SUPREME COURT OF QUEENSLAND

CITATION:	*Jansen v Frexbury Pty Ltd* [2007] QSC 387
PARTIES:	**DAVID GRAHAM JANSEN** (applicant) v **FREXBURY PTY LTD** ACN 104 518 069 (respondent)
FILE NO/S:	RS 578 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	18 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2007
JUDGE:	McMeekin J
ORDER:	**1. Declaration that for the purpose of clause 8.4.1 of the agreement between the parties, registration of the separate sub-lease was effected on 16 August 2007;** **2. Declaration that the purported termination of the agreement between the parties by the respondent was not effective;** **3. Order that the respondent pay the applicant's costs of the application.**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where contract subject to registration being "effected" within 36 months – whether registration effected by lodgement or entry of particulars in register TERMINATION - whether notice evinces intention to terminate TIME – COMPUTATION OF TIME – exclude date of execution of the contract. *Land Sales Act 1994* (Qld), ss 283, 283(2), 295, 295(1), 298, 299(1) *Associated Beauty Aids Pty Ltd v FCT* (1965) 113 CLR 662, cited *Ex parte Robinson* [1983] 1 Qd R 526, cited *Grange v Sullivan* (1966) 116 CLR 418, cited *Morton v Hampson* [1962] VR 364, cited

Norco Co-operative v Parmalat Australia Ltd [2006] QSC 38, applied
Sutton v Gundowda(1950) 81 CLR 418, cited

COUNSEL: GF Crow for the applicant
R Gotterson QC for the respondent

SOLICITORS: Macrossan & Amiet for the applicant
MacFie Curlewis Spiro for the respondent

[1] This is an originating application by David Graham Jansen for declarations that:

(a) the purported determination on 17 August 2007 by the respondent of an agreement between the applicant and the respondent dated 17 August 2004 was not effective; and

(b) the agreement between the applicant and the respondent dated 17 August 2004 remains on foot.

The Background Facts

[2] The agreement of 17 August 2004 referred to in the application relates to an agreement to purchase "off the plan" a residential unit to be constructed on Hamilton Island. The land tenure on Hamilton Island is State Leasehold and governed by the *Land Act 1994*. The agreement provided for the purchase by way of an assignment of a "separate sub-lease" relating to the residential unit from the respondent, Frexbury Pty Ltd ("Frexbury") to the applicant ("the agreement").

[3] The consideration for the assignment of the separate sub-lease was $1,950,000. The applicant paid a deposit of $100,000 upon the execution of the agreement.

[4] The agreement was subject to Frexbury obtaining the consent of the relevant Minister to the assignment of the separate sub-lease.[1] That consent was obtained on 15 August 2007.

[5] Clause 8.4 of the agreement provided that it was further subject to the following condition

> "Registration of separate Sub-Lease
>
> 8.4.1 Registration in the Department of Natural Resources and 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-Lease has not been effected within 36 months from the date of this Agreement then this Agreement will be at an end and all deposit moneys will be refunded in full to the Assignee."

[6] It is agreed between the parties that the obligation to effect registration of the separate sub-lease lay on Frexbury.

[1] See cl 8.2

[7] Searches of the leasehold register kept by the Department of Natural Resources show:

(a) that the separate sub-lease was lodged for registration on 16 August 2007 at 10.02am and assigned dealing number 710904199;[2]

(b) that as at 5.04pm on 17 August 2007 the status of the sub-lease according to the register was an "unverified dealing";[3]

(c) that as at 2.15pm on 27 August 2007 that remained the status of the sub-lease;[4]

(d) that as at 3.03pm on 27 August 2007 the sub-lease was recognised as an encumbrance and no longer as an unregistered dealing.[5]

[8] In each of the searches Hamilton Island Enterprises Limited is shown as the registered lessee under the dealing number attributable to the separate sub-lease. The parties agree that the effect of the searches is that the sub lease was lodged for registration on 16th August and within the 36 month period provided for in clause 8.4.1 and that the particulars were entered between 2.15pm and 3.03 pm on the 27th August and outside the 36 month period.

[9] By letter dated 17 August 2007 Frexbury asserted that the agreement was at an end because registration of the separate sub-lease had not occurred "in accordance with the provisions of the agreement".[6]

The Issues

[10] The short point between the parties is whether registration of the separate sub-lease is "effected" upon lodgement with the Registrar of the sub lease document or whether it is "effected" upon entry of the particulars on the title by the officers of the department.

[11] There are two subsidiary points that arise only if I am against the applicant on its construction argument – that the applicant waived compliance with the clause, it being for his exclusive benefit; and that the agreement was not effectively terminated by the respondent.

Provisions of the *Land Act 1994*

[12] The parties are agreed that the registration referred to in cl 8.1.4 is a reference to registration under the provisions the *Land Act 1994* ("the Act"). Each of the parties contended that the statutory background to the contract would be of assistance in construing the contract.

[13] The words "lodge" and register" are defined in Schedule 6 of the Act: "lodge" means "file for registration in the land registry"; "register" means "…to record the particulars of the thing in the appropriate register..".

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[2] See ex JS1 to Ms Spiro's affidavit
[3] See ex JS1 to Ms Spiro's affidavit
[4] See ex JS4 to Ms Spiro's affidavit
[5] See ex JS5 to Ms Spiro's affidavit
[6] See ex MF7 to Mr Falconieri's affidavit (at p 227)

[14] Section 295(1) of the Act imposes on the Chief Executive a duty ("must register") to register documents that satisfy the conditions set out in s 295(1). There was no suggestion here that the separate sub-lease did not satisfy those conditions.

[15] Section 299(1) provides:

> "A document is registered when the particulars about the document are recorded in the relevant register."

[16] Section 283 provides:

> "(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."

The Construction Issue

[17] Neither of the words "effected" nor "registration" used in clause 8.4.1 is defined by the agreement. It is principally the qualification, if any, that "effected" gives to "registration" that is at the heart of the dispute. Mr Crow, who appears for the applicant, draws my attention to the principles to be applied when construing a commercial document as summarised by Chesterman J in *Norco Co-operative v Parmalat Australia Ltd* [2006] QSC 38 at [11].

[18] Mr Gotterson of Queen's Counsel who appears for the respondent submitted that the meaning that the parties intended the terms to have "almost certainly was that given to it by the Act." He submitted that if the parties intended registration to mean mere lodgement, then the word "lodgement" would have been used. His submission continued that the parties must have intended that clause 8.4.1 be construed to mean that it was necessary that the particulars of the separate sub-lease be recorded in the relevant register within the 36 month period.

[19] I concede the force of Mr Gotterson's submissions and in my view the considerations are finely balanced. However, I think the better view is that the parties intended that it be the lodgement of the separate sub-lease rather than the entry of particulars on the register that they had in mind when requiring that registration be "effected".

[20] The considerations that cause me to hold this view are these. Firstly, it is evident that the provisions of the *Land Sales Act* accord priority to documents that transfer or create an interest in land in accordance with the date of lodgement: s 298.

[21] From the point of view of both parties, the important point was to ensure proper title could be transferred to the applicant. The registration dates, not from the date of entry of the particulars, but from the date of lodgement: s 283(2). Title therefore dates back to the time of lodgement.

[22] Secondly, the Chief Executive has no discretion in the matter – provided the document lodged transfers or creates an interest in land under the Act (which the separate sub-lease plainly did), then provided the conditions set out in s 295(1) are met – which principally depends upon the person lodging the document complying with the provisions of the Act – lodgement inevitably leads to registration.

[23] The only circumstance in which the document lodged by the respondent would not have resulted in registration would be if the document did not satisfy the conditions in s 295(1). Implicit in the contract must be a term that the respondent was required to do all that was reasonable to effect registration. That would have included preparing a document so that it satisfied the conditions of s 295(1). In any practical sense, it would seem that it would only be by reason of a breach of such an implied term that any document lodged by the respondent would not achieve registration – as s 295 notes, a person lodging such a document has a right to have the interest registered.

[24] Thirdly, the parties could not influence matters after lodgement. In this case, the Chief Executive took 10 days to record the particulars. That period could well have been weeks or months. There was no evidence concerning the issue. But from the point of view of the parties, it would seem impractical that their contract depend – more than was necessary - on indeterminate factors neither side could control.

[25] Practically speaking, it seems to me that the construction I prefer would achieve the objects of the parties and avoid the somewhat capricious result of the parties' rights depending on the internal workings of departmental officers.

[26] Fourthly, as Mr Crow, who appeared for the applicant, submits, this approach gives some meaning to the word "effected" in clause 8.4.1. Given that the operative date from which the sub-lease takes effect according to the register is the date of lodgement, that would seem to be the date from which registration is in fact "effected". Mr Crow supported his submission by reference to the dictionary definition of "effect" as, inter alia, "the state of being operative".[7]

[27] In reaching this view I have in mind the following passage from Chesterman J's judgement in *Norco:*

> "If the language of the contract is ambiguous, or open to two constructions ….the court should resolve the ambiguity … by adopting a construction which accords with "business common sense" or the commercial purpose of the agreement which appears from its terms and the knowledge, common to the parties ,which formed the background to the formation of their agreement.."

[28] In my view, the registration of the separate sub-lease was effected at 10.02am on 16 August 2007 and so within the 36 month period provided for in clause 8.4.1.

Waiver

[29] I will deal with the applicant's subsidiary arguments relating to waiver and the alleged ineffectiveness of the notice to terminate the contract briefly. They each assume, contrary to my finding, that the construction argument was determined against the applicant.

[30] As to the waiver argument, in my view it has no merit. The letter relied on of 2 July 2007[8] does not in terms seek a waiver of compliance with clause 8.4 but rather an extension of time, which was not acceded to. As well, the argument

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7 Macquarie Concise Dictionary (2nd ed)

8 See ex MF5 to Mr Falconieri's affidavit (at p 225)

depends upon the assumption that clause 8.4 was primarily for the benefit of the applicant. I cannot see how that can be right. The respondent plainly had an interest in obtaining title and within a set period - its own commercial interests could well be affected given that the price had been fixed three years prior to the proposed registration.

Invalidity of Notice of Termination

[31] The parties agreed that the contract was voidable not void upon non-fulfilment of the condition: *Sutton v Gundowda Pty Ltd* (1950) 81 CLR 418; *Gange v Sullivan* (1966) 116 CLR 418, 441-442. The applicant contended that it was necessary that the respondent evince by unequivocal words or conduct an election to terminate and had not done so before registration was effected on 27 August 2007. The respondent said it had done so by the facsimile of 17 August, sending the original of the facsimile on 20 August, and enclosing with that letter a trust account cheque refunding the deposit – which documents were received, if it be relevant, on the 22nd August.

[32] The applicant's submission depended on a number of propositions. First it was said that the letter of 17 August sent by facsimile at 5.04pm was not effective as it was premature, the time for fulfilment of clause 8.4.1 only expiring – at the earliest - at midnight on 17 August. The point seems to be right: *Ex parte Robinson* [1983] 1 Qd R 526.

[33] Secondly it was said that in fact the time for expiry of the condition (ie registration of the sublease) was midnight on Monday 20 August 2007. Thus the sending of the original of the facsimile by posting on 20 August 2007 with a trust account cheque for the return of the deposit was again premature. The submission depends on the view that one excludes the day of execution of the agreement in computing a period of time from any fixed day and the assertion that such an exclusion has the effect that the 36 month period expires on the 18th August 2007 which was a Saturday. Clause 27.1.6 of the argument provided that in that circumstance time was to be extended to the close of the next business day – Monday 20th August.

[34] In my view the initial premise is wrong. Whilst it is accurate to say that as a general rule one excludes the initial day, that means that time is computed from midnight on that initial date – in this case the day of execution of the agreement, 17th August 2004 - and the 36 month period therefore expired at midnight on the 17th August 2007. See *Morton v Hampson* [1962] VR 364; *Associated Beauty Aids Pty Ltd v FCT* (1965) 113 CLR 662 at 667-668. In *Associated Beauty Aids* Barwick CJ, in dealing with the general rule of computing time "from" a date, said "the period will commence at the end of the day of that date". No different result is required here. Thus the notice of termination was timely.

[35] Thirdly it was said that the sending of the original of the facsimile by posting on 20 August 2007 with a trust account cheque for the return of the deposit did not plainly evince the necessary intention to terminate because the letter was merely a copy of the facsimile and there was no fresh "intention" formed. I cannot agree with the proposition. The sending of a cheque refunding a deposit seems a fairly conclusive evincing of intention in my view.

Orders

[36] Subject to hearing from the parties as to the precise form of the orders I propose the following:

1. Declare that for the purpose of clause 8.4.1 of the agreement between the parties, registration of the separate sub-lease was effected on 16 August 2007;

2. Declare that the purported termination of the agreement between the parties by the respondent was not effective;

3. Order that the respondent pay the applicant's costs of the application.