

SUPREME COURT OF QUEENSLAND

CITATION: *No Worries Management v Dolman* [2004] QSC 153

PARTIES: **NO WORRIES MANAGEMENT PTY LTD**
(applicant)
v
DAVID REGINALD DOLMAN
(respondent)

FILE NO: S2800 of 2004

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 14 May 2004

DELIVERED AT: Brisbane

HEARING DATE: 8 April 2004

JUDGE: Wilson J

ORDERS:

- 1. a declaration that, on the proper construction of the lease dated 7 June 1999 between the respondent as lessor and the applicant as lessee ("the lease") over the premises described as Lot 14 on SP118437 in the County of Solander, Parish of Salisbury being Title Reference 50267162 also known as Unit 14 at "The Newport on Macrossan" ("the premises") and in particular clause 1.1, 3 and 4 of the lease, the rental payable by the lessee to the lessor under clause 3.1 is, and from 1 July 2000 was, an amount calculated after deduction of any Goods and Services Tax, under the *A New Tax System (Goods & Services Tax) Act 1999* (Commonwealth), payable by the lessee in respect of the supply of the premises to a sub-tenant;**
- 2. that the respondent pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: LANDLORD AND TENANT – FORM AND CONTENTS OF LEASE – CONSTRUCTION OF LEASES - Intention of the parties – where lessee sub-lets property to short-term holiday tenants – where GST is payable on letting fees – whether GST is a “deductible expense” under the lease – whether burden of payable GST should be borne by the lessee or lessor

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 Followed

Geroff v CAPD Enterprises Pty Ltd [2003] QCA 187 Cited

Wickman Machine Tool Sales Ltd v L Schuler AG [1974] AC 235 Applied

COUNSEL: RJ Douglas SC and AM Musgrave for the applicant
D Marks for the respondent

SOLICITORS: Mahoney Lawyers for the applicant
Hunt & Hunt for the respondent

- [2] **WILSON J:** This is an application for a declaration as to the proper construction of a lease.
- [3] There is a resort complex comprised of 14 accommodation units in Macrossan Street, Port Douglas known as “The Newport on Macrossan”. The applicant is the caretaker/manager of the complex under an agreement with the body corporate, as well as the lessee of the various units from their respective owners. The respondent is the owner of unit 14, which he has leased to the applicant for a term of 5 years from 7 June 1999. The applicant sublets unit 14 (and the other units) to short term holiday tenants.
- [4] The lease of unit 14 between the respondent as owner and the applicant as lessee was entered into before the introduction of the goods and services tax (“GST”). The legislation under which GST is levied and collected¹ commenced on 1 July 2000. The applicant (as supplier) is liable to pay GST on holiday lettings. The GST is embedded in the price the applicant charges holiday tenants: under the GST law it has no right or obligation to impose a further 10% charge as GST. The nub of the present dispute is whether, under the lease between the respondent and the lessor, the ultimate burden of these GST payments must be borne by the respondent/owner or the applicant/lessee.
- [5] It is readily apparent from the lease that the parties intended that the applicant should sub-let the premises for holiday accommodation purposes. See, for example, clause 7.1 (Use of Demised Premises), clause 6 (Owner’s Obligations, which include obligations with respect to furnishing and decorating, repair and replacement, and refurbishment, all to a standard acceptable for rooms in a high class holiday accommodation complex, and payment of Outgoings as and when they fall due), and clause 10.1 (Sub-letting), as well as the provisions about rent.
- [6] The applicant is responsible for maintenance and repair, and replacement of broken parts, at the respondent’s cost, to be met out of Gross Receipts: clauses 15 and 16.
- [7] Clauses 3.1 and 3.2 of the lease provide –

“3. RENTAL

¹ A New Tax System (Goods and Services Tax) Act 1999

- 3.1 The rental payable by the Lessee to the Owner during the Term shall be calculated as follows:-

$$R = G - E$$

WHERE:

R = the calendar monthly rental payable for the month in respect of which the rental is being calculated

G = Gross Receipts

E = Deductible Expenses.

- 3.2 The Owner hereby authorises the Lessee to deduct from the Gross Receipts the Deductible Expenses and to pay the same from such moneys held in trust on account of Gross Receipts.”

- [8] “Gross Receipts” are defined as meaning –

“the total amount paid each calendar month by holiday accommodation tenants (sub-lessees) in respect of the occupation of the demised premises”

and “Deductible Expenses” –

“means all and any of the following categories of expenses incurred in respect of the demised premises or the subletting thereof by the Lessee and which shall be deducted from Gross Receipts each calendar month to calculate and determine the rental payable:

- (a) The Letting Fee equivalent to twelve per centum (12%) of Gross Receipts.
- (b) Cleaning costs comprising labour and supplies charged at reasonable market rates.
- (c) Electricity and gas charges, excess water rates, electricity and gas meter rents and all licence fees or charges.
- (d) Pest control treatments periodically if and when required.
- (e) The cost of all repairs, maintenance or replacement of the Contents.
- (f) Linen and laundry costs (whether in relation to usage of Owner supplied linen or hired linen) including mending or replacement costs where applicable, charged at reasonable market rates.

- (g) Bank charges and federal and state duties levied upon bank transactions applicable to the business of subletting the Demised Premises.
- (h) Office and administration expenses including postage and petties, photocopying, telex and telephone and facsimile communications to facilitate accommodation bookings applicable to the business of subletting the Demised premises.
- (i) One sixtieth of the amount of Stamp Duty (pro rata) assessed in respect of this Lease over the term thereof.
- (j) All reasonable expenses incurred by the Lessee in the business of sub-letting the Demised Premises in respect of fees and commissions to airline travel agents and other persons or organisations taking or facilitating accommodation bookings.
- (k) The sum of
 - (i) One Hundred dollars (\$100.00) per month if the Demised Premises is a one bedroom unit; or
 - (ii) One Hundred and Fifty dollars (\$150.00) per month if the Demised Premises is a two bedroom/twin key unit,

on account of marketing and advertising fees to be paid to the Lessee with the Lessee to account to the Owner for same at the end of each month; or
- (l) The relevant share of reasonable hire charges and servicing costs in respect of any PABX service to the Demised Premises.

[9] “Letting Fee” –

“means the compensation payable to the Lessee in respect of the subletting of the Demised Premises. For the purpose of clarity it is hereby declared that the letting fee shall not include any expense or outgoing incurred by the Lessee on behalf of the Owner or otherwise in connection with the letting of the Demised Premises. The letting fee shall be twelve per centum (12%) of Gross Receipts.”

I interpret “letting of the Demised Premises” in the second sentence as “sub-letting” of those premises. Further, I interpret the second sentence as meaning that the Letting Fee was to be an entitlement clear of any expense incurred by the applicant; that is, it that it was intended as profit and not reimbursement for moneys expended.

[10] The applicant accepts that the Gross Receipts after 1 July 2000 are what the sub-tenants pay, pregnant with GST. It is not suggested that any of the listed categories

in the definition of Deductible Expenses is an amount or description which would embrace the GST liability in question. Nor is it suggested that the respondent's obligation to pay Outgoings (clause 6.3) embraces the GST obligation.

- [11] Senior counsel for the applicant submitted –
- (a) that the tenor of the whole lease is that expenses or outgoings incurred in respect of or in connection with the Demised Premises are to be borne by the respondent;
 - (b) that on the proper reading of the definition of “Deductible Expenses” the list of categories of expenses is inclusive rather than exhaustive;
 - (c) that the applicant is to receive 12% of Gross Receipts as a “compensation” or profit. He submitted that if the GST were to be borne by it, the Letting Fee would be correspondingly diminished.

Counsel for the respondent submitted that the list of categories of Deductible Expenses is exhaustive, or alternatively, that the GST is not an expense in respect of the demised premises, but rather one in respect of the applicant's own enterprise of providing holiday accommodation.

- [12] I accept the first submission for the applicant.
- [13] The second submission for the applicant involves reading the word “all” in the first line of the definition of “Deductible Expenses” distributively so that the introductory words become –

all expenses
and (ie including)
any of the following categories of expenses.

At first blush, the distributive approach is a little strained, but the expression “all and any of” contains an inherent contradiction. If the applicant incurred expenses in all of those categories, could it fairly be argued that not all of them should be deducted? Surely not. Counsel for the respondent submitted that the phrase would accommodate a situation where a particular expense might fall within more than one category. Perhaps it would, but such a situation would just as readily be accommodated by the distributive reading of “all” put forward by the applicant. As senior counsel for the applicant submitted, this distributive approach is consistent with the broad structure of the agreement about Rental – namely, that all of the receipts and all of the expenses were to be brought to account, and, after allowing a 12% profit to the applicant/lessee, the balance was to be paid to the respondent/owner. Clauses 15 and 16 further support this proposition.

- [14] Deductible Expenses are expenses “incurred in respect of the demised premises or the subletting thereof”. The Letting Fee does not include “any expense or outgoing incurred by the Lessee on behalf of the Owner or otherwise in connection with the letting of the Demised Premises.”

- [15] While there is some force in the submission of counsel for the respondent that the GST is not an expense in respect of the demised premises, but rather one in respect of the applicant's own enterprise of providing holiday accommodation, the same might be said of the bank charges and federal and state duties levied on bank transactions applicable to the business of subletting the demised premises which comprise category (g).
- [16] The applicant's obligation to pay GST arises only in the event of sub-letting. As senior counsel for the applicant submitted, there is an intimate and temporal nexus between the obligation to pay GST and the sub-letting. I am persuaded that it is an expense "incurred in respect ofthe subletting" of the demised premises, and so a Deductible Expense. I am further satisfied that it is an expense "incurred by the Lessee in connection with" such subletting, and so not intended to diminish the Letting Fee.
- [17] Senior counsel for the applicant demonstrated by a sample calculation that if the burden of GST were to be borne by it as lessee, in practical terms its Letting Fee would be much reduced from 12% unless it dramatically increased the daily tariff – a step which, presumably, would be unattractive to it in a competitive market. By contrast, returns to the applicant and the respondent comparable to those before the introduction of GST could be achieved by a modest increase in the daily tariff and the respondent's bearing the ultimate burden of the GST. This is a further reason for adopting the interpretation of Deductible Expenses for which the applicant contends, for as Lord Reid said in *Wickman Machine Tool Sales Ltd v L Schuler AG*² –

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

And in *Antaios Compania Naviera SA v Salen Rederierna AB*³ Lord Diplock said –

“If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense.”

See also *Geroff v CAPD Enterprises Pty Ltd*⁴.

- [18] Ultimately I am persuaded that the applicant's interpretation is the correct one.
- [19] In the circumstances, it is not necessary to consider the alternative argument for the applicant based on an implied term⁵ “to the effect that if, by dint of some change of circumstance, including a statutory circumstance, not immediately envisaged by the parties, an additional expense or outgoing ‘in respect of the Demised Premises or

² [1974] AC 235 at 251

³ [1985] AC 191 at 201.

⁴ [2003] QCA 187 at paras 36 – 42.

⁵ Paragraph 34 of the Applicant's Outline of Argument.

subletting thereof⁶ arose, then that expense also fell to be deducted, in addition to ‘Deductible Expenses’, in order to strike the rent so as to ensure that ‘the Letting Fee’ shall not include any expense or outgoing incurred by the Lessee ... in connection with the letting of the Demised Premises”⁷ or the submissions of counsel for the respondent that the tests for the implication of a term set out in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW*⁸ are not met and that there could not be such an implied term in the face of clause 24 (Entire Agreement).

[20] I shall ask the parties to submit a draft order.

Addendum – 14 May 2004

[21] The parties have now agreed on the form of the declaration which is appropriate and I will make a declaration in those terms shortly.

[22] The other outstanding issue is that of costs. The applicant asks for costs to follow the event. The respondent submits that there should be no order as to costs or, alternatively, that the costs should be restricted in some way.

[23] Briefly, the background is this. Over some weeks, there had been correspondence to and fro in relation to the dispute as to who ultimately should bear the GST burden. However, the basis upon which the applicant ultimately submitted that it was the respondent who should bear that burden was not disclosed until the day before the application came on for hearing and, indeed, the form of declaration which I am about to make mirrors that in the applicant's written submissions which were provided the day before the hearing, but is different from that set out in the originating application.

[24] I take these matters into consideration. However, I am satisfied that it was always a dispute as to who should bear the burden of the GST and as to the correct interpretation of the lease which would lead to the resolution of that question.

[25] In the circumstances, I can really see no reason why costs ought not follow the event on the standard basis.

[26] The orders I make are these:

1. a declaration that, on the proper construction of the lease dated 7 June 1999 between the respondent as lessor and the applicant as lessee ("the lease") over the premises described as Lot 14 on SP118437 in the County of

⁶ In the preface to the definition of “Deductible Expenses”

⁷ See the definition of “Letting Fee”.

⁸ (1981-82) 149 CLR 337

Solander, Parish of Salisbury being Title Reference 50267162 also known as Unit 14 at "The Newport on Macrossan" ("the premises") and in particular clause 1.1, 3 and 4 of the lease, the rental payable by the lessee to the lessor under clause 3.1 is, and from 1 July 2000 was, an amount calculated after deduction of any Goods and Services Tax, under the *A New Tax System (Goods & Services Tax) Act 1999* (Commonwealth), payable by the lessee in respect of the supply of the premises to a sub-tenant;

2. that the respondent pay the applicant's costs of and incidental to the application to be assessed on the standard basis.