SUPREME COURT OF QUEENSLAND

CITATION:	*Barry v Blue Stream Holdings P/L & Anor* [2003] QSC 404
PARTIES:	**PHILLIP MERVYN BARRY and CHRISTINE MARGARET BARRY** (applicant) **v** **BLUE STREAM HOLDINGS PTY LTD** ACN 106 183 528 (first respondent) **STRATEGIC PTY LTD** ACN 065 806 091 (second respondent)
FILE NO:	S9189 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	4 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2003
JUDGE:	Muir J
CATCHWORDS:	LANDLORD AND TENANT - FORM AND CONTENTS OF LEASE - CONSTRUCTION OF LEASES - where the applicant sought the second respondent's consent to the assignment of its lease and such consent was refused - where the applicant sought a declaration that it was not obliged to pay various monies under the terms of the lease and that the refusal of the lessor to consent to the assignment was unreasonable - whether 'Body Corporate' levies constitute "outgoings" under the terms of the lease *Body Corporate and Community Management Act* (Qld) 1997, s 150 *Body Corporate and Community Management (Standard Module) Regulation* (Qld) 1997, s 95, s 96 *Arbuthnott v Fagan* (CA unreported referred to in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326) *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310

Kilkerrin Investments Pty Ltd v Yiu Ying Mei Pty Ltd [2001] QSC 88
Manufacturers' Mutual Insurance Ltd v Withers (1988) 5 ANZ Insurance Cases 60-853
L Schuler AG v *Wickman Machine Tool Sales Ltd* [1974] AC 235

COUNSEL: A P J Collins for the applicant
G D Beacham for the respondents

SOLICITORS: Garland Waddington for the applicant
Nichol Robinson Halletts for the respondents

Introduction

[1] **MUIR J:** The applicant Phillip Barry is the lessee from Strategic Pty Ltd of Lot 2 in SP 149476 in the Parish of Mooloolah County of Canning under a commercial tenancy agreement dated 7 May 2003 ("the lease"). There are four other lots on the strata title plan, namely Lots 1, 3, 4 and 5. The first respondent Blue Stream Holdings Pty Ltd is the registered proprietor of Lots 1, 2, 3 and 5. Neither the first respondent nor the second respondent is, or has been, the registered proprietor of Lot 4.

[2] On 4 August 2003 the applicant sought Strategic's consent to an assignment of the lease. Such consent was refused on the basis that the applicant has refused and continues to refuse to pay the proper proportion of outgoings under the lease and body corporate levies (as part of the outgoings).

[3] In its originating application the applicant seeks declarations that under clause 4 and item 9 of the lease the applicant is not obliged to pay 20% of the combined outgoings of the whole of the building and that, under clause 4, the "Outgoings" do not include body corporate levies raised against lot 2.

[4] He also seeks a declaration that the refusal of the first respondent or the second respondent to consent to the assignment of the lease is unreasonable. After the commencement of the proceedings, Mr Barry's wife was added as an applicant on the basis that Mr Barry entered into the lease in his capacity as trustee of the Phillip Barry Family Trust and Mrs Barry was now also a trustee of the Trust. I will continue, however, to use the word "applicant" to refer to both Mr and Mrs Barry.

The documents comprising the lease

[5] I was given to understand by counsel at the commencement of the hearing that resolution of the points of construction would most probably resolve the dispute between the parties concerning the failure by Strategic to give its consent to the assignment of the applicant's interest under the lease. Accordingly, the hearing and these reasons are concerned only with questions of construction.

[6] The lease comprises three printed forms. The first is headed "Commercial Tenancy Agreement". After the description of parties and the date appears the words "This Agreement comprises the Reference Schedule and Commercial Tenancy Agreement Conditions". The balance of the first sheet is taken up with "instructions to complete". The next page marked "Page 2 of 8" is the "Reference Schedule" which

identifies the fundamental features of the agreement such as description of premises, term, option periods, rent, permitted use and security deposit. Four pages of "Special Conditions" then follow, marked consecutively at the foot "Page 1 of 4" to "Page 4 of 4". After a plan of the demised premises, there is a page containing execution clauses which has at the bottom "Page 4 of 8". That is followed by "Commercial Tenancy Agreement Conditions" on pages "5 of 8" to "8 of 8" inclusive. In the interests of brevity I will refer to this document as the Conditions.

Relevant contractual provisions

[7] Clause 1.2 of the Special Conditions provides –

> "**Agreed Proportion of Outgoings**
>
> (a) The **Tenant** must pay the **Agreed Proportion** of **Outgoings** for each **Financial Year** in the manner notified in writing by the **Landlord** and in the absence of notification, in the same manner as **Rates** (half yearly in advance)."

[8] Item 9 of the Reference Schedule provides –

> "Percentage of Outgoings 20% OF TOTAL AMOUNT"

[9] Clause 4 of the Conditions provides –

> "OUTGOINGS
>
> 4.1 Tenant to Pay Outgoings
>
> (1) The Tenant must pay the Landlord the whole, or where a percentage is stated in Item 9 of the Reference Schedule that percentage of the Outgoings for the Premises, or the property of which the Premises is part as applicable.
>
> (2) Outgoings are payable to the Landlord within 14 days of production to the Tenant of a copy of the Landlord's assessment notice or account."
>
> 4.2 Outgoings
>
> For the purposes of this clause Outgoings means the following charges levied or expenses payable in respect of the Premises or property of which the Premises is part:
>
> (1) rates and other charges levied pursuant to a law (other than land tax);
>
> (2) insurance premiums payable by the Landlord;
>
> (3) the cost of cleaning any areas adjacent to the Premises that are used by the Tenant; and
>
> (4) maintaining any gardens on the Land."

The first matter for determination

[10] The first issue between parties is whether item 9, along with clause 4, requires the applicant to pay:

(a) Twenty Per Cent (20%) of the amount of outgoings levied in respect of the entire Property, (ie lots 1-5) (the respondents' contention); or

(b) Twenty Per Cent (20%) of the outgoings levied or chargeable in respect of the Premises (ie lot 2) (the applicant's contention).

The applicant's argument

[11] The applicant submits that clause 4 is unambiguous. A person reading clause 4.1(1) is directed to item 9 of the Reference Schedule in order to ascertain if a percentage of outgoings is specified. On going to the Reference Schedule, one sees "Percentage of outgoings: 20% of total amount". "The Premises" referred to in clause 4.1 is identified in item 3 of the Reference Schedule as "Lot 2, 9 Depot Street, Maroochydore …" that is, a self-contained lot on a strata title plan.

[12] The respondent's construction is inappropriate, as to determine the "total amount" payable,

> "it necessarily obligates access to and the inclusion (for the purposes of calculating the outgoings) of a strata-title unit that is not owned by either of the respondents. That alternative construction may be appropriate where there is a lease of part of an entire premises (owned by one party) but not where the leased premises itself is entirely self-contained."

[13] **The respondent's contentions**

> "1. Clause 4 provides that the percentage stated in item 9 is to be applied to either the outgoings for '…the Premises, or the Property of which the Premises is part as applicable' (underlining added). In the present case, lot 2 is part of a larger property at 9 Depot Street (comprising five lots) such that it is the phrase 'the Property of which the Premises is part' which is applicable.
>
> 2. Secondly, it is logical that a tenant leasing one of five lots in a commercial development would pay 20%, that is, one-fifth, of the outgoings for the entire development. There is no logical reason (and the applicant does not attempt to explain why such an agreement would be reached) for the applicant to pay only 20% of the outgoings in respect of the lot that it has leased.
>
> 3. Thirdly, this is the only construction that gives some meaning to the words 'of total amount' in item 9 of the reference schedule. If the applicant's argument is correct, a simply '20%' in the reference schedule would have sufficed to give effect to the parties' intention. The addition of the words 'of total amount', … is intended to refer to the total amount of the rates for the Property as a whole.
>
> 4. Finally, if the Court finds that the clause is ambiguous, extrinsic evidence is admissible to assist in its interpretation.[1] The explanation of why the figure of 20% was inserted supports the respondents' construction of the lease."

The construction of clause 4.1(1)

[14] I am of the view that there are elements of ambiguity or obscurity about the provisions under consideration which make admissible evidence of surrounding circumstances in accordance with the principles expressed by Mason J in the

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[1] *Codelfa Construction Pty Ltd v State Rail Authority NSW* (1982) 149 CLR 337 at 352; see also *Kilkerrin Investments Pty Ltd v Yiu Ying Mei Pty Ltd* [2001] QSC 88 esp. [32], [35]

following passage from his reasons in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* -[2]

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed."

[15] Contracts are not construed in a factual vacuum, regard is had to the commercial purpose of the contract "and that presupposes an appreciation of the contextual scene of the contract."[3]

[16] The following observations of McHugh JA in *Manufacturers' Mutual Insurance Ltd v Withers*[4] are also apposite –

> "… few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means. In my view evidence of surrounding circumstances will generally be admissible if it is known to both parties or sufficiently notorious to be presumed to be within their knowledge."

[17] At the time the lease was entered into the parties were aware of the following matters. There were five lots in the relevant strata title plan and a business was being conducted on each lot. The applicant's lease of the subject premises with its previous owner was entered into before the overall property was strata titled. Then, the five separate sheds on the property were each leased to different lessees and, under the previous lease, the applicant "paid rent plus outgoings agreed at '21% of all rates and insurances'".

[18] Once these facts are taken into account, it can be understood readily why 20% appears in item 9 of the Reference Schedule. It also becomes apparent why "total amount" appears in that item and not just a percentage figure.

[19] I do not intend to suggest by the foregoing that the meaning of the provisions under consideration is plain. It is not, and there are matters which favour the applicant's construction. In particular, there is a difficulty in regarding the subject premises, which consists of a lot on a plan, as part of the premises consisting of all five lots. To do so, however, does not require an undue straining of language, particularly as all parts of the document need to be read together and as clause 4.1 is part of standard form contractual provisions. Importantly, the respondent's construction explains the selection of the 20% figure which, otherwise, would not make much

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2 *(supra)* at 352.

3 Per Steyn LJ in *Arbuthnott v Fagan* (CA unreported referred to in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326).

4 (1988) 5 ANZ Insurance Cases 60-853 at 75,343.

sense. Commercial contracts ought be construed, wherever possible, so as to make commercial sense of them.[5]

The competing contentions on whether Body Corporate levies are outgoings

[20] The parties differ on whether body corporate levies are "outgoings" under clause 4.2.

[21] The respondents argue that body corporate levies fall within the definition of "charges levied pursuant to a law" as the body corporate's power to impose the levies on lot owners stems from s 150 of the *Body Corporate and Community Management Act* 1997 and s 95 of the *Body Corporate and Community Management (Standard Module) Regulation.*

[22] In addition, it is submitted, "prior to the execution of the lease the applicant was twice notified of the respondents' intention to recover body corporate levies under the lease. It did not query that intention, nor did it object to this occurring". Rectification is not sought and I regard as inadmissible the evidence of any such notification. It is not evidence of a fact known to both parties at the time of the contract within the meaning of that concept in the above passage from Mason J's reasons in *Codelfa*. Rather, it is no more than evidence of a communication from one party to another during the negotiating process. As such, it is inadmissible.[6]

[23] The applicant accepts that "the ability of the body corporate to charge … levies is granted pursuant to" the Act. It is submitted, however, that there is no statutory obligation imposed on the tenant to pay any prescribed amount and while there may be a statutory obligation on the landlord to pay fees for the individual lots, the quantum of body corporate fees (if any) is determined by the body corporate and not by reference to any particular law.

[24] Section 150 of the *Body Corporate and Community Management Act* 1997 ("the Act") relevantly provides that "the financial management arrangements applying to a community title's scheme are those stated in the regulation module applying to the scheme". Subsection (2) provides that, without limiting subsection (1), the regulation module applying to a community title scheme **may** provide for financial arrangements about matters including the body corporate budget and the levying of lot owners for contributions. Subsection (3) provides that such "financial management arrangements" may impose obligations on bodies corporate and lot owners.

[25] Section 95 of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 ("the Regulations") requires a body corporate by ordinary resolution –

(a) to fix contributions to be levied on the owner of each lot for the financial year; and

(b) to determine the instalments in which such contributions are to be paid and the dates by which they must be paid.

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5 *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314 and *L Schuler AG* v *Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251.

6 *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales (supra)* at 352.

[26] Section 96 contains provisions in respect of notification of contributions. Section 98 permits a body corporate to fix a penalty for late payment of contributions. Section 99(2) provides that a liability to pay a contribution or an instalment thereof is "enforceable jointly and severally against the person who was the owner of the lot when the contribution, instalment … became payable".

[27] Levies made by a body corporate on proprietors of lots meets the description of "charges levied in respect of the Premises" and I do not understand the respondent to argue to the contrary. The critical question is whether such charges can be said to be levied "pursuant to a law".

[28] Although I think it fair to say that, traditionally, language such as that in clause 4.2(1) has been used to describe governmental and local authority imposts such as rates, land tax and the like imposed pursuant to legislation and subordinate legislation, the foregoing discussion shows that the levies of the subject body corporate are made pursuant to the Act and Regulations. The fact that the levy can only be made by a resolution of the Committee of the Body Corporate does not appear to me to assist the applicant. Rates are also set annually by determination of the relevant local authority. The words "pursuant to a law" does not mean "by operation of a law without determination or intervention of any authority or person". "Pursuant to" in the context under consideration has the meaning defined in the *Oxford English Dictionary* of "in accordance with", "consequent and conformable to".

[29] I will hear submissions on the form of orders appropriate to give effect to these reasons.