SUPREME COURT OF QUEENSLAND

CITATION:	*Hanna & Anor v Body Corporate for Surfers Hawaiian CTS 5662* [2008] QSC 279
PARTIES:	**ROB HANNA and NEVIN HANNA** (applicants) **v** **BODY CORPORATE FOR SURFERS HAWAIIAN CTS 5662** (respondent)
FILE NO/S:	BS10971 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	10 November 2008
JUDGE:	Dutney J
ORDER:	**1. Interlocutory injunction granted in the terms sought**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTIONS – Where applicant operates a restaurant – Where applicant claims entitlement pursuant to a licence from the respondent – Whether there is a serious question to be tried – Whether interlocutory injunction should be granted *Body Corporate and Community Management Act* 1997 (Qld) , s 310 *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld), s 161 *Burrell v Duncan* [1957] St R Qd 52, cited *Friedman v Barrett* [1964] Qd R 498, cited *Gerraty v McGavin* (1914) 18 CLR 152, cited *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, cited *Royal British Bank v Turquand* (1856) El & Bl 327 [119 ER 886], cited *Surfers Hawaiian* [2006] QBCCMCmr 775 (24 February 2006), referred to

COUNSEL: F G Forde for the applicants
P J Roney for the respondent

SOLICITORS: Frampton Legal for the applicants
Hynes Lawyers for the respondent

[1] Mr and Mrs Hanna ("the applicants") seek an interlocutory injunction restraining the respondent from interfering with the rights to which they claim entitlement pursuant to a licence from the respondent.

[2] The respondent is the body corporate of a community title scheme for a high rise residential building known as Surfers Hawaiian.

[3] Lot 1 in the building is designed for use as a restaurant. Lot 1 is owned by Mr and Mrs Hearn.

[4] The applicants leased lot 1 from the Hearns from mid 2005 to use as a restaurant. Since that time the restaurant has also used an outside area over some of which it has constructed a canopy.

[5] A part of the outside area is an area of the common property to which the owner of lot 1 has an exclusive entitlement in any event. In relation to the balance, the Hearns applied for a licence giving exclusive possession. In his principal affidavit Mr Hanna said that he and his wife attended a meeting of the body corporate on 6 July 2005 where they spoke to a person called Kate who they understood to be the body corporate manager for the respondent. After the meeting the treasurer of the committee of the body corporate, a Mr Smith, informed Mr Hanna that he and his wife had been granted a licence for the exclusive use of the common area for an initial three year period with two further three-year options. This was confirmed by Kate.

[6] A written licence agreement was entered into dated 6 July 2005 ("the first licence agreement").

[7] The first licence agreement described the property over which exclusive use was granted as 100 square metres of common property adjacent to lot 1 on BUP9648. No plan was attached. The licence term was for three years plus two three-year options to be exercised in writing by the licensee or assignee within one month of the expiry date. An occupation fee of $2,000 per annum payable annually in advance was charged.

[8] Although the resolution of the body corporate granting the licence was passed by a sufficient majority to constitute a special resolution, it was not a motion passed without dissent.

[9] The question arose within the body corporate as to whether or not such a licence containing options needed to be passed by a motion without dissent. The problem arises because s 161 of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld), which sets out the way and the extent that the body corporate is authorised to grant a licence over common property, provides that the body corporate may, if authorised by resolution without dissent, grant a licence for

more than three years over part of the common property. It goes on to say that, if authorised by special resolution, the body corporate may grant or amend a licence for three years or less over part of the common property.

[10] The issue of the validity of the first lease agreement was referred by a lot owner to an adjudicator under Part 9 of Chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld). The adjudicator determined, albeit in a somewhat unconvincing way, that the licence could only be authorised by a resolution passed without dissent. On 24 February 2006 in *Surfers Hawaiian* [2006] QBCCMCmr 775 the adjudicator said:

> "I refuse to be drawn into a legal argument about whether options should be included in calculating the term of a lease or licence. This is a complex legal issue on which there might be differing opinions. The fact of the matter is that under the standard module, a lease or licence of common property can only be granted by way of a special resolution if the term of the lease or licence is three years or less. To allow this provision of the legislation to operate as intended, and not be open to abuse, then in my view, any lease or licence granted by way of a special resolution, must not be allowed to continue beyond a maximum three year period. To "continue" beyond the initial three year term, then in my view, the lease or licence must again be approved by the body corporate in general meeting by special resolution."

[11] The referral to the adjudicator was not made by Mr or Mrs Hearn. Neither the applicants nor the Hearns were involved in the referral.

[12] In any event, a second deed of licence ("the second licence agreement") was executed by the body corporate and the Hearns. That licence was dated 16 November 2005 and was for a term of three years only. The property covered by the licence was 198.1 square metres adjacent to lot 1 on BUP9648 and the occupation fee was described as $20 per square metre for a total of $4,358.20 per annum payable in advance.

[13] The second licence agreement attaches a plan in which the areas over which the licence was granted are indicated. There were three of them containing respectively 89.2 square metres, 69.6 square metres and 39.3 square metres.

[14] Relying on the second licence agreement the body corporate purported to retake possession of the licensed areas upon expiration of that licence in July this year.

[15] The applicants deny that they had any knowledge of the existence of the second licence and purported to exercise the first option under the original licence of July 2005.

[16] The respondent points to a number of contradictory features which they submit make it plain that the applicants' contention should be rejected. These include the area of 100 square metres referred to in the first licence agreement.

[17] The area in fact occupied is the area referred to in the second licence agreement.

[18] Against this, the applicants rely upon the minutes of the general meeting which approved the original licence agreement which included a resolution that they be permitted to erect the cover over the area which is in fact covered by the second licence agreement.

[19] The respondent also points to a letter from the applicants' then solicitors dated 14 December 2005 which is in these terms:

> "Enclosed are three copies of the Deed of Licence to be signed by the parties.
>
> Please return 2 signed copies to us. We will forward one to Mr Hearns' solicitor and the other to the Office of State Revenue for stamping."

[20] The licence agreement to which the letter refers appears to be the second licence agreement suggesting that it was drafted by the solicitors for the applicants.

[21] Mr Hearn has sworn an affidavit in which he deals with the letter from the applicants' solicitors. From paragraph 6 of his affidavit he deposes as follows:

> "6. The proposed licence for the First Licensed Area was drafted by Wrightway Legal ('the First Licence'). The First Licence provided for a 3 x 3 x 3 year term. I submitted the First Licence onto the Body Corporate without alteration.
>
> 7. The First Licence was approved by the Body Corporate on 6 July 2005.
>
> 8. In about mid October 2005 I became aware of comments made by an Adjudicator about the invalidity of the 9 year licence. I then spoke with Rob Hanna and said that the 9 year license agreement was invalid, but that a 3 year licence was possible. Mr Hanna requested that I seek the 3 year term. He said he would instruct his solicitors, Wrightway Legal, to draft a new year license agreement for 3 years.
>
> 9. Subsequently, Mr Hanna provided me with a further draft of a licence agreement and I put the licence agreement to the Annual General Meeting scheduled for 11 November 2005 ('the 2005 AGM')."

[22] In response to this Mr Hanna has sworn as follows:

> "In respect of paragraph 8 of the Affidavit, I deny that Les Hearn spoke to me in mid October 2005 about any problems with the Deed of Licence dated 6 July 2005. I was not informed about any problems that may exist with the Deed of License dated 6 July 2005 until 2008. If Wrightway Legal drafted a new licence agreement for three years, they did not do it with my knowledge or on my instructions."

Mr Hanna then exhibits a letter from Wrightway Legal in which that firm refers to instructions in relation to the second licence agreement given to them by Mr Hearn.

[23] A sub-licence encompassing the whole of the term of the licence is at least arguably an assignment of the licence: see *Burrell v Duncan* [1957] St R Qd 52. Both sub-licence agreements here cover the whole period of the licence such that there is no reversionary period. If the licences were assigned, dealings between the Hearns and the body corporate could not affect their validity. Thus Mr Hearn could not

terminate the first licence agreement. In the circumstances, there seems to be a serious question to be tried as to which licence agreement applies unless on any view, the original licence was invalid.

[24] In relation to the question of the validity of the first licence agreement, the applicants rely on the decision of the High Court in *Gerraty v McGavin* (1914) 18 CLR 152 or alternatively on the indoor management rule derived from the decision of Jervis CJ in *Royal British Bank v Turquand* (1856) El & Bl 327 [119 ER 886].

[25] In addition to the common law indoor management rule, s 310 of the *Body Corporate and Community Management Act* 1997 provides that:

> "If a person, honestly and without notice of an irregularity, enters into a transaction with a member of the committee for the body corporate for a community titles scheme or a person who has apparent authority to bind the body corporate, the transaction is valid and binding on the body corporate."

[26] In this case the first licence agreement was signed by Mr Smith as treasurer of the body corporate. Whether or not his sole signature, albeit under the seal of the body corporate, attracts the protection of s 310 is an issue which I do not have to decide.

[27] *Gerraty v McGavin (supra)* is authority for the proposition that a lease for three years with an option is to be regarded as a lease for three years and upon exercise the option is to be regarded as a separate lease for three years. Against this, the respondent relies on the decision of the High Court in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 which concerned an option to purchase which was allegedly void for uncertainty. Reference was not made to the earlier decision of the High Court and the relevance of the authority to the present controversy is obscure.

[28] *Friedman v Barrett* [1964] Qd R 498 is authority for the proposition that an option to renew a lease contained in a lease for three years or less is a contractual right only. If the same principle was applied to a licence, it would mean that the initial term of the first licence agreement was enforceable but if granted by a special resolution the options might or might not be.

[29] I am satisfied that in the event that their evidence is otherwise accepted, there is a serious question to be determined as to whether or not the applicants are entitled to rely on the first licence agreement.

[30] Having come to this conclusion, it remains to consider whether the balance of convenience favours the grant of an interlocutory injunction.

[31] In this case the court is in a position to provide a trial speedily. Any significant delays in the matter being resolved will be as a result of the preparation time the parties consider necessary.

[32] The applicants have been in possession of the licensed area for the past five years with the exception of one or two days preceding the grant of the interim injunction in this case.

[33] There is no evidence that the body corporate will suffer any prejudice if this position continues until such time as the matter is determined.

[34] It seems to me that on the balance of convenience I should order an interlocutory injunction in the terms sought and give any directions the parties think desirable to advance the matter.

[35] Since the cancellation or non renewal of the licence affects the use of adjoining land to which the applicant's entitlement is uncontested, I am not persuaded that damages are an adequate remedy in the event that the applicants are wrongly deprived of the benefit of the licence.