

SUPREME COURT OF QUEENSLAND

CITATION: *Gleeson Properties P/L v Regional Television P/L* [2010] QCA 208

PARTIES: **GLEESON PROPERTIES PTY LTD**
ABN 66 009 984 187
(plaintiff/appellant)
v
REGIONAL TELEVISION PTY LTD
ACN 067 044 464
(defendant/respondent)

FILE NO/S: Appeal No 411 of 2010
SC No 610 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 6 August 2010

DELIVERED AT: Brisbane

HEARING DATE: 29 July 2010

JUDGE: Chief Justice and Muir and Chesterman JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The appeal be dismissed with costs**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – appellant leased premises to the respondent – appellant entered into a contract for work relating to air conditioning equipment on the premises two weeks prior to the expiration of the term of the lease – progress payments were issued by the air conditioning company following the expiry of the lease – appellant claimed the sum of the progress payments from the respondent as "variable outgoings" pursuant to a clause of the lease – primary judge gave summary judgment for the respondent, holding that the moneys were not payable as "variable outgoings" – whether progress payments were payable as "variable outgoings" – whether primary judge erred in giving summary judgment for the respondent

Australian Broadcasting Commission v Australasian Performing Right Association (1973) 129 CLR 99; [1973] HCA 36, cited
Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455; [1969] HCA 47, cited

COUNSEL: D B Fraser QC for the appellant
 M M Stewart SC, with G Beacham, for the respondent

SOLICITORS: Wilson/Ryan/Grose Lawyers for the appellant
 Corrs Chambers Westgarth for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **MUIR JA: Introduction**

The appellant appeals against an order of a judge of the trial division of this Court made on 22 December 2009 giving summary judgment for the respondent on the appellant's claim in the proceeding for \$306,482.

[3] The appellant plaintiff leased premises on The Strand, Townsville to the respondent defendant under a lease entered into on or about 27 June 1997. On or about 16 September 2004, the appellant entered into a contract with MVO Air Conditioning Pty Ltd for work on and in relation to air conditioning equipment on the premises. The term of the lease expired on 30 September 2004. Progress claims totalling \$306,482 were made by MVO on 24 November 2004, 24 December 2004 and 24 February 2005. That sum was claimed by the appellant from the respondent as "variable outgoings", pursuant to clause 2.6 of the lease. The primary judge held that the moneys were not recoverable as "variable outgoings" as the appellant was not liable to pay them during the term of the lease.

[4] Whether the appellant's claim was justified depends essentially on the construction of clauses 1.8 and 2.6 of the lease.

Relevant terms of the lease

[5] Clauses 1.8 and 2.6 relevantly provide:

"1.8 **The Variable Outgoings** - The aggregate of all amounts paid by the landlord or for the payment of which the landlord may be or become liable in any one (1) quarter in respect of the demised premises on account of:-

...

(p) The cost of all repairs painting plumbing maintenance renewals and replacements (including the cost to the landlord of building supplies and the rental of equipment) incurred by the landlord in keeping the building and all parts thereof in good and substantial repair and condition whether carried out by the landlord at the request of the tenant or otherwise (but excluding the cost of ongoing repairs not of a material nature carried out by the tenant and further excluding the cost of repairing the external facade any external appurtenances or the roof of the building).

...

- (r) The cost of operating supplying maintaining repairing and renovating all services from time to time provided by the landlord for the tenants of the building, including all fees payable for the operation maintenance servicing and repair of the air conditioning equipment and appurtenances.

...

The variable outgoings for each quarter shall be calculated on an accrual and prepayment basis and to that end all such outgoings costs and expenses shall be deemed to have been paid at the time when the obligation to pay debit or charge the same arose notwithstanding the actual date of payment thereof and any such outgoings costs and expenses which are assessed at intervals or for periods other than a quarter or which may vary during a quarter shall be apportioned on a daily basis so far as may be necessary to calculate outgoings for each period.

...

- 2.6 **Variable Outgoings** - During each rental year the tenant shall pay to the landlord by way of reimbursement in arrears each quarter and within thirty (30) days of the end of the relevant quarter the Agreed Proportion of the variable outgoings for that quarter. At the end of each quarter the landlord shall calculate the variable outgoings for that quarter and furnish a statement of the variable outgoings for the relevant quarter. A certificate under the hand of the authorised officer or managing agent of the landlord shall be prima facie evidence of the variable outgoings for each quarter.

...

- 2.8 **Landlord to Record Variable Outgoings** – The landlord shall keep accurate records of the variable outgoings as soon as it is practicable after the end of each quarter and shall furnish particulars and reasonable proof thereof to the tenant if requested to do so."

The primary judge's findings

- [6] The primary judge rejected the argument that upon execution of the air conditioning contract a contingent liability in respect of the payment claims arose such that the amounts of the payment claims were sums "for the payment of which the [appellant] may be or become liable in any one (1) quarter". His Honour held that in the last quarter of the term of the lease there was no possibility of the appellant becoming liable to pay MVO for work to be done under the air conditioning contract.
- [7] The primary judge's findings, which were unchallenged, in respect of payments under the air conditioning contract were to the following effect.
- [8] The air conditioning contract¹ provided that payment claims were to be delivered on the 25th day of each month. The first date on which a payment claim could have been delivered was 25 September 2004, five days before the term of the lease expired. Liability for payment under the air conditioning contract, however, did not

¹ Clause 42.1 and the annexure.

arise until after a certification process occurred. Within 14 days after receipt of a claim for payment the superintendent was obliged to issue to the principal and to the contractor, a payment certificate stating the amount of the payment, which in the opinion of the superintendent was to be made by the principal to the contractor or by the contractor to the principal. If the contractor failed to make a claim for payment under clause 42.1, the superintendent could nevertheless issue a payment certificate.

- [9] Payment in respect of the certificate was required within 28 days after receipt by the superintendent of a claim for payment, or within 14 days of issue of the superintendent's payment certificate, whichever was the earlier.

The appellant's arguments

- [10] The arguments advanced by counsel for the appellant may be summarised as follows. The contingency upon which the appellant was liable was due performance of the work under the air conditioning contract in accordance with its terms. That occurred after the end of the last quarter of the term of the lease but clause 1.8 captures moneys for the payment of which the appellant "may be or become liable". Clause 1.8 permits recovery of three classes of moneys:

- (a) moneys "paid by the landlord";
- (b) moneys "for the payment of which the [appellant] may be ... liable"; and
- (c) moneys "for the payment of which the [appellant] may ... become liable".

- [11] The wording of the clause distinguishes between the second and third classes of payments and the third class can relate only to a situation in which the other two classes of payment do not operate. The second and third classes catch liabilities like those under the air conditioning contract. Once that contract was entered into there arose an obligation on the part of the appellant to pay the contract price upon the happening of a future event, namely the performance by MVO of its obligations and the fulfilment of the provisions of the contract governing payment.²

- [12] The words "in any one (1) quarter" qualify the expressions "may be or become liable" which they immediately follow, not the expression "payment" or "paid". That conclusion is consistent with the tenant's obligation in clause 2.6 to reimburse "in arrears" the agreed proportion of the variable outgoings for the past quarter. So too, does the obligation on the landlord to "calculate the variable outgoings for that quarter".

- [13] The subject provisions must be given a business-like interpretation. Businessmen appreciate that liabilities may be incurred by contracting at one stage and, by a process of adjustments, or credits, or changed circumstances, that the amount of the liability may not be finally ascertained until a later time. It is improbable that the parties would have intended that repairs required because of a failure by the tenant to comply with clause 5.7 during the last quarter of any rental year of the lease, would be treated any differently from a failure at other times during each quarter of the lease.

- [14] If the work done to repair a system commenced on the last day of the last quarter of a rental year and was completed on the next day, on the construction adopted by the primary judge, nothing would be payable as a variable outgoing, notwithstanding that the contract under which the appellant became liable to pay was in existence during the last quarter and the work was necessary to remedy defective and inadequately maintained apparatus.

² See *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459.

Consideration

- [15] The critical part of clause 2.6 is:
- "During each rental year the tenant shall pay to the landlord by way of reimbursement in arrears each quarter ... the Agreed Proportion of the variable outgoings for that quarter."
- [16] It will be noticed that the payment by the tenant of "variable outgoings" is described as being "by **reimbursement in arrears** ... of the variable outgoings" for the preceding quarter. The use of the words "reimbursement in arrears" is strongly suggestive of a recoupment by the landlord of a sum actually ascertained and paid. The next sentence of clause 2.6 supports that view:
- "At the end of each quarter the landlord shall calculate the variable outgoings for that quarter and furnish a statement of the variable outgoings ..."
- [17] It would normally be inferred from such an obligation that the "variable outgoings" were capable of calculation at the relevant time. The "variable outgoings", however, as well as including amounts "paid by the landlord", could include amounts "for the payment of which the landlord may be ... liable" and "amounts for the payment of which the landlord may ... become liable".³
- [18] In this context the words "may be" mean "is" and "may ... become liable in any one quarter" means "becomes liable in any one quarter". Clause 2.6 and the concluding words of clause 1.8 assume that "variable outgoings" for a quarter can be ascertained. Clause 2.6 requires the amount of "variable outgoings" for a quarter to be notified by the appellant to the respondent at the end of that quarter. The role of the words under consideration is to ensure that liabilities, although not discharged by payment by the landlord, come within "variable outgoings" in a quarter, as long as the liability to pay arose in that quarter.
- [19] The fact that it is amounts "**paid by the landlord or for the payment of which the landlord may be or become liable**" suggests that "variable outgoings" do not include contingent liabilities which have not been precisely quantified. The words "pay ... by way of reimbursement in arrears" in clause 2.6 are explicable by reference to the concluding paragraph of clause 1.8. It deems outgoings to have been paid "when the obligation to pay ... arose".
- [20] Even if, which I take leave to doubt, there are three classes of payment recognised in the introductory words of clause 1.8, a pecuniary liability is not relevant for the purposes of the definition of "variable outgoings" unless it is either discharged by payment by the appellant in a quarter of the term of the lease or unless in such a quarter the appellant becomes liable to discharge the liability by payment. The introductory words make that plain.
- [21] The words "in any one (1) quarter" do not qualify only the words "may be or become liable" as counsel for the appellant argues. They also qualify the words "amounts ... for the payment of which the landlord may be or become liable". That emerges from the fact that "in any one (1) quarter" also qualifies "paid by the landlord". So much is apparent from the concluding paragraph of clause 1.8 and from clause 2.6 which contemplate the calculation and payment "by way of reimbursement" of "variable outgoings" on a quarter by quarter basis.

³ Clause 1.8.

- [22] I do not find persuasive the argument based on business efficacy. It would have been anticipated by reasonable persons in the position of the parties that maintenance would have been attended to in a timely way. And, as counsel for the respondent point out, if a necessity to make costly repairs arises in the last quarter of the term of the lease as a result of the breach by the respondent of its obligations, it would be liable for the loss suffered by the appellant as a result of the breach.
- [23] Counsel for the appellant submitted that cl 2.6 supported the conclusion that a contingent liability could come within clause 1.8 even if the amount of the liability did not become due and payable or even ascertainable until a later date. The submission credits that rather mundane machinery provision with an exaggerated role and importance. It would result, with no linguistic or other justification, in the defeat of the clear and carefully crafted scheme established in clauses 1.8 and 2.6 for the calculation, notification and payment of variable outgoings on a quarterly basis. Contractual provisions must, "if possible be construed so as to render them all harmonious one with another".⁴

Conclusion

- [24] For the above reasons, the appellant has failed to demonstrate any appellable error in the orders or reasons of the primary judge. I would therefore order that the appeal be dismissed with costs.
- [25] **CHESTERMAN JA:** I agree with Muir JA. The appeal should be dismissed with costs for the reasons given by his Honour.

⁴ *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.