

SUPREME COURT OF QUEENSLAND

CITATION: *Redfern and Redhope Pty Ltd v Penguin Island Resorts Pty Ltd* [2004] QSC 367

PARTIES: **HAYDYN JONATHAN LEE REDFERN and REDHOP PTY LTD (ACN 089 096 239)**
(Plaintiff)
v
PENGUIN ISLAND RESORTS PTY LTD (previously know as Bannerjade Pty Ltd) (ACN 098 965 210) and MICHAEL WATASZCZUK and EDWARD ALBINAS GRUSAUSKAS
(Defendants)
HAYDN JONATHAN LEE REDFERN AND REDHOP PTY LTD (ACN 089 096 239)
(First Defendants added by Counterclaim)
IAN VERDUN HOPKINS
(Second Defendant added by Counterclaim)
CLEGUM PTY LTD (ACN 010 327 983)
(Third Defendant added by Counterclaim)
ANTHONY CHARLES ROBERTS
(Fourth Defendant added by Counterclaim)

FILE NO/S: 22 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 13 August 2004

DELIVERED AT: Cairns

HEARING DATE: 3 August 2004

JUDGE: Jones J

ORDER: **Orders in terms of the amended draft initialled by me and placed with the papers.**

CATCHWORDS:

COUNSEL: Mr M Jonsson for the Plaintiff
Mr B Mellick for the third and fourth defendants

SOLICITORS: MacDonnells for the Plaintiff
Miller Harris Lawyers for the third and fourth defendants

- [1] When this matter came on for hearing I was informed by their town agents that the solicitors on the record for first and second defendants were no longer retained by the defendants. An application for leave to withdraw was duly filed. The affidavit of Dayle Smith (sworn 2 August 2004) made it clear that the defendants had only short notice of his intention to withdraw and insufficient time to arrange for other legal representation. I expect, however, that there would have been some prior discussions in anticipation of Mr Smith's withdrawal. I was further informed that the date of this hearing had been made known to the defendants. In relation to the first defendant this was confirmed by the presence of Mr McNab who claimed from the bar table that he had recently been appointed a director of the first defendant, though the appointment was not yet registered with the Australian Securities and Investment Commission ("ASIC"). I do not accept that Mr McNab had any authority to act on behalf of the first defendant nor to bind it in any way.
- [2] However for reasons which will become apparent, I regarded that the interim relief sought was of sufficient urgency and that I should proceed with the hearing despite the non-appearance of the defendants. I did this on the basis that any order made would not be irreversible at the adjourned hearing.
- [3] The applicants are the registered owners of land and improvements described as Lot 17 on Survey Plan 118447 and Lot 2 on Registered Plan No. 747733 County of Solander, Parish of Whyanbel T.R. 50284671. These are the business premises of Redbank Daintree Palms Beach Resort. By contract dated 21 December 2001 the plaintiffs agreed to sell to the first defendant the premises and the business for a price of \$5.2 million. The price was to be paid as follows:-
- (i) \$500,000 on the date of the contract.
 - (ii) A further \$1,700,000 on the date of completion of the contract.
 - (iii) As to the balance, \$3,000,000 in accordance with the mortgage to be entered into between the parties as agreed.
- The second defendants as the principal obligors unconditionally guaranteed the due performance by the first defendant of its obligations under the contract.
- [4] The terms of the contract provided for completion on before 5 April 2002. By clause 28, the contract also provided that the first defendant could go into possession of the premises on 1 January 2002 subject to it undertaking certain obligations. The obligations included that the first defendant, pending completion, would transfer the liquor licence and gaming machine licences from the plaintiff to the first defendant; that it would pay all rates, taxes and other liabilities and provide for various insurances. The right of occupancy was terminable forthwith if there was any breach of these obligations. (clause 28.5)
- [5] The uncontested evidence is that the first defendant is in breach of some such obligations, and that as a consequence the plaintiffs are exposed to penalties for breaches of licence conditions in accordance with the provisions of the *Liquor Act* 1992 and/or the *Gaming Machine Act* 1991. There is also a risk that the licences could be withdrawn.
- [6] The plaintiffs have served formal notices for the sale to be completed, firstly on 16 October 2002 and then on 28 May 2004. The first defendant has refused to complete and the plaintiffs have now given notice of termination of the contract.

- [7] The plaintiffs instituted these proceedings on 24 January 2003 seeking specific performance of the contract or in the alternative, damages for breach of contract as well as consequential taking of accounts. By their amended Statement of Claim filed on 7 July 2004, the plaintiffs no longer seek specific performance of the contract but rather the recovery of possession of the land.
- [8] The defendants defend the claim on the basis that there has not yet been set a valid date for completion of the contract and by counterclaim they seek an order pursuant to s 87 of the *Trade Practices Act* varying the contract price so as to accord fair value for the asset. In the alternative, they seek damages. The counterclaim alleges a series of misrepresentations made by the first named plaintiff on behalf of the corporate plaintiff and by other persons identified as the second, third and fourth defendants by counterclaim. The substance of the alleged misrepresentations are detailed in the Defence and Counterclaim but do not need to be referred to for present purposes.
- [9] If the defendants wish to maintain their defence to the plaintiff's claim and their action by counterclaim whilst remaining in occupation of the business premises then one must conclude that they have the present intention and capacity to complete the contract. At the very least their continued occupation of the premises requires the fulfilment of the obligations to protect the licences which form part of the property sold and the business undertaking.
- [10] It is this failure which gives rise to the application for an interlocutory injunction and the reason why I propose to deal with the issue in the defendants' absence. The defendants will have an opportunity to be heard on the resumed hearing when directions can, if appropriate, be given for an early determination of the action.
- [11] Turning then to the considerations relevant to the granting of an interlocutory injunction whether there is a serious question to be tried and wherein lies in the balance of convenience. The pleadings and the affidavit material identify that there is a serious question to be tried. Critical to the form in which the action will proceed is the contest as to whether the plaintiffs have validly terminated the contract or whether it remains on foot with the defendants having the right to vary its terms. The first defendant in breach of its obligation under the terms of the contract has failed to pay stamp duties on the contract document so its reliance upon that document may well be subject to that impost.
- [12] The assessment of damages sought by the competing parties will necessarily follow the resolution of the property issue. But for present purposes it is the plaintiffs who are the registered owners of the property and prima facie entitled to occupation of it. The first defendant has no right to occupy other than that arising from a non-exclusive right to use and to occupy the land pursuant to the terms of the written agreement. However, I do hold that there is a serious question to be tried.
- [13] As to the balance of convenience, the obvious concern is the evidence suggesting a failure on the part of the first defendant (and therefore the second defendants) to fulfil the obligations of the first defendant's occupancy of the premises and the conduct of the business. As the first defendant went into occupation on 1 January, 2002 the failure is of long standing and on the material before me is continuing. This failure puts at risk some of the property which is the subject of the contract of sale. It is this fact which persuades me that the balance of convenience lies in

restoring to the person who has the primary obligation under the relevant statutes to pay licence fees, the right to occupy and derive benefit from the property. In that way, it seems to me, that it is more likely that the statutory imposts will be paid and the risk to property removed.

- [14] I am satisfied that unless the first defendant meets the obligations of the contract which by its pleadings it seeks to uphold, then the possession of the property should be restored to the first plaintiff.

Orders

- [15] I make orders in terms of the amended draft initialled by me and placed with the papers.