. The value ascribed to closing stock in the applicant's profit and loss statement for the 2002 financial year is $18,500.

[14] Mr Corliss says that the financial statements exhibited to Mrs Dwyer's affidavits indicate to him that the hotel business is run down. The profit and loss statement shows, for the 2002 financial year, turnover in excess of one million dollars but a net profit of only $13,000. He considers that a turnover of those proportions ought to yield a net profit of at least $250,000. He and his wife are, therefore, concerned that the business is not being run profitably. They had proposed to give the business to their son who sustained serious injuries in a motor vehicle accident in 2001. He is to be married in the next 12 months, and it was intended as a wedding present.

Serious question to be tried

[15] In the absence of any written agreement for a further lease to support any action,[1] Mr Bowden, counsel for Mrs Dwyer, relied on the doctrine of part performance and on equitable estoppel. He pointed to the payment of $60,000 as an act of part performance. He did also refer to the applicant's having uprooted her family and moved to Childers, to her family having worked without pay, and to their having effected improvements to the hotel; but since none of those matters was, on any version, the subject of contract, they can hardly count as acts of performance.

[16] Alternatively, Mr Bowden argued, the elements of an equitable estoppel were made out in terms of the test set out by Brennan J in *Walton Stores (Interstate) Ltd v Maher*[2]. The applicant had assumed that a particular legal relationship, the agreement for a lease to commence on the expiration of the first 18 month term, was in existence; the respondents had induced her to act on that assumption, and she had done so by establishing herself in Childers, spending money on the hotel, and failing to obtain legal advice, to the respondent's knowledge; she would suffer detriment in the form of the loss of her $60,000, the expenditure on improvements

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1 As required by s 59 *Property Law Act* 1974.

2 (1988) 164 CLR 387.

and personal difficulties likely to be incurred if the assumption were not met; and the respondents by failing to fulfil their obligation to execute a new lease had failed to act to avoid that detriment to her.

[17] Lord Selbourne LC's formulation in *Maddison v Alderson*[3] of what amounts to part performance is that "the acts relied on must be unequivocally, and in their own nature, referable to some such agreement as alleged". Those acts however "need not point to the 'very' contract alleged"[4]. Acting for present purposes on the applicant's version of events, the claimed payment of $60,000 is not referable to the written lease agreement entered between the parties, in respect of which no such consideration is prescribed. Rather, if made, it is capable of being regarded as an act referable to an agreement of the kind alleged by the applicant: initially made with Mr Corliss for a three year lease with three year option, and subsequently varied on discussion with Mrs Corliss to an agreement for a three-year lease with option after the expiry of the eighteen-month lease, on the condition that Mrs Dwyer's performance of the first lease was "OK".

[18] Similarly, there is sufficient on the applicant's case to provide the elements of an equitable estoppel; although, as Mr Martin points out, there must be a question as to whether the necessary proportionality between remedy and detriment identified by the High Court in *Commonwealth of Australia v Verwayen*[5] would not be better reflected in damages rather than enforcement of an agreement to lease.

[19] Mr Martin, however, argued that if, taking the evidence at its highest, there were an agreement for a further lease, it was rendered uncertain by the qualifying words used, on Mrs Dwyer's account, by Mrs Corliss: "If you are OK". That expression was uncertain, both as to its content, and as to who was to determine what amounted to "OK". At best it left to the respondents a discretion to determine whether the applicant met that criterion, and, thus, whether the agreement to lease would be fulfilled.

[20] It is important to bear in mind that ambiguity does not necessarily amount to uncertainty[6]; and, of course, a court "should be astute to adopt a construction which will preserve the validity of the contract."[7] It seems to me that the condition, if that is what it is, is capable of being construed as meaning "if you have complied with the conditions of the existing lease", something which can be objectively determined. That is not to say it is the proper construction, but it is at least open. At any rate, for the purposes of this application I am satisfied that there is a serious question to be tried.

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3 (1883) 8 App. Cas. 467 at 479.
4 *Darter Pty Ltd v Malloy* [1993] 2 Qd R 615.
5 (1990) 170 CLR 394.
6 *Upper Hunter County District Council v Australian Chilling & Freezing Co. Ltd* (1968) 118 CLR 429 at 436; *Meehan v Jones* (1982) 149 CLR 571 at 578.
7 *Meehan v Jones* per Mason J at p 589.

Balance of convenience

[21] The question of where the balance of convenience lies presents, in my view, more difficulty. While there is authority to the effect that the relative strength of the applicant's and respondent's cases is relevant to the question of whether there is a serious question to be tried, or a "prima facie case"[8], other decisions lend weight to the proposition that the strength of the applicant's case may be considered as part of the court's general discretion in approaching the question of balance of convenience[9]. That is to say, consideration of the strength of the evidence as a factor need not be confined to the "class of case" identified in *Kolback Securities Ltd v Epoch Mining NL*[10], where "the decision to grant or refuse an interlocutory injunction will in a practical sense determine the substance of the matter in issue"[11]. Given the nature of the discretion to be exercised I consider it appropriate to have regard to the strength of the applicant's case in the balance of convenience context.

[22] The applicant's case suffers from the real difficulties that her claim of a further lease agreement is not supported by the contemporary correspondence from her solicitor Mr Stanton, who merely suggests that it is "appropriate" that option periods be included; that she does not point to any subsequent request for execution of a further lease, even when the existing lease expired; and that the letter of her solicitors written only a month ago, while explicit about the representations alleged to have been made by the respondents, does not allude at all to any representation as to a three year lease or three year option. There is the further difficulty that the correspondence exchanged between the solicitors at the time the original lease was signed suggests that the lease had been sent by the respondents' solicitors to Mr Stanton for finalisation. That would tend to support Mr Corliss' version that it was Mrs Dwyer who presented the lease for execution rather than as she says, her being pressed to sign a lease produced by the Corlisses. I do not purport to resolve on this application whether the applicant's account is correct; but one can say, by reference to documents which she herself relies on, that her case is not strong; and that is a factor which I consider can properly be taken into account in the exercise of my discretion.

[23] The applicant's undertaking as to damages is of little value, a relevant consideration[12]; although it should be said that if she were to continue to pay weekly rent of $2,500 significant loss to the respondents seems unlikely. On the other hand, the respondents do not point to any very pressing need for their immediate possession of the hotel, and I do not think that their concern that the profitability of the hotel is being reduced is of great weight. They make no complaint of the level of turnover, and there is no reason to suppose that if it continued at existing levels until possession was returned to them, profitability could not be improved. There is greater force, I think, in the argument that damages are an adequate remedy. This

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8 See *Shercliff &Anor v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729

9 *Sabre Corporation Pty Ltd v Laboratories Pharm-A-Care Pty Ltd* (1995) 31 IPR 445; *Trade Practices Commission v Santos Ltd* (1992) 110 ALR 517 at 527; *Seekers Nominees Ltd & Anor v Target Australia Pty Ltd & Anor* (1995) 32 IPR 372.

10 (1987) 8 NSWLR 533.

11 at p 356.

12 *Cambridge Credit Corporation Ltd v Surfers Paradise Forests Ltd* [1977] Qd R 261

is, in essence, a commercial dispute, in which redress can be formulated in money terms. There is no reason to suppose that the respondents cannot meet any award of damages.

Conclusion

[24] On the whole, taking into account the matters I have identified, I consider that the balance of convenience weighs against the grant of an injunction. I dismiss the application and discharge the interim injunction granted on the hearing of the application. I will hear the parties as to costs.