

# SUPREME COURT OF QUEENSLAND

CITATION: *Kumar Hospitality Pty Ltd v Sunstate Fast Foods Pty Ltd*  
[2014] QSC 315

PARTIES: **KUMAR HOSPITALITY PTY LTD**  
(applicant)  
**v**  
**SUNSTATE FAST FOODS PTY LTD**  
(respondent)

FILE NO/S: 9956 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 29 October 2014 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 29 October 2014

JUDGE: Carmody CJ

ORDERS: **1. Application granted;**  
**2. Orders as per draft as amended;**  
**3. The respondent to pay the applicant's costs on the standard basis.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – GENERAL PRINCIPLES – where applicant alleges notice of termination by the respondent was unlawfully made – whether applicant failed to complete performance of contract for sale of franchise business within the appointed time

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – RELEVANT CONSIDERATIONS AND DEFENCE MATTERS – where both parties allege that they were ready, willing and able to perform the contract of sale and purchase of the franchise – where applicant alleges that the contract was illegally terminated – where the respondent alleges that the applicant failed to perform the terms of the contract and thus breached the contract – where substantial performance of the contract had already occurred – whether damages would be an inadequate remedy

COUNSEL: P Hackett for the applicant.  
M Slingsby (solicitor) for the respondents.

SOLICITORS: Kalyans Lawyers for the applicant.  
ACS Legal Solutions for the respondents.

**THE CHIEF JUSTICE:** The applicant seeks a declaration that the notice of termination of a business contract with the respondent for the sale and purchase of a franchise business known as Red Rooster Jimboomba dated 19 September 2013 was unlawful when it was given on Friday 3 October 2014. The notice of termination was based on the applicant's alleged failure to complete the contract on 29 September 2014. The termination was not accepted and the respondents were required to perform their obligations under the contract according to its terms and conditions.

On the material provided on the application I am not satisfied that the applicant failed to complete on 29 September 2014. Clearly, settlement was not effected but it is clear from the available evidence that that was due to the franchisor, Red Rooster, not allowing the settlement to take place on 29 September 2014 because the respondent had failed to give it sufficient time to make necessary arrangements. Both parties claim that they were ready, willing, and able to complete on 29 September 2014 and, again in common, assert that the other was not. I am satisfied that whatever the respondent's position was, the applicant was ready, willing, and able.

In light of that finding, it is not necessary to determine the alternative basis of the applicant's argument, namely, that time was not of the essence and had ceased to be so prior to 29 September 2014. However, to the extent that it might be said that there was some doubt about the applicant's own willingness, readiness, and ability to settle on 29 September, I am satisfied that whether it was or was not, there was no obligation for it to do so either or both because Red Rooster was the barrier to settlement or, alternatively, the respondent itself was not able to complete on 29 September 2014 to the extent that it was not able to deliver good title to the applicant in exchange for the payment of the balance of the purchase price. In the circumstances I am satisfied that the respondent's termination on 3 October 2014 was invalid and I am prepared to make the declaration sought.

The respondents raise three issues that I do not think affect the consideration of the declaration point but if they had substance may be relevant to the second form of relief applied for, namely, specific performance of the contract. The respondents assert that the purchase price was re-negotiated down to \$423,000 because of undue pressure and even if this is not a reason for refusing the declaratory relief, it is a good ground for not granting the equitable remedy of specific performance on the principle that the applicant has unclean hands. I am satisfied on the balance of the material, including exhibit 1, that, despite the unusual re-negotiation of a purchase price after apparent partial completion of the contract, there was nonetheless an agreement to that effect which was not effected by what is now said to be overbearing pressure.

While the respondents may have been reluctant to reduce the purchase price it is clear enough to me that at the time they chose to do so to give the contract every chance of settling on the agreed date. There was no explanation for their change of heart since 29 September 2014. Oddly, when Red Rooster was reticent about the deal the respondents pushed for the franchisor to accept it. Now that the franchisor is willing to proceed with the settlement of the contract the respondents themselves are no longer interested.

The second matter raised on behalf of the respondents was that after December 2013, one of the directors of the applicant company managing the franchise was short banking. This allegation is denied but, in light of the declaration and if the transaction is completed, any loss is borne by the applicant as the incoming owner rather than the respondents. In any event, any loss resulting from short banking, if proved, is a matter that can be dealt with in another proceeding and is not a basis to refuse an application for specific performance.

The third issue raised late in the proceeding relates to calculations that the respondent says need to be investigated on a hearing as to disputed facts before it would be appropriate to order specific performance. The argument proceeds on the basis that damages, which are not sought by the applicant, are a more appropriate form of relief.

I am satisfied that none of the matters pointed to on behalf of the respondent carry enough weight to prevent an order for specific performance being made in the terms sought. My distinct sense in the course of argument and reading the affidavit material was that the respondents have since changed their attitude to selling the business despite the fact that the contract has been partially completed for nine months and that the applicants have paid more than the deposit. That change of position has not been satisfactorily explained and it seems to me that the arguments advanced against the declaration and the application for specific performance was designed to delay resolution of the dispute more than to protect any legitimate right or interest of the respondents that would be affected by making the orders sought.

Orders as per draft as amended. The respondent to pay the applicant's costs on the standard basis.