SUPREME COURT OF QUEENSLAND

CITATION:	*Mealing & anor v Rahim & Anor* [2004] QSC 194
PARTIES:	**JAMES THORNTON MEALING AND OLIVE MAY MEALING** (Plaintiffs) v **MOJGAN RAHIM** (First defendant) **MOHAMMAD HAMOULEH** (Second defendant)
FILE NO/S:	34 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	28 May 2004
DELIVERED AT:	Cairns
HEARING DATE:	27 February 2004
JUDGE:	Jones J
ORDER:	
CATCHWORDS:	CONVEYANCING – LEASES – UNREGISTERED LEASES AND AGREEMENT FOR LEASES – PERIODIC TENANCY – TENANCY AT WILL - Where an agreement to lease retail souvenir shop entered into – Where lease never formally executed – Whether conduct on behalf of the parties constituted acceptance – Whether right of recovery of possession can be exercised – Whether right of option to renew can be exercised *Re Davies* (1989) 1 Qd R 48 *Farmers' Mercantile Union v Coade* (1921)30 CLR 113 *Empirnall Holdings Pty Ltd v McMahon Paull Pty Ltd* (1988) 14 NSWLR 523 *Progressive Mailing House Proprietary Limited v Tobali Proprietary Limited* (1984-5) 157 CLR 17 *Walsh v Lawnsdale*
COUNSEL:	Mr K Priestly for the plaintiffs Mr C Jensen for the defendants

SOLICITORS: Williams Graham & Carman for the plaintiffs

Robin Smith for the defendants

[1] The plaintiffs are the registered owners of land described as Lot 8 on Registered Plan 862223 situated in the County of Nares, Parish of Cairns. On that land there has been erected a building which at ground level has been subdivided into 10 shop premises (known as Kuranda Market Mall). The plaintiffs' residence is on the first floor level above the shops.

[2] The defendants are the tenants of one of the shop premises known as Shop 10.

[3] The questions for determination are the nature and terms of the tenancy, and whether the plaintiffs are entitled to recover possession of the premises upon the basis that if their occupancy is as tenants at will, then they have failed to comply with a note to deliver up possession dated 11 October 2002. The defendants counterclaim seeking a declaration that they hold the premises as tenants pursuant to an agreement to lease expiring on 30 June 2004 and containing an option for a further term of three years. They seek specific performance of that agreement.

Background facts

[4] The defendants entered into occupation of the premises following the purchase of a retail souvenir business which had been carried on in Shop 10 by a Mr Surbandi. This appears to have occurred in or about February/March 2001. The defendants paid Mr Surbandi $4,000 for the shop fittings and $13,000 for stock.

[5] Before finalising the purchase of the business, the defendants met with the plaintiffs at their residence. The purpose of the meeting was for the plaintiffs to assess the defendants' suitability as tenants and to ensure they were aware of the plaintiffs' requirements. The discussion took place between Mr Mealing and the defendants. Mrs Mealing was present and sat at the table during the discussion.[1] At this meeting Mr Mealing presented to the defendants a lease document which showed as the lessee only the first named defendant. It is common ground that during the discussions Mr Mealing, in his own hand, inserted on two pages of the document the name of the second named defendant.[2] Exhibit 2 illustrates this change.

[6] It is agreed between the parties that there was a discussion about rents and rental payment. There was also discussion on the topic of what goods could be sold from the shop. From Mr Mealing's perspective this was to protect the businesses of the other tenants. The defendants recollect that there was special concern prohibiting the sale of honey from their shop.

[7] The defendants claim that it was on this initial visit that they executed the lease in the form presented to them and corrected only by the addition of the second defendant's name. They claim to have signed the form after Mr Mealing had signed it in their presence. They claim that Mrs Mealing was engaged in other activities at the time of their signing and that she did not sign. The first named defendant thought a duplicate was signed at the same time. She claimed that she was then

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1 Transcript 16/40

2 Transcript 17/45

given a document which Mr Mealing had placed in an envelope which she did not particularly observe. It is this document which became ex 2.

[8] Mr Mealing gave evidence that at the meeting there was discussion about certain clauses in the document, as well as certain rules which he expected the defendants to comply with. He explained that he would provide formal leases at a latter date with a commencement date of 1 July 2001. When the defendants departed they took with them the document (ex 2) in respect of which he told them to read and make sure they agreed with its terms. Mr Mealing said no documents were signed at this meeting.

[9] Mr Mealing claims that he did prepare three copies of the formal lease with the commencement date of 1 July 2001 when he became aware that the defendants had taken over the conduct of the business in Shop 10. In accordance with their practice, Mr Mealing and his wife then duly executed the leases in the presence of a Justice of the Peace their friend, Mr Freeman.[3] Mr Mealing claims that he gave to the defendants the Disclosure Statement and the three lease documents for their execution explaining that they were required to stamp the documents and when this was done, to return one to him. He did not say the documents had to be returned by 1 July[4] nor, it seems by any other date. In any event no executed copy lease has been returned to him. The defendants claim that no further lease documents were given to them after the initial discussion.

The issues

[10] The first matter for determination is whether a lease document was executed by Mr Mealing and the defendants at the time of the initial discussion. This requires a consideration of the credibility of the parties in the circumstances of this transaction. Mrs Mealing was unable, because of ill health, to give evidence but there is no suggestion that she signed this particular document.

[11] Mr Mealing has owned the Kuranda Market Mall for 12 years. In addition, he owns the Kuranda Markets which are on the opposite side of the street. The markets consist of premises that are subject to formal leases as well as open air stalls which are subject to less formal arrangements. He appeared to me to be well aware of the requirements of the legislation governing the leasing of retail shops. He prepares his own lease documentation. He explained that he prepared the Disclosure Statement for the Rahims at the same time as the lease and this is why the initial Disclosure Statement (ex 4) bore only the name of the first defendant. Both names were included when the formal leases were prepared.

[12] The defendants had no business experience prior to this venture.[5] The second defendant was further disadvantaged because he could not speak English at the time of the initial discussion and required information to be translated by his wife. Even now, three years later, he has evident limitation with the language. As a consequence, the likelihood for each of the defendants to be confused by the process was, in my view, quite high.

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3 Transcript 42/5-50

4 Transcript 35/15

5 Transcript 50/30; 52/32

[13] I am satisfied that at the initial discussion no lease agreement was executed. It would be quite unwise of the defendants to do so without having taken the time to consider the document, even if not intending to take legal advice upon it. There was no advantage to the plaintiffs to have the document signed at that time. Indeed, they would have been at some risk if they had not given the defendants, with their obvious inexperience and limitations, the opportunity to take advice.

[14] Of more significance, is the fact that the lease documents would, as a matter of practicality, have to be signed in triplicate if the parties were to retain a copy for their own individual records. Moreover, the document provides for the signatures to be witnessed and there is no suggestion by the defendants that a witness was present at the time of the initial meeting. My assessment of Mr Mealing is that he would not overlook a requirement of that kind.

[15] I accept the evidence of Mr Mealing that after the defendants entered into possession of the shop he prepared formal lease documents which were duly executed by himself and his wife. I accept his evidence that he delivered those documents to the defendants for execution by them, for stamping and for the subsequent return of one copy to him. Those documents were never stamped[6] and nor was a copy of any document executed by the defendants' returned to him.

[16] This finding makes unnecessary any consideration of whether Mr Mealing had authority to sign on behalf of his wife or whether Mrs Mealing by her conduct ratified the agreement to lease. I have come to the view that the only document which was executed by the plaintiffs was the formal lease in triplicate which I accept was delivered to the defendants. I find that the defendants have not executed any written lease.

[17] What then is the situation of the parties? Whilst there is no written lease signed by the parties there was between them certainly an agreement to lease. They have responded to that agreement by showing themselves having been bound by the various terms of the proposed formal lease. The annual rent has been increased in accordance with the agreed terms on two occasions. That rent has been paid and accepted. This is common ground.

[18] The events occurring after the commencement of the term of the lease on 1 July 2001 that had been disclosed by the evidence are as follows:-

> On 13 September 2001 the defendants' then solicitors wrote to the plaintiffs alleging that they made an unauthorised entry upon the shop premises. That letter purported to rely upon clause 7.03 of the standard terms of the formal lease;
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> On 19 March 2002 the plaintiffs delivered to the defendants a letter granting permission to sell certain items subject to them complying "with all conditions set out in your lease"[7];
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> On 13 August 2002 the solicitors for the plaintiffs sent a letter to the defendants' solicitors in the following terms:-

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6 Before pursuing this action an unexecuted copy of the hand amended draft lease was stamped on 11 February 2004

7 See ex 6

> "We act for James Thornton Mealing and Olive May Mealing who entered into a lease with your clients Mojgan Rahim and Mohammed Hamouleh for shop premises being Shop 10at Kuranda Market Mall in Kuranda.
>
> Our clients advise that the Lease was returned to your office for stamping. They have not received their stamped copy of the Lease. Can you please forward our client's copy to our office by return."[8]

[19] No executed stamped copy of the lease was produced in response to that letter. This appears to have been the first occasion that the defendants became aware that the formal lease documents tendered by them to the defendants in March 2001 had not been returned and had not been executed. The plaintiffs now seek to argue that the delivery of the formal documents constituted an offer to lease and this has not been accepted because the mode of acceptance has not been followed.

[20] There can be no doubt in the light of their own conduct that the plaintiffs have in fact accepted the defendants as tenants. They have insisted on the compliance with the terms of the lease and they have accepted the benefits of the terms of the formal lease. Both Mr and Mrs Mealing signed the letter of the 19 March 2002 and the solicitor's letter of 13 August 2002 was written on their instructions.

[21] With that background conduct continuing over a period of two years and eight months of a three year term it cannot now be argued that the offer to lease has not been accepted. Acceptance can be inferred by conduct. *Farmers' Mercantile Union v Coade*[9] and *Empirnall Holdings Pty Ltd v McMahon Paull Pty Ltd*[10]. In the latter case the following passage appears from the judgment of McHugh JA (in which Samuels JA agreed):-

> "Nevertheless, the silence of an offeree in conjunction with the other circumstances of the case may indicate that he has accepted the offer: *Rust v Abbey Life Assurance Co Ltd*. The offeree may be under a duty to communicate his rejection of the offer. If he fails to do so, his silence will generally be regarded as an acceptance of the offer sufficient to form a contract.
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> (His Honour then referred to a number of cases in the United States and the manner in which the principle is formulated in those cases and he then went on) –
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> This formulation states acceptance in terms of a rule of law. However, the question is one of fact. A more accurate statement is that where an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to the tribunal of fact to hold that the offer was accepted according to its terms."

[22] There was an expectation, at least on the part of the plaintiffs, that the lease would be registered but there was no condition that the agreement to lease was subject to

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8 See ex 7

9 (1921) 30 CLR 113

10 (1988) 14 NSWLR 523

any such requirement. There was no discussion on this point referred to in evidence and the terms of the draft document contain no such reference.

[23] I am satisfied that as a result of the initial discussions between the parties in February/March 2001 and the subsequent conduct resulted in an agreement for lease for a period of three years commencing on 1 July 2001 upon the terms and conditions of the draft lease, ex 2. The formal lease documents and the letters referred to above provide sufficient writing of the lease as well as pointing to the belief by all parties that they were bound by the written terms.

[24] Mr Jensen of counsel relies upon the rule in *Walsh v Lawnsdale* to argue that an agreement for lease is to be treated in equity as though it were a lease which may be ordered to be specifically enforced. The High Court considered this principle in *Progressive Mailing House Proprietary Limited v Tobali Proprietary Limited*[11] where the following passage appears from the judgment of Mason J (as he then was):-

> "In *National Trustees, Executors and Agency Co. of Australasia Ltd v Boyd* (26) the High Court held that a lease for a term of seven years which was not registered as required by s 61 of the *Transfer of Land Act* 1915 (Vict.) was effective to give the lessee an equitable lease for seven years and was a good defence to an action by the successors in title of the lessor to recover possession of the premises. Knox C.J., Gavan Duffy and Rich JJ., having said that the real argument before them was that the instrument, for want of registration, could operate only as a contract and not as a lease binding the remainder, continued (27):
>
> > "The simple answer is that it operates, not merely to create contractual rights and duties, but to create an equitable term of years and a tenure by estoppel between the lessor and her privies and the lessee."
>
> I should prefer to say that the equitable term arises by virtue of the doctrine in *Walsh v Lonsdale* and the maxim that equity considers as done what ought to be done, rather than by reference to the doctrine of estoppel. That was the approach taken in *York House Pty Ltd v Federal Commissioner of Taxation* (28). And it is an approach which accords with the comprehensive explanation given by Jordan C.J. in *Carberry v Gardiner, Dockrill v Cavanagh,* and in *Australian Provincial Assurance Ltd v Rogers*.(29)." [12]

[25] As in *Progressive Mailing House* the rights of the parties in the present case are to be determined on the basis that notwithstanding there was a failure to sign and thereafter to register the lease; the circumstances brought into existence an equitable term for the three years agreed upon subject to the terms and conditions set out in the draft document. The rights, duties and liabilities of the parties identified in the terms of the draft lease fall to be determined by the ordinary principles of contract law.

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11 (1984-5) 157 CLR 17

12 Ibid at p 27

[26] Mason J went on to observe that "the incidence of the law of landlord and tenant indicate that mere breaches of covenant on the part of the lessee do not amount to a repudiation or fundamental breach".[13] I mention this fact because of the history of conflict between the parties, particularly as to the non-payment of rent and disputes over aspects of behaviour. These matters were not litigated before me with the plaintiffs being content to found the Notice to Quit on the failure to sign the formal lease documents. However, they are matters which might affect the granting of discretionary relief.

[27] Given the circumstances and particularly the fact that the plaintiffs have had the benefit of increased rents and have sought to enforce the restrictive trading elements of the agreement, I would, subject to hearing further submissions, exercise my discretion to declare that the agreement for lease is of a kind that ought to be specifically enforced.

[28] But to actually enforce the agreement may not be advised. The initial term of the lease has only one month to run. The question of whether the option to renew the lease can be enforced depends upon circumstances not argued at the trial. In the course of discussions before me, a statement was made that the plaintiffs had sold the premises (transcript p 9/35). If that has occurred the defendants would not be able to enforce the option against the new owner. Re *Davies*[14].

[29] Having these matters in mind, I propose to adjourn the further consideration of the argument to allow the parties to make further submissions on the appropriate relief having regard to the findings which I have made.

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13 Ibid at p 34

14 (1989) 1 QdR 48 at p 51