[2002] QSC249

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 4552 of 2002

VANWORLD PTY LTD ACN 076 593 783 Applicant

and

PERPETUAL TRUSTEES AUSTRALIA LIMITED ACN 000 431 827 Respondent

BRISBANE

..DATE 10/07/2002

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: The applicant, who is the plaintiff in the proceedings, seeks the continuation of an interlocutory injunction granted by Justice Holmes on 21 June 2002 until 4 p.m. on 9 July 2002 restraining the respondent/defendant from calling on the applicant's bank guarantee with the Bank of New Zealand. The injunction was extended by consent yesterday afternoon till 10 o'clock today. The application is opposed.

The applicant is the lessee of 16 outlets on level E of the Myer Centre in Brisbane known as the Food Court. The respondent is the lessor and registered owner of the premises and Gandel Asset Management Pty Ltd is the agent of the lessor and manager of the Myer Centre.

The subject lease commenced on 3 October 1995, has been varied from time to time and expires on 31 January 2009, although the lessor has terminated for breach. The lease is one to which the Retail Shop Leases Act 1994 applies. Inter alia the lease provides for the lessee's quiet enjoyment. The Myer Centre contained a theme park and amusement area known as Tops at the top of the centre, and cinemas below the Food Court.

Between approximately November 2000 and November 2001, these facilities were closed and new cinemas were developed at the upper level. A large area of level E was redeveloped to establish a Coles Express supermarket. As a consequence the applicant alleges that this reduced the number of people patronising the Food Court and accordingly it has suffered loss and damage in respect of turnover, profits and capital

losses.

Further development has and is taking place in the Food Court to upgrade the area which the applicant deposes, through Mr John Pearson, has led to further ongoing losses. The amount of the loss of profit alleged by the applicant is 1.33 million dollars and continuing. There is also a dispute about electricity overcharges in the sum of $70,000. The applicant has not paid a significant amount of the rent and outgoings over the past four to six months and this has led to a notice to remedy breach for non payment of some 1.25 million dollars. The applicant maintains that it is entitled to set off its losses from the interference to its business against the rent and other charges.

Over some years the parties have been in negotiation about the surrender of the balance of the applicant's lease, and a figure of $4.8 million has been discussed. On 18 June 2002 the applicant was served with proceedings instituted by the respondent and Gandel Management Ltd as plaintiffs, No 5435 of 2002, to recover possession of the demised premises and arrears of rent. The claim also seeks $19,000,000 for damages for loss of the bargain of the lease.

The amount of base rental is $240,024.85 per month, with approximately $5000 per month for other outgoings. The applicant's undertaking as to damages is challenged. It undertakes to pay $120,000 per month for the next six months towards rent and outgoings if the injunction continues. There

is clearly a serious issue to be tried concerning the allegations of breach of the applicant's rights to quiet enjoyment and its own obligations under the lease, but that is not the issue on this application. It is whether there is an entitlement to call up the bank guarantee irrespective of that dispute. This requires a consideration of the relevant clause in the lease which concerns the circumstances in which the respondent might call up the guarantee.

Clause 3.6.1 requires the lessee to provide a cash bond to secure the due performance of its obligations. Clause 3.6.2 which is the operative clause allows the lessee at its option to provide a bank guarantee for the same amount namely $700,000 in substitution, otherwise the clauses are identical.

Clause 3.6.2 stipulates relevantly that the lessee -

> "provide to the lessor a guarantee from an Australian Trading Bank… as security for the due and punctual performance of the covenants… on the part of the lessee… if at any time the lessee fails to so duly and punctually perform any of its obligations under the lease the lessor may, in its discretion at any time call up the said guarantee and apply the whole of the amount received or so much thereof as may be necessary in the opinion of the lessor to compensate the lessor for loss or damage sustained… by reason of such breach."

The Courts will enforce such a guarantee according to its terms and it is for the applicant to demonstrate that its due implementation ought not occur. Charles JA posed the question in Fletcher Construction Australia Ltd v. Varnsdorf Pty Ltd [1998] 3 VR 812 at 821 which must be asked in respect of

clause 3.6.2., namely:

> "Whether the relevant commercial purpose of the agreement was to provide security to Varnsdorf [the beneficiary] so that a valid claim to damages would be secured or whether clauses such as 3.13 made provision for an allocation of the risk between [the parties] showing which party was to be out of pocket pending resolution of any dispute."

The provision of this security is for "the due and punctual performance of the covenants obligations and provisions of the lessee." If the lessee defaults "the lessor may in its discretion at any time call up" the guarantee and "apply the whole of the amount… or so much… as may be necessary in the opinion of the lessor to compensate the lessor for the loss or damage sustained… by reason of the breach."

There are two indicators in the words used in the clause which point to an entitlement in the respondent to call on the guarantee notwithstanding that there is a genuine dispute and a serious question to be tried whether or not the applicant has a good set off against the claim for rent and outgoings.

The lessor is entitled to determine "in its discretion" to call up the guarantee. It may apply however much is necessary "in its opinion" to compensate for the breach. These expressions are inconsistent with a right to the guarantee only after there has been an adjudication on the parties' net financial obligations. The entitlement to call up the

security is expressed to be independent of any other entitlement of the lessor.

Except in certain limited circumstances, the construction contended for by the applicant would give the clause little operation. It is not easy to imply a restriction or negative covenant into this clause with the effect contended for by the applicant, that is that when there is a dispute between the parties which would entitle the lessee to a set off, the lessor is to be restrained from utilising the security.

There are clauses where such an implication has been found, see for example, Pearson Bridge (NSW) Pty Ltd v. State Rail Authority of NSW 1982 1 ACLR 81 but that is not so here. Here the terms of clause 3.6.2 show that the commercial purpose of this agreement was to allocate the risk of who was to be out of pocket pending resolution of the dispute to the applicant.

There is no suggestion that should the applicant ultimately be successful, it cannot recover the amount of the guarantee plus interest. There is no allegation of fraud or illegality and neither is the respondent's claim deemed trivial such as might prevent the operation of the clause.

There is in my view no serious question to be tried in respect of the calling up of the bank guarantee. As to the balance of convenience, there is nothing advanced by the applicant which indicates any disadvantage apart, of course, from the loss of interest on the money.

The respondent has substantial assets to compensate the applicant. The applicant is in a sound financial position although it is the case that the value of the lease may be an eroding asset if it does not negotiate for relief against forfeiture.

The claim by the respondents so far as rent and outgoings are concerned virtually balances the applicant's claim for damages but the respondents have a very large claim for loss of the bargain of the lease which is capitalised at $19,000,000. That of course is not a real figure in the sense that other lessees will go in to the premises, but nonetheless the claim is likely to be beyond the apparent assets of the applicant if successful.

The offer to pay half rent for the next six months and remain in possession of the demised premises can be of scant comfort to the respondent. However it is unnecessary to decide where the balance of convenience lies in view of my conclusion that there is no serious question to be tried.

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HER HONOUR: The formal orders are that I dismiss the application.

The costs orders are that the applicant pay the respondents' costs of and incidental to the application to be assessed on

the standard basis, but excluding the cost of the appearance of counsel on 21 June 2002 before Justice Holmes.
