SUPREME COURT OF QUEENSLAND

CITATION:	*Van der Velde & Anor v Marklyn Enterprises P/L* [2005] QSC 239
PARTIES:	**TERRY GRANT VAN DER VELDE AND DAVID MICHAEL STIMPSON** (applicants) **v** **MARKLYN ENTERPRISES PTY LTD** **(ACN 010 689 380)** (respondent)
FILE NO:	BS4742 of 2005
DIVISION:	Trial Division
PROCEEDING:	Originating application, application
DELIVERED ON:	23 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2005
JUDGE:	Wilson J
ORDER:	
CATCHWORDS:	LANDLORD AND TENANT – FORM AND CONTENTS OF LEASE – CONSTRUCTION OF LEASES – where lease was of hotel premises – where tenant held liquor and gaming licences - where tenant defaulted on lease – where landlord determined the lease and re-entered into possession – where companies comprising the tenant are in the process of winding up - where landlord obtained interim licences and resumed trading – where landlord is using some of the tenant's property – where the lease contained a clause for a lien in favour of landlord in event of tenant's default – whether lien is valid and enforceable *Corporations Act* 2001, s 262, 588FA, 588FE(2) *Osborne Computer Corporation Pty Ltd (vol admin apptd) v Airroad Distribution Pty Ltd* (1995) 17 ACSR 614 at 620, cited *Legione v Hateley* (1983) 152 CLR 406, cited *Re Trendent Industries Pty Ltd (in liq)* (1983) 8 ACLR 115, cited *Seka Pty Ltd (in prov liq) v Fabric Dyeworks (Aust) Pty Ltd* (1991) 28 FCR 574, cited

COUNSEL: PW Hackett for the applicant
IA Erskine for the respondent

SOLICITORS: Crouch & Lyndon for the applicant
Tucker & Cowen for the respondent

[1] **WILSON J**: Mylne Pty Ltd, Owey Enterprises Pty Ltd and Cashman Holdings Pty Ltd were the tenants of hotel premises in Toowoomba of which Marklyn Enterprises Pty Ltd (the respondent) is the owner. (I shall refer to them collectively as "the tenant".) It held appropriate liquor and gaming machine licences. It defaulted in the payment of the rent, and on 4 May 2005 the respondent determined the lease and re-entered into possession. Two days later, the companies comprising the tenant went into voluntary administration, and on 2 June 2005 their creditors resolved to wind them up.

[2] Meanwhile the respondent had obtained interim liquor and gaming machine licences, and had recommenced trading. In trading the respondent has been using various items of property which the liquidators (the applicants) claim are the tenant's and which they claim the respondent has no right to use.

[3] On 10 June 2005 the applicants filed an originating application seeking directions under of the *Corporations Act* 2001, and on 11 July 2005 the respondent filed a cross application seeking to restrain the applicants from surrendering, removing or otherwise dealing with the liquor and gaming machine licences otherwise than in accordance with the lease.

[4] In the originating application the applicants sought wide-ranging relief, involving factual determinations most of which their counsel conceded are not for determination in the Applications List. However, he asked the Court to deal with the application in paragraph 3 for –

> "a declaration and order that the lien referred to in clause 44.2 of the lease does not entitle the respondent to withhold assets and undertaking of the companies from the applicants as liquidators of the companies."

[5] It is appropriate to record at the outset that the originating application came before Philippides J on 15 June 2005, when it was adjourned to 12 July 2005 upon the respondent's undertaking not to mortgage, dispose of, sell, encumber or otherwise part with possession of the gaming machine licence, the gaming machines or the plant and equipment referred to in a certain valuation until trial or earlier order, and that at the hearing on 12 July 2005 the respondent through its counsel indicated its willingness to continue that undertaking until trial.

[6] Further, upon the applicants' giving an undertaking not to deal with the licences in the terms I am about to set out, the parties agreed that the cross application should be adjourned to a date to be fixed.

The applicants' undertaking….

> "not to surrender, remove or howsoever otherwise deal with the liquor licence and the gaming machine licence or any part thereof

> otherwise than in accordance with the terms of the lease (including clauses 18.6 and 47 thereof) between the respondent and the companies being exhibit B to the affidavit of Terry Grant van der Velde sworn 10 June 2005 and filed herein until trial or earlier order".

[7] The lease was for 10 years from 1 July 2003. The style in which it was drafted used the first person ("we", "us", "our") to refer to the respondent landlord and the second person ("you", "your") to refer to the tenant. By clause 44 the respondent could exercise various rights in the event of default by the tenant. In particular clause 44.2 provided –

> "**44.2 Lien**
> If we terminate this lease by re-entry, we may retain possession of your property until payment of all rent and other moneys payable by you under this lease have been paid in full and you acknowledge that such right of retention shall constitute a legal lien on your property in our favour."

Clause 1.2 contained the following definitions –

> "**your property** means all property inside the premises, except our property, and includes all fixtures, fittings, signs, equipment and goods.
>
> **our property** means all plant, equipment, fixtures, fittings, furniture, furnishings, signs and other property the Lessor provides in the Premises or in the Centre."

[8] After re-entering into possession and before reopening for business the respondent caused a stocktake and accounting of all plant and equipment, cash and miscellaneous items on the premises to be undertaken by independent accountants. It provided a copy of those accountants' report and a copy of the data file they extracted from the computer on the premises to the applicants (who were at that stage the administrators of the companies). In addition, they allowed the applicants access for the purposes of obtaining an independent valuation.

[9] There was then correspondence about a possible offer by the respondent to purchase the tenant's assets or some or them (see clause 47 of the lease), and about entitlement to the gaming authorities associated with the gaming machine licence. The applicants took steps purportedly to surrender the gaming machine licence. They demanded that the respondent cease to retain and use the tenant's property including the gaming machines.

[10] The principal issues in contention on the hearing of the application were –

(a) whether the lien created by clause 44.2 is valid and unenforceable;

(b) whether the respondent may use the tenant's property.

[11] Counsel for the applicants submitted that clause 44.2 is invalid because it is tantamount to distress for rent, which has been abolished in Queensland.

[12] At common law if a tenant did not pay his rent, a landlord could seize and retain his goods. If the tenant wished to regain possession of his goods, he had either to pay the rent or to apply for an order restoring them (ie to "replevy" them). The landlord could not sell the goods. The *Distress for Rent Act* 1689 (UK) granted the landlord power to sell. But from the late 19th century the availability of the remedy in England was restricted by a series of statutes. There were similar developments in Queensland, culminating in the abolition of distress for rent (and rates) by s 103 of the *Property Law Act* 1974. See generally Kim Lewison QC (Ed), *Woodfall on Landlord and Tenant* (London: Thomson, Sweet and Maxwell) chapter 9; Queensland Law Reform Commission Report No. 16, *Regarding Property Law Reform*, 1973 at p 79.

[13] Clause 44.2 is a contractual provision between the tenant and the respondent. It is binding on the applicants as liquidators if it is otherwise valid. By virtue of that clause the respondent had the right, exercisable in the event of termination by re-entry, to retain possession of the tenant's property. That right was clearly intended to survive the termination of the tenancy. By contrast, distress could be levied only during the subsistence of the tenancy: once a tenancy had been terminated, the landlord could not thereafter distrain for rent: see *Woodfall* para 9.006. It follows from this fundamental distinction that clause 44.2 is not tantamount to distress for rent.

[14] As counsel for the respondent submitted, clause 44.2 confers a mere possessory lien. It is not a charge requiring registration under s 262 of the *Corporations Act* 2001, the critical difference being that it depends for its existence on possession whereas a charge exists regardless of possession: *Re Trendent Industries Pty Ltd (in liq)* (1983) 8 ACLR 115; *Seka Pty Ltd (in prov liq) v Fabric Dyeworks (Aust) Pty Ltd* (1991) 28 FCR 574; *Osborne Computer Corporation Pty Ltd (vol admin apptd) v Airroad Distribution Pty Ltd* (1995) 17 ACSR 614 at 620. Accordingly the lien is not void against the liquidators.

[15] It is common ground that the respondent has been using the tenant's property. Is it entitled to do so? Counsel for the respondent submitted that it is implicit in the lease as a whole, in particular clause 47, that the respondent may do so. Clause 47 provided –

> "47. **Offer to purchase your business**
>
> 47.1 If
>
> (a) you wish to remove the liquor licence from the premises; or
>
> (b) you wish to surrender or transfer to another premises any right to use gaming machine licence at the premises; or
>
> (c) you wish to sell your business; or
>
> (d) Upon the expiry or earlier termination of this lease
>
> you must, before undertaking any such removal, surrender or transfer, give us a written notice advising of your intention

and offering to sell us your business for the market Value of your business ('Offer Notice').

47.2 We may accept the offer in the 'Offer Notice' by written notice to you within 14 business days of receipt of such notice. If we accept the offer in the Offer Notice, we will pay you the Market Value of your business, the liquor licence and the gaming machine licence within ninety (90) days of the Market Value being determined or agreed under clause 47.4. You must (upon receipt of the Market Value of your business, the liquor licence, the gaming machine licence and any necessary consents required under the *Liquor Act* 1992 and the *Gaming Machine Act* 1991) transfer your business and the liquor licence to us or our nominee.

47.3 If we do not accept the offer in the Offer Notice within 14 business days of receipt of such notice, you may undertake such removal, surrender or transfer as specified in the Offer Notice.

47.4 For the purposes of clauses 47.1 and 47.2 the Market Value of your business, the liquor licence and the gaming licence is the amount you and we agree is the market value of your business and the liquor licence immediately prior to the time of the issuing of the Offer Notice. If we are unable to agree within fourteen (14) days of your notice, the amount determined to be the market value shall be that determined by an independent valuer (with not less than five (5) years experience in the valuation of hotels in Queensland) appointed at the request of either of us by the President of the Australian Property Institute (Qld). The valuer shall act as an expert and not an arbitrator. The cost of the valuer shall be born equally by both of us."

"Your business" was defined in clause 1.2 as follows –

"**your business** means the business carried on from the premises."

[16] The clause required the tenant to offer to sell its business to the respondent not only where the tenant wished to remove the liquor licence for the premises or to surrender or transfer any right to use the gaming machine licence or to sell the business, but also "upon the expiry or earlier termination of the lease". Counsel for the respondent submitted that where the lease has been terminated but the respondent still has a period within which to accept the tenant's offer to sell the business, it must be implied that the respondent may use the tenant's property in the meantime: otherwise, there would be nothing for it to buy (transcript p 25). I do not accept this argument. The right given by clause 44.2 was a right to retain the tenant's property, while clause 47 was concerned with the sale of the tenant's business. "Your property" being defined as "all property inside the premises" could not include the goodwill of the business. "Business" is not defined, but in the context probably means the goodwill of the business, and probably does not include physical property used in the course of the business. Further, the right to the

possessory lien was one of a number of rights given to the respondent which it might choose to exercise upon default by the tenant. The tenant had an obligation to offer to sell its business to the respondent in a variety of circumstances, not just in the case of default. In other words there was no necessary correlation between the obligation to offer to sell the business and the exercise of the respondent's right to retain the tenant's property. No other provisions of the lease were pointed to in support of the right to use the tenant's property.

[17] In short, I consider that the respondent is not entitled to use the tenant's property.

[18] By clause 44.2 the respondent may retain possession of the tenant's property until the rent is paid. The respondent re-entered into possession on 4 May 2005; the tenant companies went into voluntary administration on 6 May 2005 and subsequently their creditors resolved to wind them up. Under part 5.6 division 1A of the *Corporations Act* the winding up is taken to have commenced on 6 May 2005 (the date the administration began). Had the tenant companies paid the rent after 4 May 2005 the payment would have been a voidable preference: ss 588FE(2), 588FA. Counsel for the applicants submitted that the lien is thus of little utility. That may be so, but it is not a sufficient reason to hold the lien unenforceable.

[19] No point was taken as to whether the respondent's right to hold the tenant's property amounts to a forfeiture against which relief might be granted. See Duncan & Vann, *Property Law and Practice*, (Sydney: Law Book Company) para 8.85; *Legione v Hateley* (1983) 152 CLR 406 at 444 – 445.

[20] The applicant liquidators are obliged to collect and realize the assets of the tenant companies. The practical solution may be an arrangement allowing the applicants to sell the tenant's property on their undertaking to pay the respondent its dividends. No specific proposal was put before the Court, and it would be inappropriate to give any direction in this regard at this time.

[21] It seems to be accepted that the respondent has provided a complete inventory of the property in question. However, there are disputes about whether various items comprise part of the fitout of the premises and so the property of the respondent pursuant to clause 41 which provides –

> "**PART M: FITOUT**
>
> 41. You acknowledge that any fitout in the premises, whether or not the fitout is effected or installed or paid for by you, is our property. Without limiting the application of any other provisions of this lease, the following shall apply in relation to the fitout:
>
> (a) you may use the fitout during the term of the lease;
>
> (b) you must at your expense insure the fitout;
>
> (c) you must at your cost keep the fitout in good condition and repair and must at your cost promptly replace worn or damaged items with items of similar quality."

Such questions cannot be resolved on an application such as this.

[22] In all the circumstances I decline to make the order sought in paragraph 3 of the originating application.

[23] I will ask the parties to try to reach agreement on the terms of the order appropriate in the light of my rulings, and on directions for the further conduct of the proceeding.