

SUPREME COURT OF QUEENSLAND

CITATION: *Jansen v Frexbury P/L* [2008] QCA 286

PARTIES: **DAVID GRAHAM JANSEN**
(applicant/respondent)
v
FREXBURY PTY LTD
ACN 104 518 069
(respondent/appellant)

FILE NO/S: Appeal No 263 of 2008
SC No 578 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 19 September 2008

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2008

JUDGE: McMurdo P, Cullinane and Jones JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS:

- 1. Allow the appeal;**
- 2. Set aside judgment below;**
- 3. Declare that the appellant by notice of 20 August 2007 has lawfully terminated the agreement entered into between the appellant and the respondent dated 17 August 2004 for the assignment of a sublease by the appellant to the respondent;**
- 4. Order the respondent to pay the appellant's costs of and incidental to the original application and the appeal to be assessed**

CATCHWORDS: CONTRACT – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – TERMS ESSENTIAL TO ENABLE PERFORMANCE – UNCERTAINTY – where there was an agreement for the assignment of the sublease of land – where contract subject to registration of sublease being “effected” within 36 months – where learned trial judge made a declaration that registration of the sublease was effected on the date of lodgement, that being the 16 August 2007 – whether learned trial judge erred in making the declaration – whether registration effected by lodgement or entry of the particulars on the register

Land Act 1994 (Qld), s 283, s 295, s 297, s 298, s 299, s 301, s 302, s 303, s 305, s 306, s 332

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited

Jansen v Frexbury Pty Ltd [2007] QSC 387, overruled *Snowlife Pty Ltd v Robina Land Corporation Ltd* [1992] 1 Qd R 564, cited

Upper Hunter County District Council v Australian Chilling and Freezing Co. Limited (1968) 118 CLR 429; [1968] HCA 8, cited

COUNSEL: P J Lyons QC for the appellant
J R Baulch SC for the respondent

SOLICITORS: Macfie Curlewis Spiro for the appellant
Macrossan & Amiet for the respondent

- [1] **McMURDO P:** The appellant, Frexbury Pty Ltd ("Frexbury") agreed to sell to the respondent, David Graham Jansen, one of a number of residential units it was building on Hamilton Island. Hamilton Island Enterprises Ltd ("HIE") was the registered lessee of State land on Hamilton Island on which Frexbury, as sublessee of the land from HIE, built the units. Frexbury's sale of the unit to Mr Jansen was to be effected by it assigning a new sublease relating to the unit to Mr Jansen. Under cl 8.4.1 of the agreement between Frexbury and Mr Jansen, the assignment was conditional on the new sublease being registered under the *Land Act* 1994 (Qld) in the "Department of Natural Resources & Mines" within 36 months from the date of the agreement (17 August 2004) that is, by 17 August 2007. Under cl 18.1 of the agreement, time was of the essence. This case turns on whether the new sublease was registered under Ch 6 of the *Land Act* within that 36 month time frame.
- [2] It was necessary for Frexbury to obtain the consent of the relevant Minister and for the new sublease under s 332 *Land Act* prior to Frexbury registering the new sublease. It was not disputed at the hearing that Frexbury's solicitors received the Minister's consent on or about 15 August 2007. Frexbury lodged the sublease for registration in the Department the next day, 16 August 2007, that is, the day before the expiration of the 36 month period referred to in cl 8.4.1. The sublease was not entered on the Department's register until 27 August 2007. Meanwhile, on 17 August 2007, Frexbury purported to terminate the agreement for non-compliance with cl 8.4.1 by facsimile. On 20 August 2007, Frexbury posted the original of the facsimile together with a trust account cheque returning Mr Jansen's deposit.
- [3] The primary judge declared that the new sublease was registered on the date it was lodged, 16 August 2007, rather than on the date when its particulars were recorded in the register under s 299 of the *Land Act*, that is, 27 August 2007, so that Frexbury's purported termination of the agreement was not effective.¹ I agree with Cullinane J's reasons for concluding that the judge erred in making these declarations. I emphasise, however, that it is

¹ *Jansen v Frexbury Pty Ltd* [2007] QSC 387 at [28].

unnecessary to determine in this case whether the combined effect of s 283 and s 298 of the *Land Act* is that, once entered on the register on 27 August 2007, the new sublease retrospectively became registered from the date it was lodged on 16 August 2007. That is because when Frexbury terminated the agreement (at least by 20 August 2007) the new sublease was not then registered under Ch 6 of the *Land Act*. Even if ordinarily the combined effect of s 283 and s 298 is that a document, once registered, takes effect retrospectively from the date it was lodged, this would not have assisted Mr Jansen in the present factual matrix. The registration on 27 August 2007 could not have affected Frexbury's right to terminate its agreement with Mr Jansen under cl 8.4.1 by, at the latest, 20 August 2007, some seven days before registration of the new sublease.

- [4] I agree with the orders proposed by Cullinane J.
- [5] **CULLINANE J:** The appellant appeals against a judgment of the Supreme Court pronounced on 18 December 2007, declaring that its purported termination of an agreement entered into with the respondent was not effective.

THE AGREEMENT

- [6] The agreement was entered into on 17 August 2004. It was an agreement for the assignment by the appellant to the respondent of a sublease of land on Hamilton Island for a price of just under \$2,000,000.
- [7] A company, Hamilton Island Enterprises Ltd, is the registered lessee of land on Hamilton Island. The appellant subleased part of the land of which Hamilton Island Enterprises Ltd was the lessee and intended to develop the area, the subject of the sublease.
- [8] As will be seen from the recitals, it was intended that as each stage of the development was completed, the original sublease would be surrendered or partially surrendered and separate subleases would be entered into between Hamilton Island Enterprises Ltd and the appellant for each residential unit in each stage of the development.
- [9] The appellant agreed to assign one of the separate subleases to the respondent on the terms set out in the agreement.
- [10] The contract was subject to a number of conditions. One of these was the consent of the relevant minister to the assignment of the newly created sublease and another was the consent of Hamilton Island Enterprises Pty Ltd to the assignment. This appeal is concerned with the proper construction to be afforded to a further condition contained in clause 8.4.1.
- [11] Clause 8.4.1 provided:

“8.4.1. Registration in the Department of Natural Resources & Mines of the Separate Sub-lease to be assigned pursuant to this Agreement within 36 months from the date of this Agreement. In the event that registration of the Separate Sub-Leases has not been effected within 36 months from the date of this agreement then this agreement will be

at an end and all deposit monies will be refunded in full to the assignee.”

[12] Clause 4.1 provided for completion in the following terms:

“The Completion Date shall be either the..... [insert date for completion] or that day which is fourteen (14) days after notice from Frexbury or its solicitors that the last of the conditions contained in clause 8 have been satisfied or fourteen (14) days from the date clause 29 is satisfied or waived whichever is the later date .”

[13] The Court was informed that clause 29 is inapplicable. No specific date was inserted in the agreement.

[14] The learned trial judge found that the separate sublease was lodged for registration in the leasehold register kept by the Department of Natural Resources on 16 August 2007 at 10.02 am and assigned a dealing number.

[15] As at 5.04 pm on 17 August 2007 the status of the sublease according to the register was an “unverified dealing”. As at 2.15 pm on 27 August 2007 this remained the status of the sublease. As at 3.03 pm on 27 August 2007 the sublease was recognised as an encumbrance and no longer as an unregistered dealing.

[16] These facts were contained in an affidavit filed on behalf of the respondent.

[17] His Honour found that the effect of these facts was:

the sublease was lodged for registration on 16 August 2007 within the thirty six month period provided for in clause 8.4.1 and the particulars were entered upon the register on 27 August 2007 and thus outside the thirty-six month period.

[18] The appellant gave notice by facsimile transmission of 17 August 2007 purporting to terminate the agreement for non-compliance with clause 8.4.1. The original of the facsimile was posted on 20 August 2007 with a trust account cheque returning the deposit.

[19] The learned trial judge found that the appellant, if it was entitled to terminate the agreement, had done so in a timely fashion evincing an intention to do so. There is no challenge before this Court to those findings. The learned trial judge also rejected a claim of waiver advanced by the respondent.

[20] The issue before the learned trial judge and now before us, is a rather narrow one. His Honour described it as being whether registration of the separate sublease is “effected” upon lodgement with the Registrar of the relevant register of the sublease documentation or whether it is “effected” only upon entry of the relevant particulars in the register.

[21] I think more accurately the issue could be said which of the two events constitutes registration for the purposes of the first sentence in 8.4.1.

- [22] As will be seen the word “effected” upon which some of the argument focussed, appears in the second sentence, which confers upon the parties the right to terminate the agreement in the event that registration has not been effected within thirty-six months from the date of the agreement.
- [23] The construction of the agreement falls to be determined against the background of the relevant legislation, in this case Chapter 6 of the *Land Act* 1994, which provides for a land registry and registers of leasehold land.
- [24] The contending arguments as they were developed will be apparent in the following discussion of the relevant legislative provisions.

THE LEGISLATION

- [25] Part 2 of Chapter 6 of the *Land Act* deals with registration and its effect. The *Act* provides for a system of title by registration.
- [26] Sections 301, 302 and 303 are central to this scheme. They provide respectively as follows:

“301 Interest in land not transferred or created until registration

A document does not transfer a lease or licence or create a legal interest in a lease until it is registered.

302 Effect of registration on interest

On registration of a document expressed to transfer or create an interest in land, the interest-

- (a) is transferred or created in accordance with the document; and*
- (b) is registered; and*
- (c) vests in the person identified in the document as the person entitled to the interest.*

303 Evidentiary effect of recording particulars in the register

In all proceedings, the particulars or a registered document recorded in the register are conclusive evidence of-

- (a) the registration of the document; and*
- (b) the contents of the document; and*
- (c) all things stated or implied in it by this or another Act; and*
- (d) when the document was lodged and registered .”*

These provisions are contained within Division 2 of Part 2.

- [27] Contained within the provisions of Division 1 of Part 2 are provisions which afford a particular relevance to the lodgement of the relevant documents.
- [28] Sections 295, 297 and 298 provide respectfully as follows:

“295 Right to have interest registered

- (1) *If a person lodges a document transferring or creating an interest in land under this Act, the chief executive must register the document if-*
- (a) *the document has been correctly executed; and*
 - (b) *the person lodges the document and all other documents needed by the chief executive to effect registration of the document; and*
 - (c) *the document appears on its face to be capable of registration; and*
 - (d) *the person has otherwise complied with this Act for the registration of the document.*
- (2) *However, subsection (1) does not prevent the person from withdrawing the document before it is registered.*

...

297 Order of registration of documents

- (1) *Documents about a single parcel of land must be registered in the order they are lodged.*
- (2) *Subsection (1) is subject to section 308.*

298 Priority of registered documents

- (1) *Registered documents have priority according to when each of them was lodged and not according to when each of them was executed.*
- (2) *A document is taken to be lodged on the day and at the time endorsed on the document by the chief executive as the day and time of the lodgement unless the contrary is proved.*
- (3) *Subsection (1) is not affected by actual, implied or constructive notice.”*

[29] Section 299, which appears in Division 1 of Part 2 is, in my view, of critical importance to the issue here.

“299 When a document is registered

- (1) *A document is registered when the particulars about the document are recorded in the relevant register.”*

[30] All of the above provisions form part of the scheme of registration. Sections 295, 297 and 298 confer upon a person lodging a document a right to have the document registered provided the formal requirements of s 295(1) have been satisfied. Documents concerning the same parcel of land must be registered in the order in which they are lodged and registered documents have priority according to when each of them was lodged.

- [31] The priority which is afforded to documents according to when they are lodged only arises upon subsequent registration.
- [32] For the respondent it was contended before the learned trial judge that the event with which 8.4.1 is concerned is the lodgement of the relevant documents for registration and not the recording of the particulars of the lodged document in the relevant register.
- [33] The appellant contended that the time at which registration occurs is expressly provided for in s 299 as being when the relevant particulars are recorded in the register and thus this must be what the parties intended to refer to in clause 8.4.1.
- [34] His Honour accepted the respondent's argument giving a number of reasons for doing so to which I will turn in a moment.
- [35] The verb "lodge" is defined in schedule 6 to the *Act* (the dictionary) in the following terms:

"means file for registration in the land registry."

- [36] The verb "register" is defined in the same schedule as follows:

"a document, an interest, land or something else, means to record the particulars of the thing in the appropriate register in the land registry."

- [37] The appellant contends that his Honour has construed clause 8.4.1 in a way which does not conform to the natural meaning of its terms and in a way which does not conform to the relevant legislative provisions and in particular s 299 and the provisions contained in Division 2 of Part 2 of Chapter 6.
- [38] The learned trial judge gave four reasons for concluding that the parties intended that condition 8.4.1 would be satisfied upon lodgement of the separate sublease with the relevant Registrar.
- [39] The first was the priority which was afforded to documents from the date of lodgement as provided for in s 298. He expressed the view that the consequence of an earlier provision (s 283) was that title dated back to the time of lodgement. Section 283 provides as follows:

"283 Documents form part of a register

(1) A registered document is part of the register to which it relates.

(2) A registered document forms part of the register from when it is lodged."

- [40] The second reason His Honour gave was that the Chief Executive of the Department had no discretion in the matter. Provided the conditions of s 295(1) were satisfied, lodgement inevitably led to registration.

- [41] Thirdly, it was said that the parties could not influence matters after lodgement. In the present case, the Chief Executive took ten days to record the particulars but, as his Honour said, it could have been weeks or months. These were matters which the parties could not control. The learned trial judge expressed the view that in these circumstances a construction which would avoid the “somewhat capricious result” of the parties’ rights depending upon the internal workings of departmental offices should be avoided.
- [42] Finally, his Honour referred to the argument based upon the meaning of the word “effected” in the second paragraph of clause 8.4.1. Since the sublease took effect from the date of lodgement, it is that date from which registration is in fact “effected”. Counsel who appeared for the respondent before the learned trial judge supported this submission by reference to a dictionary definition of “effect” as inter alia “the state of being operative”.
- [43] It is of course, axiomatic that a Court of construction will adopt the natural and ordinary meaning of language used in the contract. An exception to this is where such a construction would be “capricious, unreasonable or unjust”. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J (as he then was).
- [44] In *Snowlife Pty Ltd v Robina Land Corporation Ltd* [1992] 1 Qd R 564 at 576 Williams J (as he then was) discussed the application of this principle to a contract intended to operate in a particular statutory context:

“It is clear that at the time the parties entered into the contract they were aware of the fact that a rezoning application had been made pursuant to the provisions of the Local Government Act 1936, and that the detailed procedure provided for therein would have to be followed. To that extent it is true to say that the parties entered into the agreement against the background of that statute and with knowledge of the procedures therein contained. The learned Chamber Judge may well have been right in expressing the view that the ‘draftsman of cl. 3.3 appears not to have been fully seized of the procedures under s. 33(18) of the Act for a rezoning’. But such an observation is not really all that helpful when it comes to construing the clauses in question. In construing the terms of this contract the court must, in my view, primarily have regard to the words used by the parties. If the words used have a clear meaning and provide for a certain consequence then it is not to the point to say that such a provision in the contract does not mesh well with the provisions of the statute. If a contractual provision was so in conflict with the statutory procedure as to make the agreement unworkable then it may well be that there is no enforceable contract between the parties. But before arriving at such a conclusion a court would be justified in considering whether or not there was a construction open, although not the most obvious or most grammatically accurate, which would render the agreement compatible with the statutory provisions. (cf. Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, especially per Gibbs J. at 109 and Upper Hunter County District Council v Australian Chilling and Freezing Co. Limited (1968) 118 C.L.R. 429.)”

- [45] This is not in my view a case in which the statutory context which the parties must be taken to have knowledge of is inconsistent with the language of clause 8.4.1. The statutory background includes of course the central role which registration plays in the scheme. The interest, the subject of the contract, does not come into existence unless and until such registration is effected and upon registration the interest is vested in the person identified in the relevant document as the person entitled to the interest. It also includes the express terms of s 299 which provides that a document is registered when its particulars are recorded in the relevant register.
- [46] This being so, there is in my view no reason for concluding that the parties have not intended to use the term “registration” in the sense in which it is used in the legislation, namely the recording of relevant particulars of the document in the relevant register. It is worth noting that the *Shorter Oxford English Dictionary* defines “registration” as “the act of registering or recording” and gives as an instance of this “an entry made in a register”.
- [47] The priority which is accorded to documents according to when they are lodged is something which flows not from lodgement alone but from the subsequent registration of the lodged documents. Similarly s 283 which provides that a registered document is part of the register to which it relates and forms part of the register from when it is lodged only has effect upon subsequent registration.
- [48] I think it is open to doubt whether the effect of s 283 taken with s 298 is that the sublease comes into existence from the date of lodgement. The effect of these provisions is that a document forms part of the register from the time it is lodged and has priority upon registration according to when it was lodged. Whilst it is not necessary in my view to express a concluded view about this, I think it is at least open to doubt whether these provisions have the further effect that the interest commences from the time of lodgement. The effect of these provisions cannot alter the fact that the legislation expressly provides in s 299 that a document is registered when the particulars are recorded in the relevant register.
- [49] His Honour expressed the view that satisfaction of the conditions in s 295(1) “principally” depend upon the person lodging the document. The use of the word “principally” seems to recognise that there may be circumstances in which the person lodging the document has taken all reasonable steps to comply with the requirements of s 295(1) but that this has not been possible. It will be obvious from a reading of s 295(1) that the co-operation of others may be required in order to satisfy s 295. Senior counsel for the appellant in his argument before us pointed to a number of possibilities in this regard. In addition, s 305 confers upon the Chief Executive the right to deliver a requisition to the person who has lodged the document requiring that person to take certain steps or produce certain information and pursuant to s 306 can reject a document for failure to comply with such a requisition.
- [50] It can be accepted that after the lodgement of the documentation and assuming that all is in appropriate form, the matter then rests with the Chief Executive who is obliged to proceed to registration. This, in my view, however cannot be regarded as a consideration which is determinative of the

issue. As with many contracts, this contract is subject to a number of conditions which depend entirely upon the actions of others.

- [51] Finally, the reliance upon the term “effected” is in my view, misplaced. The *Shorter Oxford English Dictionary* defines “effect” as “to bring about; to accomplish”.
- [52] In my view, the word “effected” more correctly describes the act of registering a document for which s 299 provides than the act of lodging the relevant documents. Such a view accords with both the natural meaning of the language taken with the relevant statutory language (particularly s 299) and scheme.
- [53] If the respondent’s contention were correct, then it seems to me that some unintended consequences could follow. As will be seen, the contract provides for completion fourteen days after notice from the appellant that the last of the conditions contained in clause 8 have been satisfied. Clause 8 contains a number of conditions. Clause 8.2 provides for the consent of the minister and this necessarily would have to be obtained prior to registration. Whilst one would expect that clause 8.3.1 would in all likelihood be satisfied before clause 8.4.1 is satisfied, this may not necessarily be the case. Whether however this is the case or not, what is important is that clause 8.4.1 may be the last of the conditions to be satisfied.
- [54] If it is and is satisfied upon lodgement of the documents as the respondent contends, then in accordance with clause 4.1 the appellant can call upon the respondent to complete. As his Honour pointed out the recording of the relevant particulars in the register could take weeks or months. No statutory period is prescribed. This raises the possibility that the parties would in terms of the contract be obliged to complete the contract before the interest, the subject of the contract, came into existence. This cannot have been intended.
- [55] It follows from what I have said above that in my view the judgment below must be set aside.
- [56] The respondent sought final relief in this case upon the basis of its contention that the contract remained on foot and instituted proceedings by way of originating application seeking such relief upon this basis. In addition, it advanced two further arguments in support of its claim for final relief in the event that it did not succeed on its primary contention. These were that there had been a waiver by the appellant of any right to determine the contract and that the purported determination was in its form ineffective. He failed on each of these claims. There is no notice of contention in relation to the claim based upon waiver or inadequate notice.
- [57] The respondent has indicated that he wishes to raise some unspecified factual claims which would result in the appellant being denied final relief. This was hinted at before the learned trial judge but the matter was not taken any further (see *R vol 2 p17 ll 12 to 25*).
- [58] In my view, it is not open to a party seeking final relief to seek to withhold for the purposes of determination in the same suit at a later date, an

unspecified issue or claim. The parties chose the issues to be resolved and the manner in which they came before the Court, in seeking final relief.

- [59] The respondent obtained judgment for final relief at first instance but has failed on appeal.
- [60] The orders of this Court allowing the appeal now dispose of the claim for final relief.
- [61] I would allow the appeal, set aside his Honour's judgment and make the following declaration: The appellant by notice of 20 August 2007 has lawfully terminated the agreement entered into between the appellant and the respondent dated the 17 August 2004 for the assignment of a sublease by the appellant to the respondent.
- [62] I would order the respondent to pay the appellant's costs of and incidental to the original application and the appeal to be assessed.
- [63] **JONES J:** I have had the opportunity of reading the reasons of Cullinane J in draft form. I agree with those reasons and with the orders he proposes.