

SUPREME COURT OF QUEENSLAND

CITATION: *Ratnasakera & Ors v Body Corporate for Focus Community Title Scheme 12996 & Ors* [2003] QSC 438

PARTIES: **NIMAL ANTHONY DE SILVA RATNASAKERA**
(first plaintiff/first applicant)
LAKSHMAN JAYASINGHE
(second plaintiff/second applicant)
DE JAY'S AT SURFERS PTY LTD ACN 096 733 489
(third plaintiff/third applicant)
v
**BODY CORPORATE FOR FOCUS COMMUNITY
TITLE SCHEME 12996**
(first defendant/first respondent)
FOCUS OWNERS LIMITED ACN 010 096 992
(second defendant/second respondent)
**DAVID LINNETT, LORRAINE BRYANT, ROBERT
CASE, DAVID DEMOOR, LAURENCE DOOREY AND
ERNEST HALL**
(third defendants/third respondents)

FILE NO/S: S3238 of 2003

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 24 December 2003

DELIVERED AT: Brisbane

HEARING DATE: 15 October 2003

JUDGE: Mullins J

ORDER:

1. **With respect to the relief sought in paras 1, 2 and 3 of the application filed on 30 September 2003, the application be dismissed.**
2. **With respect to the relief sought in para 4 of the application filed on 30 September 2003, the application be adjourned to a date to be fixed to be brought on by either party on 2 days' notice in writing to the other.**

CATCHWORDS: PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – application for summary judgment pursuant to r 292 *Uniform Civil Procedure Rules* – where plaintiffs seek discretionary relief – where defences raise an issue relevant to whether the discretion would be exercised to grant that relief – factual dispute about whether representations were made in the terms

alleged– application dismissed

UCPR r 292

COUNSEL: R G Bain QC for the plaintiffs/applicants
P J Roney for the defendants/respondents

SOLICITORS: McDonald Balanda & Associates for the plaintiffs/applicants
Hynes Lawyers for the defendants/respondents

- [1] **MULLINS J:** By application filed on 30 September 2003, the plaintiffs seek summary judgment of part of their claim against the first and second defendants, an order to strike out part of each of the defences of the first, second and third defendants and an ADR referring order in relation to the remaining issues in dispute in the plaintiffs’ statement of claim.

Background

- [2] The first defendant is the body corporate of “Focus”, a residential apartment tower at Surfers Paradise. The second defendant is the trustee of the Focus Owners’ Unit Trust and is party to a management agreement with the first defendant. Mr Robert Spencer and Mrs Kim Spencer are the two managers employed by the second defendant to conduct its business. The third defendants have been sued on the basis that at material times each was a member of the committee of the first defendant and a director of the second defendant.
- [3] On the ground floor of Focus is space in which various restaurants have operated from time to time. It is common ground that as at October 2000 the area used for the restaurant consisted of Lot 1 on BUP 2130 (“Lot 1”) and an area of common property of Focus of approximately 144m² (“the leased area”) which was the subject of registered lease number 601815171 (“the said lease”). The plaintiffs allege that the restaurant space also included a further area of common property of approximately 65m² (“the licensed area”), but that is a matter which is in issue.
- [4] By contract dated 30 April 2001 the first and second plaintiffs purchased Lot 1 from the second defendant. There is no reference to the leased area in the contract. The purchase of Lot 1 was completed on 30 May 2001. The first and second plaintiffs with their respective wives set up the third plaintiff to conduct a restaurant business in the restaurant space as the tenant of the first and second plaintiffs. A dispute has arisen between the plaintiffs and the defendants over the entitlement of the plaintiffs to use the leased area and the licensed area.
- [5] The proceeding was commenced by claim filed on 11 April 2003 and is based on pre-contractual representations alleged to have been made by the first and second defendants which the first and second plaintiffs allege induced them to enter into the contract to purchase Lot 1. The first and second plaintiffs allege that representations were made by the second defendant that were authorised by the first defendant to the effect that the area dedicated to the restaurant included both the

leased area and the licensed area, that if the first and second plaintiffs were to purchase Lot 1, they would have thereby or would be given exclusive use of each of the leased area and the licensed area to use together with Lot 1 for the purposes of a restaurant and that the second defendant had and would make over to any purchaser of Lot 1 from it the exclusive right to use each of the leased area and the licensed area together with Lot 1 for the purposes of a restaurant. The defendants deny that these representations were made or, if they were made, that they were made in order to induce the first and second plaintiffs to do any act.

- [6] It is common ground that the said lease was granted by the first defendant to the then operators of the restaurant, Messrs R C & S G Moon and Keanfam Pty Ltd on 27 September 1976 for a term of 99 years commencing on 2 August 1976 at a rental of \$1 per annum.
- [7] The defendants plead that the said lease was varied by deed of variation made on 2 October 1993 (“the deed of variation”) to include a revised annual rental and provision for review and rental increase over the term of the lease. For the first rental year under the deed of variation which would commence on a date to be determined under the deed of variation, but no later than 1 July 1993, the rent was to be \$3750. The parties to the deed of variation were the first defendant and Sailingworld Australia Pty Ltd (“Sailingworld”) the then assignee of the said lease from the original lessee. There has been no registration of the amendments to the said lease made by the deed of variation.
- [8] By contract dated 3 March 1999 the second defendant purchased Lot 1 from Sailingworld on condition that Sailingworld would assign the said lease to the second defendant and upon the first defendant consenting to that assignment. The special conditions of the contract refer to the said lease being varied by deeds dated 1 November 1989 and 2 October 1993. That sale was completed and a transfer of the said lease was registered in favour of the second defendant.
- [9] The second defendant granted a lease to Kemqui Investments Pty Ltd (“Kemqui”) over Lot 1 for a period of 4 years commencing on 1 July 1999 and a sub-lease over the leased area for the same period at a rental of \$1 per annum. Both the first and second defendants entered into a licence agreement with Kemqui dated 16 July 1999 pursuant to which the first defendant granted the licence to permit the sub-letting of the leased area by the second defendant to Kemqui. Although Mrs Spencer swore that by an executed licence agreement Kemqui was able to operate the restaurant in the licensed area, the licence agreement that is exhibited as Exhibit KS6 to Mrs Spencer affidavit is not such a licence agreement, but the licence agreement which contains the licence from the first defendant to the second defendant to grant the sub-lease of the leased area to Kemqui. Kemqui operated its restaurant in Lot 1, the leased area and the licensed area. The directors of Kemqui fell out. There was no one available to manage the restaurant. At the request of one of the directors of Kemqui, Mr and Mrs Spencer commenced running the restaurant from about late October 2000.

- [10] In late 2000 Mrs Ratnasakera undertook negotiations with a director of Kemqui with a view to she and the first plaintiff acquiring the leasehold restaurant business. Those negotiations were unsuccessful.
- [11] In or about March or April 2001 the second defendant decided to sell Lot 1. The contract with the first and second plaintiffs was the result. That contract for the sale of Lot 1 was expressly subject to the existing lease in favour of Kemqui.
- [12] One source of the pre-contractual representations relied on by the first and second plaintiffs is a document entitled "Focus Restaurant Brief Overview" ("FRBO"). It is alleged by the plaintiffs that the FRBO was produced and used by the second defendant to advertise the existing restaurant to potential purchasers of Lot 1. The plaintiffs rely on the description of the area of the restaurant in the FRBO in the following terms:
- "The area is currently known as Focus By The Sea. The premises consists of a restaurant and bar area, outside courtyard area to the side of the restaurant and a front courtyard area fronting the Surfers Paradise Esplanade and separated from the street walkway by a glass wall."
- [13] In the defence of the second defendant, there is a denial of the allegations made by the plaintiffs based on the FRBO and the second defendant expressly states that it did not produce or cause to be produced the FRBO and did not provide the representations alleged to be contained in the FBRO. The first defendant also pleads that it did not have any involvement in the authorship or production of the FRBO.
- [14] Although not the subject of any express pleading, Mrs Spencer in her affidavit sworn on 14 October 2003 states that she prepared the FRBO in early May 2001 after the first plaintiff had told her that he needed assistance in producing a document to provide to his financier to assist him in gaining the finance for the purchase of the property and/or for renovations to the restaurant. Mrs Spencer swears that there was no plan attached to the FRBO as produced by her and that it was provided by her as a favour to the first plaintiff and was not produced on behalf of the second defendant or as part of any sales campaign.
- [15] Mrs Spencer also swears in that affidavit to hearing a conversation between one of the third defendants, Mr Linnett, the chairman of the first defendant, and the first plaintiff which took place on Good Friday 2001. Mrs Spencer states that Mr Linnett advised the first plaintiff, "that if he was considering purchasing the lot 1 area and considering taking over the lease of the outside common property area he should make allowance for the rental of that outside area which at that time was approximately \$4,500.00". The substance of that conversation is not raised in any of the defences.
- [16] The first plaintiff swears that in the course of the pre-contractual discussions with Mr and Mrs Spencer in late April 2001, he was advised by Mr Spencer on behalf of

the second defendant that there was a 99 year lease of the canopied area of \$1 per annum which Kemqui currently held. Mr Spencer in his affidavit sworn on 14 October 2003 swears that he believes he did mention the outside area was subject to a lease for a period of 99 years from the Body Corporate, but denies indicating that it was \$1 a year lease, because Mr Spencer states that he had always been aware that the lease had been varied by agreement in 1993 and that the rent was in the vicinity of \$4,000 per annum.

- [17] Subsequent to the completion by the first and second plaintiffs of their purchase of Lot 1, it appears that a surrender of Kemqui's lease was negotiated and the plaintiffs undertook refurbishment works involving the internal fit out and external improvement of Lot 1, the leased area and the licensed area. The first and second plaintiffs spent in excess of \$480,000 on these works and the works undertaken on the common property were done with the approval of the first defendant. The minutes of the first defendant note that the works on the common property were to be done at no cost to the body corporate. In the statement of claim the plaintiffs rely on the failure of the committee of the first defendant at its meetings to express any reservations of qualifications in considering the proposed works that the first and second plaintiffs did not have or would not have the exclusive use of the licensed area for the purposes of a restaurant.
- [18] Although not pleaded, the second defendant's solicitors by letter dated 23 May 2001 provided copies to the first and second plaintiffs of the said lease, the deed of variation and a document described as "Licence between the Body Corporate, Focus Owners Limited and Kemqui Investments Pty Ltd". After settlement, the second defendant's solicitors wrote to the then solicitors for the plaintiff by letter dated 19 June 2001 enclosing a deed of assignment relating to the assignment of the said lease from the second defendant to the first and second plaintiffs with the approval of the first defendant and a transfer of the lease. No reference was made in that proposed deed of assignment to the deed of variation. It appears that those documents were signed by the first and second plaintiffs, but copies signed by the first and second defendants were never returned to the first and second plaintiffs.
- [19] The first and second plaintiffs have been tendering rent of 50c per half year to the second defendant in respect of the leased area.

Strike out application

- [20] The plaintiffs' application to strike out the reference in each of the defences relating to the allegation of the variation of the lease pursuant to the deed of variation was made on the basis that the deed of variation was unstamped. On 27 October 2003 Mr Ian Anthony Brisson, the solicitor for the defendants, swore an affidavit exhibiting a true copy of the original stamped deed of variation. Leave is given for the filing of that affidavit. The plaintiffs therefore cannot succeed on their strike out application.

Summary judgment application

- [21] The plaintiffs concede that the dispute between the parties in respect of the licensed area cannot be determined summarily.
- [22] The plaintiffs' application for summary judgment is limited to seeking the transfer of the said lease to the plaintiffs pursuant to s 87 of the *Trade Practices Act 1974* (Cth) ("*TPA*") and in equity on the basis that the defendants' pre-contractual representations and post contractual representations and conduct amount to misleading and deceptive conduct in contravention of s 52 of the *TPA* and was conduct that was unconscionable within the meaning of s 51AA of the *TPA*.
- [23] In accordance with r 292 of the *UCPR*, in order to obtain summary judgment, the plaintiffs must satisfy the court that the defendants have no real prospect of successfully defending this part of the claim and that there is no need for a trial of this part of the claim.
- [24] The plaintiffs' submissions would have been stronger, if the deed of variation were not admissible in evidence. As the deed of variation has been stamped and is able to be relied on by the defendants, it is not possible to characterise the admission by the defendants that as at October 2000 the leased area formed part of the restaurant space as an admission that entitles the plaintiffs to judgment, as that admission was qualified by reference to the amendments to the rental provisions of the said lease effected by the deed of variation.
- [25] Because the first and second plaintiffs did not contract to purchase the interest of the second defendant in the said lease, they are left to rely on a case based on alleged representation, misleading and deceptive conduct or unconscionability. The relief they seek in respect of the transfer of the said lease is a discretionary remedy. The transfer of the said lease which they seek is a transfer of the said lease without taking into account the effect of the deed of variation.
- [26] Even though the deed of variation is not registered, if the defendants could show that the plaintiffs had knowledge of the terms of the deed of variation at a material time, it may be that the second defendant could resist being ordered to transfer the said lease to the first and second plaintiffs without allowance for the deed of variation. The issue is raised sufficiently in the defences of the first and second defendants by their reliance on the existence of the deed of variation.
- [27] Apart from the fact that in the circumstances of this case, it is not appropriate to grant the discretionary relief sought by the first and second plaintiffs on a summary judgment application, when there is this issue about the terms of the said lease which is the subject of the relief, there are also other matters raised by the defendants' material as to whether or not the alleged representations which the first and second plaintiffs claim to have relied upon in the pre-contract period were made in the terms alleged.

- [28] Although it is apparent from the submission of the deed of assignment of lease document by the second defendant's solicitors immediately after settlement of the purchase of Lot 1 to the solicitors for the first and second plaintiffs that the second defendant was contemplating transferring the said lease to the first and second plaintiffs at that stage, that is not sufficient to order the transfer of the said lease that is sought by the first and second plaintiffs, when there is an issue raised as to whether or not the first and second plaintiffs can be bound to the effect of the deed of variation.
- [29] As a result of the additional factual matters that were raised on behalf of the defendants to resist the application for summary judgment that were not pleaded in the defences, the defendants may wish to amend their defences. That is a matter that can be attended to without the necessity of an order.

ADR Referral

- [30] It appears that prior to the filing of the application, the parties had been involved in without prejudice negotiations. The prospect of seeking a referral to ADR in respect of the remaining issues in dispute in the claim, other than those the subject of the summary judgment application, was raised in correspondence by the plaintiffs' solicitors on 12 September 2003. It does not appear that the parties have previously been unable to agree on the terms of an ADR referral order. The preparation for the hearing of this application precluded an opportunity for the parties to agree upon the terms of a referral to mediation. During the hearing of the application, Mr Roney of counsel on behalf of the defendants indicated that he did not expect that there would be opposition to an appropriately convened mediation. I would therefore be disposed to give the parties an opportunity to agree on the terms of a mediation order, before making the ADR referral order sought in the application.

Orders

- [31] It follows that the following orders should be made:
1. With respect to the relief sought in paras 1, 2 and 3 of the application filed on 30 September 2003, the application be dismissed.
 2. With respect to the relief sought in para 4 of the application filed on 30 September 2003, the application be adjourned to a date to be fixed to be brought on by either party on 2 days' notice in writing to the other.
- [32] Although the plaintiffs have been unsuccessful in obtaining the relief sought in the application, the bringing of the application has resulted in material being adduced on behalf of the first and second defendants which was not clearly foreshadowed by the defences. The hearing of the application has therefore been positive in advancing the proceeding. I would be inclined to make an order for costs which preserves the possibility of either the plaintiffs or the defendants recovering the costs of the application, depending of the ultimate outcome of the proceeding. Before making any order for costs, I will hear submissions from the parties.