

SUPREME COURT OF QUEENSLAND

CITATION:	<i>Cathmark Pty Ltd v Nethercott Constructions Pty Ltd</i> [2011] QSC 86
PARTIES:	CATHMARK PTY LTD ACN 124 478 440 (Applicant) and NETHERCOTT CONSTRUCTIONS PTY LTD ACN 006 136 821 (Respondent)
FILE NO/S:	S108 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	Thursday 14 April 2011
DELIVERED AT:	Townsville
HEARING DATE:	6 April 2011
JUDGE:	Cullinane J
ORDERS:	[1] I declare that the respondent has unreasonably withheld its consent to the assignment by the applicant of the lease. [2] I order the respondent pay the applicant's costs of and incidental to the application to be assessed.
CATCHWORDS:	CONTRACTS – Particular parties – Vendor and purchaser – Assignment of contract – By purchaser
LEGISLATION	<i>Property Law Act 1974</i>
CASES	<i>Hamilton Island Enterprises Limited v Voss & Ors</i> (2009) QCA 229. <i>Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd</i> (1979) 144 CLR 596. <i>Daventree Holdings Pty Ltd v Bacalakis Hotels Proprietary Limited</i> (1986) 1 Qd.R. 406 <i>International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd</i> (1986) Ch 513

COUNSEL:	Mr P. Elliot for the respondent Mr D McKeon (self-represented)
SOLICITORS:	MacDonnells Law for the Respondent

- [1] The applicant seeks a declaration that the respondent is in breach of its obligations as lessor under a lease to the applicant lessee by refusing to consent to the assignment of the lease to one Mark Kenneth Robert Thompson and Deborah Joanne Thompson. In addition the applicant seeks a declaration that the respondent is in breach of s 121 of the *Property Law Act 1974* as amended by unreasonably withholding its consent to that assignment.
- [2] There is a small resort on the leased property. The respondent purchased it in 1991 and shortly thereafter built the resort. It contains 17 one bedroom bures, a deluxe four bedroom villa and a manager's unit.
- [3] David Mark McKeon and Catherine Ina McKeon are the directors of the applicant. Although they had had legal representation until shortly before the hearing of this matter, they appeared with leave on behalf of the applicant at the hearing.
- [4] After some years conducting the resort the respondent decided to lease it. It was initially leased pursuant to a lease dated 27 June 1998 and the expiry date was 13 July 2003. There were options to renew.
- [5] The applicant acquired the business in April 2007 and the respondent consented to that assignment. The applicant had not previously had any experience conducting a resort.
- [6] The applicant exercised the second option to renew contained in the lease for a period of five years. This commenced on 14 July 2008 and would expire on 13 July 2013.
- [7] The applicant listed the resort for sale in 2009 and was approached in November 2010 by the Thompsons expressing an interest in purchasing the resort business.
- [8] A contract has been entered into which is subject to the consent of the respondent to the transfer of the lease. The purchase price was just over \$300,000.00.
- [9] The principals of the respondent are Aileen and Peter Nethercott.
- [10] Clause 8.1(1) of the lease provides as follows:

"The Tenant will not mortgage or otherwise charge the Tenant's interest in this Lease assign underlet grant any licence over or part with the possession of the Premises or share with any person the occupancy of the Premises without first obtaining the written consent of the Landlord. The consent will not be arbitrarily or capriciously withheld in the case of the proposed assignment or subletting of the while of the Premises to a respectable and financially responsible assignee or sub-tenant. The onus of proving the respectability and financial responsibility of any proposed assignee sub-tenant or surety is upon the Tenant and at its expense."

- [11] Section 121 of the *Property Law Act* so far as is relevant provides as follows:
- (1) *In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of*

premised leased or any part of the premises, without licence or consent, such covenant, condition, or agreement shall-

(a) *Despite any express proviso to the contrary, be deemed to be subject-*

i. *To a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the licence or consent."*

[12] The solicitors acting for the applicant wrote to the respondent by letter of 17 December 2010 seeking the approval of the respondent to the assignment of the lease. Accompanying the letter were resumes provided by the purchasers. I will return to this shortly.

[13] By a facsimile transmission on the 21 December 2010 the solicitors for the respondent replied in the following terms:

"In addition to the information provided, our client requires a copy of the Contract, a copy of the purchasers' business plan to include evidence that they have taken into account the costs of bringing the Resort up to an acceptable standard and evidence of their financial capacity to pay the rent and comply with their obligations under the Lease, including the refurbishment obligation which is due next in 2013."

[14] The applicant's solicitors wrote to the solicitors for the respondent by letter of 22 December 2010. The terms of this letter would suggest that it was written in the belief that provided the assignee could be shown to be respectable and financially responsible, the respondent was obliged to consent to the assignment. This is plainly not the case. See *Hamilton Island Enterprises Limited v Voss & Ors* (2009) QCA 229.

[15] Pursuant to the lease the respondent is entitled to withhold its consent provided that such withholding of approval is not arbitrary or capricious.

[16] The issue which falls for consideration here is whether the respondent has acted unreasonably in withholding consent to the assignment. This is because s 121 is imported into the terms of the lease, notwithstanding its express provisions.

[17] The letter from the solicitors for the applicant to which I have referred adopted a somewhat argumentative tone dismissive of the respondent's request.

[18] The last two paragraphs of the letter are as follows:

"You have requested a copy of our client's Business Plan which is to include evidence that our clients have taken into account "the costs of bringing the Resort up to an acceptable standard", and are able to meet their obligations including the 'refurbishment obligation which is due next in 2013'.

We advise our clients do not have a Business Plan, they do not regard the Resort as being in need of an upgrade, and they are well aware of the requirement to 'redecorate' the premises in 2013. However, with respect, these matters are

irrelevant in assessing our clients 'respectability and financial responsibility' as required by the Lease. We would regard any attempt to enforce these requirements as 'capricious or arbitrary' on your clients part."

[19] The facsimile transmission in reply from the respondent's solicitors not surprisingly claimed that the respondent was entitled to further information than had been provided in order "to obtain a fairly basic, but practical, understanding of the client's ability to pay the rent, to maintain the resort and when necessary, redecorate the resort."

[20] On the following day another facsimile transmission from the solicitors for the respondent followed. It was in the following terms:

"The Landlord gives the Tenant notice that it does not consent to the proposed assignment to Thompson.

The Landlord is not satisfied that Thompson:

- 1. will be able to operate the business. Thompson has no business experience. This lack of experience is highlighted by the fact that they have no business plan and appear to view the request for a business plan to be unreasonable; and*
- 2. has not provided any financial information to the Landlord. This failure combined with the lack of a business plan means that the Landlord is unable to determine whether the proposed assignee will be able to comply with the obligations of the tenant under the lease.*

The Landlord has requested the necessary information from the Tenant and the Tenant has refused to provide it. The refusal of the Landlord to consent to the assignment is neither arbitrary nor capricious."

[21] A statement of the proposed purchaser's assets and liabilities and a copy of the business plan was forwarded by letter of 24 December 2010 by the applicant's solicitors. This letter included a complaint that less than 24 hours after requesting the information, the solicitors for the respondent were alleging that the applicant had refused to provide it.

[22] The business plan which the Thompsons prepared is of some six pages. It sets out in general terms the manner in which the Thompsons would conduct the resort, the steps they would take to develop custom for it and generally the steps they would take to market it.

[23] It does not contain details of assumed income and outgoings or the basis for these although it states that some 10% of the yearly net profit would be put aside for renovations and modernisation of the structures.

[24] In her affidavit Mrs Nethercott sets out at paragraph 29 her complaints about what she says is the inadequacy of the business plan, describing it as a wish list, not including any financial analysis. Some criticisms were made of other aspects of the business plan.

[25] None of these concerns were taken up by the respondent with the assignees or their solicitors who appear also to have been acting for the applicant.

- [26] Instead a facsimile dated 4 January 2011 was forwarded in the following terms:
- “Our client has reviewed the information provided and instructs it does not consent to the proposed assignment to Thompson. Thompson has no relevant business experience.”*
- [27] By a letter dated 5 January 2011 written in an apparent attempt to have the respondent reconsider its position, the solicitors for the assignees summarised the experience and qualifications of the assignee.
- [28] Mark Thompson has had a career in the police force in both Queensland and South Australia and also the New South Wales Corrective Services where he obtained the rank of Senior Assistant Superintendent
- [29] He has a history of working as a driller and says that he is employed presently in that field in the mining industry at Mount Isa. He conducts his own business and is presumably engaged as a contractor.
- [30] He has obtained a certificate in property sales at the Australian School of Business and Law.
- [31] His wife is a police officer of some 22 years standing in the Queensland Police Force and currently holds the rank of Sergeant and is in charge of the cross cultural liaison unit.
- [32] By its response the respondent asserted its previous position.
- [33] According to their statement of assets and liabilities, the Thompsons have a total net worth of \$1.128 million. This includes some \$550,000 of superannuation. (In the case of Mark Thompson it is said that his superannuation entitlement of \$170,000 is currently available.)
- [34] Although in the affidavit material a number of matters were raised justifying the refusal, before the Court the respondent based its refusal on two grounds. The first of these is a lack of experience in the tourist industry by the Thompsons. The second is what is said to be some mis-statements by the Thompsons of their financial position. The respondent is entitled to rely upon matters which have arisen since the time of the initial refusal. See *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* (1979) 144 CLR 596.
- [35] As to the matters concerning the financial situation of the assignees, it is said that whilst the solicitors for the assignees had referred to the assignees having a residence and two investment properties, their statement of assets and liabilities show only one investment property. There is no reason to believe that this involves any attempt to deceive the respondent. There is no reason in the material before me to disbelieve what the proposed assignees state in their statement of assets and liabilities.
- [36] The respondent also complains about some apparent doubling up with the contents of the property at The Esplanade, Bagarra shown separately and the property itself shown as having a value of \$450,000 on a fully furnished basis. It may be accepted that this involves some doubling up but it is something which is apparent from the respondent's own material and I would not regard it as being a matter of any great

significance in terms of what is under consideration here. The same might be said also about the estimates that Mrs Nethercott has obtained in respect of the vehicles as compared to the value of the vehicles shown in the statement of assets and liabilities.

[37] There has also, it would seem, been some reduction in the value of the house at Bagarra between the time of the statement of assets and liabilities and the time it had been placed on the market. I do not think this reflects in any way on the proposed assignees.

[38] As Thomas J said in *Daventree Holdings Pty Ltd v Bacalakis Hotels Proprietary Limited* (1986) 1 Qd.R. 406 at 412:

"What is required is fair dealing between the two parties to the end that the landlord may make a reasonable decision."

[39] The respondent is entitled to come to a conclusion about the proposed assignment.

[40] The matters of concern raised by Mrs Nethercott arising from the business plan are matters which she might reasonably have concern about and be entitled to further information upon. However no attempt was made to seek any further information.

[41] The peremptory nature of the respondent's actions in refusing to consent to the assignment by the facsimile of 4 January 2011 and the earlier forwarding of the facsimile of 23 December 2010 notifying its non-consent and alleging a refusal on the part of the applicant to provide the necessary information when less than 24 hours had passed since it had been requested (for the second time it must be said) leaves the strong impression that a refusal had been determined upon prior to any information being sought or provided. In any case I think that the respondent in acting in this way has acted unreasonably.

[42] Relevant considerations when considering reasonableness of the refusal to consent to an assignment are set out in the judgment of Balcombe LJ (with whom the other members of the Court agreed) in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* (1986) Ch 513 at pages 519 to 521:

(1) *The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee*

(2) *As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease*

(3) *The onus of proving that consent has been unreasonably withheld is on the tenant*

(4) *It is not necessary for the landlord to prove that the conclusions which led him to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances*

- (5) *It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease*
- (6) *There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld*

- [43] The refusal upon the grounds that the proposed assignees did not have any prior experience in the business of tourism as the matter was put in argument is in my view unreasonable.
- [44] It can be readily accepted that the capacity of a proposed assignee to properly conduct a business on the leased premises is a matter which the landlord has a direct interest in. In this sense capacity includes financial capacity as well as the know how to conduct the relevant business.
- [45] Here what is under consideration is a small tourist operation on Magnetic Island which has in the past employed two full time employees and one part time employee apart from the owners. There are 17 one bedroom units and a deluxe four bedroom villa with a manager's unit.
- [46] In my view there is no reason to doubt that the proposed assignees with their backgrounds and experience would be capable of properly conducting such an undertaking.
- [47] The effect of a clause in a lease taken with section 121(a)(i) of the *Property Law Act* is that the provision in the *Property Law Act* qualifies the covenant against assignment without consent in the lease as to make it subject to a proviso that the landlord will not unreasonably withhold such consent. In that event the lessee may assign without breach of covenant or condition.
- [48] In my view the proper conclusion to draw on the evidence here is that the landlord has unreasonably refused consent to the assignment.
- [49] I declare that the respondent has unreasonably withheld its consent to the assignment by the applicant of the lease.
- [50] I order the respondent pay the applicant's costs of and incidental to the application to be assessed.