SUPREME COURT OF QUEENSLAND

CITATION:	*Transmetro Corporation Ltd v Davy & Ors and Anor* [2004] QSC 278
PARTIES:	**TRANSMETRO CORPORATION LTD** **ACN 001 809 043** (applicant) **v** **RONALD DAVY AND OTHERS** (first respondents) and **TOWER MILL BODY CORPORATE CTS 1918** (second respondent)
FILE NO:	SC No 5819 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	1 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2004
JUDGE:	Chesterman J
ORDERS:	**1. Declare that the first respondents' notices of 30 June 2004 have no effect and have had no effect on the leases made between the applicant and the first respondents** **2. The respondents should pay the applicant's costs of the application to be assessed on the standard basis**
CATCHWORDS:	CONTRACT – OFFER – ACCEPTANCE – GENERALLY – where the applicant was the lessee of a number of lots in a building which operates as a motel – where the first respondents were a number of owners of those lots – where the motel business suffered financial difficulties – where the applicant made a proposal to the first respondents to overcome these difficulties – where the first respondents issued notices to terminate the leases, which purportedly accepted an offer made in the proposal – where the applicant sought a declaration that the first respondents' notices were invalid acceptances of the offer CONTRACT – OFFER – ACCEPTANCE – WITHIN WHAT TIME – whether, if the first respondents' notices were purported acceptances of the offer, acceptance was made within a reasonable time

Ramsgate Victoria Hotel Co v Montefiore (1866) LR1Ex 109, cited
Ballas v Theophilus [No.2] (1957) 98 CLR 193, considered

COUNSEL: Mr J B Sweeney for the applicant
Mr P J Favell for the first respondent
Ms S E Brown for the second respondent

SOLICITORS: Hillhouse Burrough McKeown for the applicant
Walsh Halligan Douglas for the first respondent
Tress Cox for the second respondent

[1] Since 1994 the applicant has operated a motel business at the Tower Mill Motor Inn on Wickham Terrace. The building is nine stories high and is serviced by two lifts. The rooms, or suites as they have been called, in the building which are let out as motel rooms are lots in a Building Unit Plan which are owned by a number of individual owners who have leased them to the applicant. They have also entered into letting and caretaking agreements with the Body Corporate, the second respondent. The object of these agreements was to allow the applicant to conduct its business by giving it access to and control of the common property necessary to the conduct of the applicant's business.

[2] In recent years there has been a downturn in the profitability of businesses such as the applicant's. In addition the age of the Tower Mill building and a lack of capital applied to its maintenance and refurbishment has made it less attractive to visitors wanting overnight or short-term accommodation. The result is that the applicant has struggled to pay rent to the first respondents at the levels agreed to in the leases between them. A proposal to overcome the problem has become the subject of dispute. The first respondents claim that they validly determined their leases with the applicant and have demanded immediate possession of their lots. The applicant disputes the validity of the purported termination. By these proceedings it seeks:

> 'A declaration that the first respondents notices dated 30 June 2004 … purportedly accepting an offer by the applicant to terminate the leases on 30 June 2004 are void or of no effect.'

[3] The application seeks further declarations and an injunction, but the only outstanding issue between the applicant and first respondents is whether the notices referred to in the declaration set out have brought about a termination of the leases. A determination of the parties' rights with respect to the subject matter of that declaration should resolve the present disputes between them and further declarations or injunctions should be unnecessary.

[4] The application brought by the applicant against the second respondent has been dismissed by consent.

[5] The leases between the applicant and the first respondents are in identical terms. They were for a term of nine years and nine months, from 30 September 1994 until 30 June 2004. By clause 10.1 the leases:

> '… shall automatically be renewed for further terms each of 5 years on and from July 1, 2004, July 1, 2009, July 1, 2014, and July 1, 2019 unless the Lessee shall give notice of termination in writing to the Owner at least one month before such relevant date or unless this

> Lease shall have previously been determined, which renewed Lease shall be on the same terms and conditions as this Lease …'.

Clause 10.2 continues:

> 'Following a renewal of this Agreement in accordance with clause 10.1, the Lessee will prepare a new Agreement. The owner and the lessee will execute it, the owner will promptly attend to the stamping and registration of it in priority to any mortgage and deliver a registered copy and immediately following registration, deliver a registered copy of it to the Lessee.'

[6] The first respondents are the 'owners' referred to, and the applicant is the lessee.

[7] On 5 June 2002 the applicant wrote to the first respondents:

> 'As you would be aware … the tourism industry has been in a terrible slump for some time. Many hotels and other accommodation properties are battling low occupancies, and particularly low room rates.
> The Ansett situation, September 11 and a general over-building of hotels has added to our woes.
>
> The situation with Metro Inn Towermill is that we have tried to absorb recent losses and to continue to pay the rent in full, irrespective of the downturn. We have been sustaining losses, however, our ability to do this is not indefinite, and we are now forced to review our arrangements with the owners.
>
> ... The unfortunate bottom line is that we cannot continue to pay rent that is out of step with the capacity of the business to generate sufficient revenue to sustain it.
>
> We are prepared, and indeed, are contracted, to continue operating the premises, but at a more sustainable rent level … the current trading conditions do not make it possible to continue …
>
> We recognise that this is inconsistent with our contractual arrangements … but unfortunately we are not in any position to pay … the existing rent as it currently stands. …'

[8] On 2 July 2002 the applicant wrote again to the first respondents:

> 'Further to [the] letter of June 5, 2002 we have weighed up the various options open to owners …
>
> As indicated in [the] letter we have been absorbing losses for some time, however with the exaggerated downturn in recent months, our ability to continue to do this cannot be sustained. We are also facing the fact that the building is more than 30 years old, and maintenance is becoming a heavier burden each year. We are also continuing to have to refurbish …We are also still battling with the old lift. …

We propose continuing to operate the building, with as minimal impact on the current rent as possible. Whilst we indicated in our last letter a level that could be sustained would be 70% of the existing rent, we are uncertain as to the longer term outlook. Owners may wish to seek alternative uses, even on an individual basis. At this stage there are 2 years remaining on the lease, however as foreshadowed … we believe it in the owners interests to address the longer term future of the building now.

Our position is that we need a lower rental for the business to be viable. In reducing the return now, it may well be that the longer term use of the property can be secured. As we are not in a position to deal with 75 different owners, and as time is a serious factor, we have taken the liberty of continuing rental repayments on the 70% basis.

To offset this we propose two alternatives to owners:

i) For you to make alternative arrangements for use of your unit. One possibility would be for you to have the unit for your own use. Another would be to let, or lease it to a … corporate tenant. We of course would be prepared to surrender our lease on your unit if this was the course of action you wished to take.

ii) To continue on the basis of us paying you 70% of the current rent. In terms of the longer term future we are prepared to execute a new lease of your unit for an additional 3 years … at the proposed (70%) rental, while preserving the existing options of renewal. Alternatively the variation could be struck so that a market rent review be taken in 2 years time. …

...

We are conscious that what we propose will disadvantage owners, however having looked at the options we genuinely believe this is the best way forward, with owners continuing to receive the bulk of their rent, secured for at least the next 5 years. Following that, with market rent reviews every five years, the future of the building will be assured.

We will need to prepare a lease document for those that wish to take up the offer, and on what basis (fixed rent, or review to market in 2 years).

Please signify your intentions by ticking one of the following:

1) We would like to take up the offer of a new 3 year lease on the following basis:

a) the proposed rent fixed for the next 2 years, and the following three years with a market rent review to take place prior to the commencement of each option period.

b) the proposed rent fixed for the next 2 years, then a market rent review prior to the commencement of the new 3 year lease; and then prior to the commencement of each option period.

2) We prefer to take the unit back as at the end of this month (31 July 2002), and request a surrender of our lease.

3) We wish to continue our lease until the expiry of 30 June 2004, at which time we shall take possession back ourselves, unless a new lease is on offer for us to consider at that time.

Please return the photo-copy of this letter in the stamp addressed envelope provided.'

[9] At 4.58 pm on 30 June 2004 each of the first respondents caused to be delivered to the applicant a document entitled 'Notice to Terminate Lease'. The notices identified the lots which were the subject of leases between the respective first respondents and the applicant, and went on:

'With reference to the lease of the premises … for a term expiring on 30 June 2004 and your fundamental breach of that Lease in that, amongst other things:-

1. You are in breach of Clause 5.5 … to pay the guaranteed income and outgoings quarterly…;

2. You have failed to remedy a breach of covenant as outlined to you in a Form 7 Notice to Remedy Breach of Covenant dated 22 June 2004;

3. You have, in correspondence directed to the lessee dated 2 July 2002 and 14 April 2004, as well as by other actions offered and/or agreed to a novation of or variation of the Lease Agreement such that it is terminated on 30 June 2004, which is accepted and agreed to by the lessor;

I hereby give you notice that the Lease Agreement is terminated and forfeited and that you are required to provide possession and control of the premises to me forthwith such that I … may re-enter into possession … immediately.'

[10] The breach of covenant referred to in paragraph 2 of the notices was the failure to pay the full amount of rent specified in the leases. The notices dated 22 June 2004 called on the applicant to remedy the breaches by paying the shortfall.

[11] From at least 5 June 2002 the applicant had not paid the first respondents the full amount of rent set out in their leases. It had paid at a level of 70 per cent of the specified rent, as was foreshadowed in the correspondence.

[12] The first respondents submit that by their notices of 30 June 2004 they accepted the offer contained in the paragraph numbered 3 in the applicant's letter to them of 2 July 2002 – that was to 'continue our lease until the expiry of 30 June 2004 at which time we shall take possession back ourselves …'. The result, it is submitted, is that a binding agreement came into effect by which the leases were to be at an end and any interest or estate the applicant had in the lots was determined. The applicant submits that the notices of 30 June 2004 were not an acceptance of the offer contained in paragraph 3 of the letter of 2 July 2002 and were ineffective either to terminate the leases or to bring about a contract to determine the leases as and from 1 July 2004.

[13] The applicant advances a number of points, but it is only necessary to mention two of them because it is, I think, clear that the notices do not have the effect contended for by the first respondents.

[14] The first point is that the notices of 30 June 2004 are not acceptances of the offer and cannot be construed to be such.

[15] The terminology of the notices does not readily suggest the acceptance of an offer leading to an agreement to change the state of the legal relations between the parties. The notices are peremptory in tone. They are not couched in the language of agreement or consent, or reciprocal promises, but rather of individual and unilateral action. The whole tenor of the document is to assert that the applicant was in breach of important terms of the leases, giving rise to a right in the first respondents to terminate for breach, which right was being exercised.

[16] Clause 3 does, it is true, refer to an offer in the correspondence of 2 July 2002 which was 'accepted and agreed to' by the first respondents, but the overall context of the notice prevents it, I think, from being read as an acceptance of what the letter offered. Clause 3 of the notice is the third item in a list of identified 'fundamental' breaches of the lease. The notices conclude with the emphatic assertion that the leases are terminated and forfeited, having set out the list of fundamental breaches. Clause 3 seems to be a complaint that the applicant's correspondence amounted to a repudiation of the lease. In a real sense it was because it conveyed the applicant's decision to pay a lower rent than it was obliged to. The clause probably means that it is the repudiation which was 'accepted and agreed to' by the first respondents, rather than the offer contained in the letter.

[17] Had the offer contained in paragraph 3 of the letter of 2 July 2002 been accepted the parties would have had to make the necessary arrangements to bring the lease to an end on 30 June 2004. Acceptance of the offer by itself would not have done that. It would have led to the formation of an agreement to bring the leases to an end on 30 June 2004 but the parties would have had to co-operate to achieve that result. Without that further agreement the leases would have remained in force, and by the operation of cl 10.1 would have been renewed automatically on 1 July 2004. The operation of cl 10.1 could have been prevented by the applicant giving notice as contemplated by the clause or by the parties executing a surrender of the lease, or by a variation to the term of the lease. In any case co-operation between the parties would have been necessary. Acceptance of the offer would not have conferred on the respondents the right to determine the leases for breach. This is what the notices purport to do.

[18] This consideration tends strongly to suggest that the notices were not, and did not purport to be, acceptances of the offer.

[19] The applicant's second point is that the offers had lapsed before 30 June 2004 and were not then available for acceptance. The point appears to be irrefutable.

[20] There is no doubt that an offer will lapse after the effluxion of a reasonable time from its making (see *Ramsgate Victoria Hotel Co v Montefiore* (1866) LR1Ex 109; *Ballas v Theophilus [No.2]* (1957) 98 CLR 193 at 197, 199). The question what is a reasonable time is a question of fact, depending upon circumstances, including any stipulations contained in the offer or which might affect its acceptance. In *Ballas* the purported exercise of an option to purchase a deceased partner's interest in a partnership made 16 months after the death was held to be ineffective. Dixon CJ noted (197):

> 'That means that due time must be allowed for the calculation of the amounts to be added to the share disclosed by the last balance sheet and the completion of the balance sheet to the date of death, and for the valuation of goodwill if that be required. It means too that a reasonable time must be allowed for the consideration by the surviving partner of the information thus obtained. But thereafter he must act with that promptness which is always required in the case of the exercise of an option to acquire an asset the value of which is affected by the changing conditions which time and the vicissitudes of business bring.'

[21] Williams J said (199):

> 'If a specific price had been fixed by the option there could be little doubt that, having regard to its terms and to the nature of the business, this time would have been of short duration. Since no such price was fixed, and the calculation of the price required the preparation of a balance sheet … a reasonable time would have to include a sufficient period for these purposes and some short additional period to allow the surviving partner to decide whether he was prepared to pay the resultant price for the business.'

[22] The submission that the offer would remain open for acceptance for 23 months cannot be entertained. The period is excessive and unreasonable. The offer sought a response in the stamped addressed envelope provided. This indicates that a prompt reply was required. Two years is too long.

[23] It must also be borne in mind that if the offer were accepted the lease would have to be brought to an end on 30 June 2004 in some regular way. As I have mentioned the obvious means were the execution of an instrument of surrender, or for the applicant to give notice pursuant to clause 10.1 that it would not allow the lease to be renewed automatically for a further term. If that were the means by which the lease was to come to an end the offer had to be accepted in time to allow the applicant to give the required month's notice. If a surrender were to be executed, of if the leases themselves were to be varied to delete the terms as to renewal, the offer had to be accepted in sufficient time to allow the preparation of an instrument to take effect from 30 June. At the very latest the offer had to be accepted before it was too late to terminate the lease by some consensual and legally effective means. The acceptance of the offer at 4.58 pm on that day was too late.

[24] If the notices are to be regarded as a purported acceptance of the offer they were ineffective by reason of the prior lapse of the offer.

[25] Accordingly the notices of 30 June are ineffective. I declare that the first respondents' notices of 30 June 2004 have no effect and have had no effect on the leases made between the applicant and the first respondents. The respondents should pay the applicant's costs of the application to be assessed on the standard basis.

Schedule of First Respondents

Lot	Suite No	Respondent's Name	Respondent's Address
5	4	B & L Elms	PO Box 25, Esk, Qld 4312
31	101	Skafola Pty Ltd	PO Box 1298, Toowong, Qld 4066
32	102	DP Faggotter	28 Corbett Avenue, Dubbo, NSW 2830
33	103	NT & R Clements	9/17 Muddlestone Place, Bruce, ACT 2617
35	105	Delta Investments Pty Ltd	213-217 Queen Street, Ayr, Qld 4807
41	201	RJ Cox	PO Box 13, Crabbes Creek, NSW 2483
42	202	Delta Investments Pty Ltd	213-217 Queen Street, Ayr, Qld 4807
45	205	PJ Hunter	15 Brownsmith Cres, Kambah, ACT 2902
46	206	KL Oung	PO Box R39, Rhodes, NSW 2138
49	209	BW Shepherdson	237 Cornelia Road, Toongabbie, NSW 2146
50	210	Sukhvinder Singh	9 Continua Court, Wattle Grove, NSW 2173
53	303	JL Wharton	Jeffs Go-Vita, Shop 4, Erina Mall, Erina, NSW 2250
57	307	S Singh	9 Continua Court, Wattle Grove, NSW 2173
60	310	JA Sargeant	56 Repton Road, Malvern East, VIC 3145
61	401	Delta Investments Pty Ltd	213-217 Queen St, Ayr, Qld 4807
64	404	L Majcan	26 Stainsby Ave, Kings Langley, NSW 2147
65	405	RV & P Williams	31A Short St, Banksia, NSW 2216
66	406	Glenda Ruth Gilkes	8 Lemon Gums Dr, Tamworth, NSW 2340
67	407	PJ Hart	73 Weemala Rd, Chester Hill, NSW 2162
69	409	CF Chambers	61 Scott St, Shoalhaven Heads, NSW 2535
73	503	TG Lord	8/25 Temperley St, Nicholls, ACT 2913
74	504	Michael TC Lam & Jane KW Hui	Flat A, 18th Floor, Millennium Ct, 11 Sands St, Westpoint, Hong Kong
77	507	RG & DF Melbourne	147 Ziegenfuzz Rd, Thornlands, Qld 4164
78	508	I & RH Townsend	PO Box 1066, Bathurst, NSW 2795
79	509	I & RH Townsend	As above
80	510	M & K Hanna	9 Bolger St, Upper Mt Gravatt, Qld 4122
82	602	P Thompson	65A Carrington Rd, Randwick, NSW 2031
83	603	LP Flahavin	2 Daintree Dr, Wattle Grove, NSW 2173

84	604	N Saxena	9 Luckins Pl, Fadden, ACT 2904
87	607	CS & VJ Carmichael	Kungari Timor Rd, Coonabarabran, NSW 2357
88	608	Davy Investment Pty Ltd	15/58 Swann Rd, Taringa, Qld 4068
91	701	MJ & IC Talbot	22 Vimy St, Rainworth, Qld 4065
92	702	BJ Garrett	PO Box 25286, Awali, Bahrain
93	703	Lisa Elms	PO Box 25, Esk, Qld 4312
94	704	Canh Trong Tran & Huong	82 Harcourt Rd, Darra, Qld 4076
97	707	R & G Gopalkrishnan	3 Loble Pl, Wanniassa, ACT 2903
98	708	BA & BA Allen	11 Annesley Ave, Stanwell Tops, NSW 2508
99	709	JD Chambers	61 Scott St, Shoalhaven Heads, NSW 2535
105	805	Che Hung Wong	123 Holmead Rd, Eight Mile Plains, Qld 4113