[2006] QSC 366

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS9145 of 2006

CHONGHERR INVESTMENTS LTD (ACN 054 161 821)	Applicant
and	
TITAN SANDSTONE PTY LTD (ACN 105 299 223)	Respondent

BRISBANE

..DATE 07/11/2006

ORDER

CATCHWORDS: Landlord and tenant - whether option to renew for a year and sublease of a mining lease had been effectively exercised so as to preclude giving of notice to quit on basis of a monthly tenancy - no formalities for exercise of option were specified - reliance on conduct by remaining in possession and paying rent, written and oral communications of desire to renew in the long term and negotiate purchase of lease.

HIS HONOUR: This is an originating application seeking that "the applicant be allowed to recover immediate possession" of land at Helidon known as Zack's Quarry. On that land, the respondent, for some reason described in the originating application as the plaintiff, conducts a quarrying operation.

The parties find themselves in litigation partly because of the lack of sophistication of the contractual arrangements they have made. The respondent went into occupation under a short agreement in the following terms:

"This sub-lease agreement is made on the 6th day of May 2004.

BETWEEN:
Chongherr Investments / Australian Sandstone Industries
A.C.N.: 054 161 821 A.C.N.: 062 269 318

AND:
Titan Sandstone Pty ltd
A.C.N.: 105 299 223
A.B.N.: 62 105 299 223

WHEREAS:

A. The Sub-Lessor is the lessee of mining lease ML50013 issued pursuant to The Mineral Resources Act 1989 of the State of Queensland on land described as lot 130 on Crown Plan CA311458 county Cavendish, parish Helidon and being the property shown on Survey Plan Catalogue Number MP36037.
B. The sub-lessor has agreed to grant a sub lease agreement of an agreed area of not more than 10 hectares of Mining Lease ML50013 to the sub-lessee on the terms and conditions contained in this agreement, and subject to the provisions of the Act.

THE PARTIES AGREE:

(1) that a minimum of $2,500 for 25 loads (approximately 25 tons per load) per calendar month;

(2) thereafter $90.00 per 25 tons of load;

(3) extraction period will be from 10th May 2005 with the option to renew after that date every year for a period of five years so long as all terms and conditions of agreement are met;

(4) rent payment to be paid monthly in advance;

(5) bond payment of three months' rental in advance;

(6) Titan Sandstone Pty Ltd are to fax to ChongHerr Investments Ltd/Australian Sandstone Industries head office the exact number of loads each month;

(7) accounts are payable by the 7th of the following month;

(8) royalties of stone extracted from this agreement to the Department of Natural Resources and Mines to be paid by Titan Sandstone Pty Ltd

(9) cancellation of this agreement:

(a) ChongHerr Investments Ltd/Australian Sandstone Industries has the right to demand all extraction operations cease after 14 days of the non-payment of monies after the due date of the account;
(b)ChongHerr Investments Ltd/Australian Sandstone Industries has the right to demand extraction operations be stopped and removal of all machinery and equipment of the site after 30 days if Titan Sandstone Pty Ltd do not comply with the requirements of the Department of Natural Resources and Mines, and rectify any notices received from the Department of Natural Resources and mines;
(c) Titan Sandstone Pty Ltd has the right to cease operations and cancel this agreement after 30 days of written notice to ChongHerr Investments Ltd/Australian Sandstone Industries and all monies owing are paid in full;

(10) a Plan of Operations is to be submitted to and accepted by the Environment Protection Agency. Copy of the Plan of operations to be submitted to ChongHerr Investments Ltd/Australian Sandstone Industries;

(11) Titan Sandstone Pty Ltd to appoint a Site Senior Executive Officer for ML50013. A copy of the appointment to be submitted to ChongHerr Investments Ltd/Australian Sandstone Industries;

(10) ChongHerr Investments Ltd/Australian Sandstone Industries has the right of inspection of the site each month of this agreement;

(11) on the ending of this agreement between ChongHerr Investments Ltd/Australian Sandstone Industries and Titan Sandstone Pty Ltd, Titan Sandstone Pty Ltd is to leave the site in a clean and tidy manner, and agree to inspection by the EPA and ChongHerr Investments Ltd/Australian Sandstone Industries Staff."

The dispute today centres on whether the respondent exercised

the option to renew in (3) in such a way as to have a right of

occupancy which is still current. There was no difficulty in respect of the first renewal, which was effected pursuant to a letter of 22 April 2005 advising that, "We wish to exercise our option to renew our lease as per our lease agreement dated 6 May 2004, which entitles us to the same terms and conditions as per the original agreement": see Exhibit 1 to Mr Ebsworth's affidavit.

Following the renewal of the term, the applicant sent the respondent a letter in the following terms, dated 12 May 2005:

> "Further to my letter dated 20 April and 3 May 2005, and as per discussions amongst you, Patrick Ng and myself in a meeting on 22 April 2005, I propose that the Agreement between ChongHerr Investments Limited (ChongHerr) and Titan Sandstone Industries Pty Ltd (Titan) dated 6 May 2004 to remain effective for a further 12 months, to expire on 6 May 2006 pending your agreement to the following additions and amendments:
>
> (1) Titan will ensure that operation will be within area assigned by ChongHerr/ASI and that the operation comply with conditions imposed by a standard EMOS;
>
> (2) Titan is to submit to ChongHerr by 31 May 2005, a bank guarantee of $10,000 showing ChongHerr as the beneficiary, as a provision for rehabilitation expenses related to Titan's extraction activities within ML50013;
>
> (3) Titan is to submit a Plan of Operation and have it approved by the relevant government departments/agencies by 15 August 2005. Failure to obtaining approval of the said Plan of Operation by 15 August 2005 will automatically terminate the original (dated 6 May 2004) and this Amendment to Agreement;
>
> (4) within 14 days of approval of the Plan of Operation, the bank guarantee amount will be adjusted by either party to reflect the EPA required amount. The Bank Guarantee will be released at termination of the submission-lease agreement and when Titan has rehabilitated its disturbed area to the satisfaction of the EPA;
>
> (5) commencing 1 May 2005, monthly minimum payment will increase to $3,000 inclusive of GST for up to 30 loads taken from ML50013 within one month. The fee is prepaid and payable on the first day of the month;

(6) $100 per load inclusive of GST will be charged for any additional loads in excess of 30 taken within one month. Titan will fax to ChongHerr a worksheet by the seventh of each month, detailing number of loads taken from ML50013 during the previous month. Payment is due by the 14th of the month;

(7) in order to ensure that correct load numbers are being charged each month, ChongHerr is to set up a monitoring system by installing a security camera at the entry to ML50013. The record will be cross-referenced with the reported load numbers by Titan. Any discrepancies should be discussed and dealt with in a timely manner;

(8) commencing May 2005, ChongHerr is to send to Titan a monthly invoice for royalties due based on previous month's extraction figures at $0.50 per ton. Royalty is due and payable within 14 days of the date of invoice;

(9) royalty from July '04 to April '05 totalling $8175 is due and payable by 30 June 2005 (Invoice NO 19376 attached, please disregard the one faxed on 6 May '05);

(10) should the parties fail to agree on this Amendment to Agreement by 31 May 2005. the Sublease Agreement dated 6 May 5004 will cease immediately and all outstanding accounts including royalties and a provisional rehabilitation bond of $10,000 will become due immediately;

(11) this letter serves as a supplementary document to the Agreement dated 6 May 2004."

There are some very unusual features about that letter, and the implications of Mr Ebsworth's signing it for the respondent below the words "accepted by" are unclear.

The document may create more issues than it resolves. One relates to the beginning and expiration dates of the 12 month terms. One would think that it was because of the date of the sublease at the top of it that the view was taken that the date of expiration was going to be 6th of May in any year, whereas reference to the document suggests that the relevant date is the 10th of May. See clause (3). This difficulty has

potential relevance to the efficacy of notices to quit which have been given by the applicant.

The first of them signed by Mr Liu, managing director of it, is dated 1st August 2006, purports to be faxed and demands removal of personnel, stock, machinery and any infrastructure by the 1st of September 2006.

I think it is likely that by referring to the wrong date in the month the document is without effect. An improved notice was sent by the applicant's solicitors dated and under cover of a letter also dated 29 August 2006. That construed the arrangements as involving a variation of the sublease agreement so that the first renewal would expire on the 6th of May 2006 and in line with that view notice to quit effective 6th of October 2006 was given.

There seems to me room for argument whether the 6th day of the month supplanted the 10th day of the month, given that the document of 12 May 2005 describes itself as "supplementary". There are questions, at the least, in my opinion, whether a supplementary document can have the effect of cutting short a term. In the end, if it cannot, the solicitor's notice to quit may be no more effective than its predecessor.

The question may have some relevance given the attempt made by the respondent today to formally exercise the option to renew "for a further (third) year commencing from expiry of the second term in May 2006."

...

There may be a question whether the respondent's document of today, which is in terms described as additional to other things relied on as exercises of the option, can be effective if there has been a valid termination of the lease. Whereas the respondent exercised the option to renew in a clear (and one may say, traditional) fashion in respect of a new term commencing in May 2005, it did not act so clearly in respect of the further renewal.

Mr Ebsworth's affidavit says in paragraph 16 that the respondent "exercised its option to renew the lease by letter to ChongHerr dated 2 May 2006" and goes on in paragraph 17 to depose that, "On or about 19th April 2006, I had a telephone conversation with Jing-Jing Chen. I told her that we would be staying on the property for the next three years of the lease. I said further that we needed to upgrade our machinery and buy more machinery and equipment to be used on site and I would like to extend the lease beyond the next three years. I said I would prefer to extend for a period of an additional seven years over and above the three years we had remaining. She said she would ask the director."

Such matters were confirmed in an exhibited letter dated 19 April 2006 which refers to the conversation as happening in the previous week. I do not know that much would turn on that discrepancy.

In her subsequent affidavit filed by leave this morning, Ms Chen took no issue with Mr Ebsworth's account of the conversation. I have given leave to read and file after lunch a further affidavit of hers in which she gives her version of the telephone conversation. She says that she does not recall "discussing the exercise of the option to renew the current lease." She goes on to say that if she had been told there was an intention to exercise the option, she would have advised that the respondent was in no position to do that as it was in breach of the lease terms by failing to pay the "rehabilitation bond" which was something introduced, if at all, by the document of 12th May 2005.

Mr Ebsworth does not contend that he used the word "option" or any equivalent. The letter of 2nd May 2006 on which he placed reliance in like manner fails to mention in a relevant way the word "option" or any equivalent. It is in the following terms:

"Sorry I've taken so long to put this proposal in writing - it is in reference to our conversation of last Thursday.

As I have said previously in order for us to run a viable mining operation at Zac's we need an extension of time to 10 years perhaps a 3 x 3 x 4 year option or negotiate the freehold purchase and mining lease from Chong-Herr Investments and/or Australian Sandstone Industries.

I'd like to formalize the freehold purchase if this is to be the case as soon as is possible. We would need at least ninety(90) days due diligence. We would also require the EPA extraction permit on the mining lease to be in place before settlement which we would envisage to be approximately ninety (90) days after the above matters are in place.

The price discussed of 1.2 million dollars would be for the whole freehold property, mining leases, extraction permits and

whatever other associated documents would be required to finalize the purchase.

As this matter is most urgent for us to continue our operations we would like to formalize the extension of our existing lease agreement or purchase the mining lease, freehold land and extraction permit as soon as possible. If you could let me know which way we are heading we can have contracts drawn up immediately and therefore start the due diligence process."

The respondent remained in possession conducting its accustomed operations and paying rent which, effectively, is a royalty required to be paid to a specific minimum amount however little material may be extracted.

The applicant did not, for all that appears, give any indication of its attitude until July 2006 when the following letter dated 19th July 2006 was sent:

> "Further to the meeting between Patrick Ng of our office and yourself on 11 July 2006, I would like to confirm the following:
>
> 1. In relation to the sale of Zacks Quarry, the company will only consider offers above $1.5 million;
>
> 2. We have offered Titan the priority in purchasing the property, however, the price you have offered so far falls short of our reserve price;
>
> 3. As our sublease agreement expired in May 2006, there is currently no formal lease agreement in place between the 2 companies. While we consent to a temporary arrangement with no specific terms based on conditions contained in the sublease agreement (dated 12/05/05) and it amendments (dated 12 May 05), we would require Titan's agreement to the following points while the property is offered for sale:
>
> a. Titan is to pay the $10,000 rehabilitation bond still outstanding within 5 working days from the date of this letter;
>
> b. As there is no specific term of lease in the current arrangement, each party can terminate the current arrangement by giving the other party a notice of one calendar month;

c. Upon leaving the site, Titan is to restore the site to EPA's satisfaction;

d. Commencing 1/8/06, the monthly rental payment is to increase to $5500 per month inclusive of GST, which will entitle Titan to take away from Zacks a maximum of 50 loads (truck and dog) of boulders per month. Anything in excess of 50 loads will be charged at $110 per load including GST.

The above points are the minimum requirements which Titan has to meet in order to continue to operate in Zacks until further notice.

4. **Please sign for your acceptance by Friday 21 July 2006. Please call me or Patrick to discuss if you have any questions.**"

On this occasion, Mr Ebsworth was being more careful. He did not co-operate by appending his signature. He wrote, suggesting meetings to discuss a possible purchase, et cetera, his letter attracting the communication of 1st August 2006 already noted, which denies any lease arrangement being in place. It indicates unwillingness to consider any offer to purchase below $1.5 million.

Ms Moody's argument on behalf of the applicant, in significant measure, relies on a couple of local authorities, the first of which went to the Court of Appeal. That is Powell v. Bochas, 148 of 1995, 1 June 1995, Williams J, BC9506007; affirmed in appeal 125 of 1995, 19 November 1995, BC9507501.

That was a case upon a clause containing an option for renewal "exercisable by notice in writing, delivered by the lessee to the lessor not less than three calendar months prior to expiration of the term". There was not due performance by the

tenant, which did nothing within the time allowed by the option clause other than indicate an intention in a telephone conversation. Written notification of exercise of the option came too late.

The other authority principally relied on is Tropical Meat Packers Pty Ltd v. Schultz (2006) QSC 164. At paragraph 30, Douglas J referred to authority for a proposition that "an option to purchase is only collateral to and not an incident of the leasing relationship and does not survive the term of the lease".

It will be seen at once that the case concerned an option to purchase. His Honour, at paragraph 1 of the reasons, set out the terms of the option to renew, which required that the sublessee "prior to the expiration of the said term, give the sublessor not less than three months' previous notice in writing... and duly perform and observe the covenants..."

The option to purchase provided that it "may be exercised by the said sublessee at any time during the term of this lease and any extension thereof and prior to 3rd December 2007 by the sublessee giving to the sublessor notice in writing". I do not find assistance in those decisions in the present matter, given the very different terms of the option here.

There is, in my opinion, no warrant for an approach that the option must be exercised in writing, nor is any formality whatever indicated. It seems to me that an oral exercise of

the option would be permissible, and even an exercise by other conduct which might be continuing in possession and payment of rent.

The respondent has the advantage here that those matters occurred against a background of what was said on the 19th of April 2006, if that was the true date - which wouldn't seem to matter much - and the letter of the 2nd of May 2006. Although Ms Moody says it may be difficult to understand from those communications exactly what the respondent is about, particularly against the background of the formality resorted to for the first renewal, it strikes me as unrealistic, in the present circumstances, to contemplate that the respondent had in some way elected not to exercise the option while embarking on negotiations for different arrangements for the long-term future.

The judgment of Young J in Tsaoucis v. the Gallipoli Memorial Club Ltd (No 1) (1998) 9 BPR - Butterworths Property Reports - 16265 acknowledges that there may be some differences of approach when Australia is compared with other jurisdictions in which more indulgence may be shown to those seeking to exercise options. In some respects, at least, his Honour favoured the adoption of a similar approach in this jurisdiction. I respectfully would agree subject, of course, to regard being had to any binding authorities.

One of the respects in which his Honour thought it was open to follow overseas decisions concerns the exercise of options

after the expiration of a term. There is plenty of authority in other jurisdictions for that, including Gardner v. Blaxill [1960] 1 Weekly Law Reports 752. In that case, there was not even any provision for notice to be given exercising an option. Ms Moody contends that the landlord there had done much more than her client by way of acquiescence, but this is a distinction in degree only.

Clause 3 in the present context may be odd, but in referring to the "option to renew after that date" (being 10th of May), there is a total absence of anything to indicate that the option should be exercised earlier.

These considerations may go to save the exercise attempted today, unless it is precluded by the expiration of a valid notice to quit. I do not see how the notice to quit could be valid if the option had already been exercised effectively.

It is based on the theory that the respondent's possession is as tenant on a month to month basis, as set out in the covering letter. There is a statutory basis for that approach, again assuming the option has not been exercised, in section 129(1) of the Property Law Act 1974.

The most striking case illustrating exercise of an option by conduct, which is discussed by Young J, is a Newfoundland decision, Blomidon Mercury Sales Ltd v. John Piercey's Auto Body Shop Ltd (1981) 129 DLR (3rd) 630, whose headnote is said to set out the principle:

> "Where a lease gives the lessee an option to renew and does not specify when or in what manner the option must be exercised, it is validly exercised if the lessee remains in possession at the end of the term."

Here the respondent is able to point to that and more.

There is local authority, binding on this Court, in which one finds an indulgent approach taken to the exercise of options, where there is some degree of informality or imprecision of language, for example in Traywinds Pty Ltd v. Cooper [1989] 1 QdR 222 at 225. Kelly SPJ, whose judgment was agreed in by Macrossan J and Derrington J, applied the following test from a Victorian decision:

> "A purported exercise of an option should be fairly and not pedantically construed...One looks at the character of the document or other communication and the information that it conveys...and the question to be asked for the purpose of judging its sufficiency is 'what would anybody receiving it fairly understand to be the meaning of it?'"

To similar effect is his Honour's decision in re de Jersey (1989) 1 QdR 133.

...

The result is that the Court is of the view that the option has been effectively exercised and that the application should be refused. That may or may not be the end of the parties' differences, as the applicant has made clear its view that there are breaches by the respondent of its obligations.

Those matters may well be contentious; Mr Bowden at the beginning of the hearing foreshadowed that the outcome today may be directions for trial of issues. As matters have developed, it seems to me that no issues have emerged which need to go to trial in relation to the claim for possession presently pursued. No case for that being ordered today has been made out, so the application is dismissed.

...

HIS HONOUR: The application will be dismissed with costs.
