LexisNexis

Australian
Property Law
Bulletin

2017 . Vol 32 No 7

Contents

Information contained in this newsletter is current as at September 2017

LexisNexis Butterworths

Australian
Property Law
Bulletin

Rushcutters Bay Developments Pty Ltd v Dragon Asset Investment Pty Ltd (No 2)

Peter Beekink *and* ***Jean-Marc Papineau*** *LAVAN*

Introduction

When constructing the terms of a contract, it is necessary to consider the wording from an objective basis, in terms of what a reasonable person with the same knowledge will understand the words of the document to mean.

In the recent case of *Rushcutters Bay Developments Pty Ltd v Dragon Asset Investment Pty Ltd (No 2)*,[1] the Supreme Court of NSW was asked to interpret a sale of land contract that was amended on several occasions and subsequently contained clauses that were in conflict with each other.

The clause the subject of interpretation dealt with the amount of the deposit that could be retained by the vendor.

Summary

The parties entered into an agreement for the sale of four commercial strata lots at Rushcutters Bay in Sydney for $16 million (Contract). The Contract provided that a deposit of 10% of the purchase price would be paid in two instalments, with time being of the essence.

The vendor experienced difficulty in obtaining the funds to pay the deposits, and subsequently, raising the finance to pay the balance purchase price. The purchaser defaulted on the deadline for making the second instalment of the deposit. The parties entered into a deed of variation to extend the Contract date provided that new deposit conditions were met.

Over the following months, the parties entered into a total of five deeds of variation as a consequence of the purchaser's repeated failure to meet payment deadlines. As a result, the purchaser agreed to increase the purchase price under the Contract to compensate the vendor for the breaches. In addition to this, the purchaser was liable for payment of further instalments of the deposit that would go beyond the 10% cap permitted by the standard sale conditions.

Under the fifth deed of variation, the parties negotiated that the sale of the four lots would occur in two stages. A portion of the deposit paid by the purchaser totalling $3.5 million was apportioned as the full price payable for two lots. The remaining deposit paid of $325,000 would be applied towards the deposit payable for the remaining two lots. Under the agreement for the remaining lots, the purchase price was $12,625,000 and a deposit of 20% was to be paid in instalments.

The purchaser subsequently failed to meet the deadline to pay the deposit under the second stage and the vendor terminated the Contract for the remaining two lots. The vendor instituted legal proceedings to recover the unpaid portion of the 20% deposit, specifically $2,312,500.

The purchaser made a cross-claim citing the ability of the court to exercise the statutory discretion granted under s 55(2A) of the Conveyancing Act 1919 (NSW) to return the purchaser's deposit in situations where it was unjust and inequitable to permit the vendor to retain the deposit.

Contractual construction — recovering the unpaid deposit

The vendor claimed it had an entitlement under the Contract to recover the unpaid deposit up to the 20% amount that was negotiated and drafted by the parties' solicitors. In support of its claim, the vendor relied on cll 3.2 and 3.3 in the fifth deed of variation. These clauses provided that:

- the purchaser acknowledged the deposit exceeded 10% of the price under the Contract;
- if for any reason the excess portion above 10% was not considered to be properly part of the deposit, the excess would serve as security for the vendor's risk; and
- the purchaser would not challenge or object to the vendor retaining the excess portion as security.

The vendor submitted that these provisions, agreed to in the fourth and fifth deeds of variation, clearly demonstrated that it was the intention of the parties that the vendor would be able to keep the whole deposit, even the amounts that went beyond 10% of the purchase price.

The purchaser argued that cl 9.1 of the Contract operated to limit the vendor's ability to keep or recover the deposit to a maximum of 10% of the purchase price. It was submitted that the provisions the vendor was relying on dealt with retaining the deposit paid. The clause failed to mention any rights of recovery, displace the cap or provide any additional manner or mechanisms to claim any unpaid deposits. The purchaser argued that cl 9.1 was the only provision that dealt with recovering unpaid deposits.

Statutory discretion — repayment of the deposit

The vendor submitted that:

- the obligations to make the deposit payments were not penal in nature as they were in proportion to the loss the vendor might suffer if the purchaser failed to complete the purchase; and
- it was justified to increase the deposit as it reflected the increased risk the vendor assumed in granting an extension of the completion date.

As such, there was no reason to prevent recovery of the unpaid deposit amount.

Counsel for the purchaser did not make submissions in regard to the characterisation of the nature of the payments for the deposit or argue if the payments were penal in nature. In support of its claim, the purchaser stated that the vendor and its representatives made various representations regarding such things as the value of the property and lending ratios used by Australian banks that encouraged the purchaser to proceed with the Contract.

Subsequent to the commencement of these proceedings, the vendor entered into contracts to sell the two lots the subject of the second transfer for a greater purchase price than the initial amount for the four lots under the Contract. The vendor argued that as a result of the breach, the vendor is in a better position than it would have been had the contract with the purchaser been completed. Consequently, the court should grant relief against forfeiture and return the deposit to the purchaser.

Decision

Construction of the Contract

In determining the meaning of the terms of the Contract, the court reiterated the well-known principles for making such a determination:

> The meaning of the terms of a commercial contract is to be determined objectively, by what a reasonable businessperson would have understood those terms to have meant. That determination requires consideration of the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or objects to be secured by the contract (see *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35 at [22]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]). A commercial contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience (see *Electricity General Corporation v Woodside Energy Ltd* (above) at [35]). The subjective beliefs or understandings of the parties are not relevant to such questions of construction (see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [40]). In approaching the question of construction, regard must be had to the whole of the instrument since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious with another (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109). Generally, the words of a contract should be construed in a way that gives all of them meaning, and does not render parts inoperative (see *Dovuro v Wilkins* (2000) 105 FCR 476; [2000] FCA 1902 at [152], citing *Re Strand Music Hall Co Ltd; Ex parte European and American Finance Co Ltd* (1865) 35 Beav 153 at 159; 55 ER 853 at 856).[2]

On that basis, the court held that the applicable clause was cl 9.1 and the maximum amount of the deposit that could be recovered was 10% of the purchase price. The court found that cl 9.1 plainly imposed a maximum of 10% of the price upon the amount of the deposit the vendor may keep or recover. The court found that cl 9.1 was not expressly altered by any of the subsequent deeds of variation. This was not withstanding the tension between cl 9.1 and the terms of some of the provisions that were later introduced into the Contract by the deeds of variation.[3]

Clause 9.1 was the only provision that dealt directly with the recovery of the deposit. As such, the application of cl 9.1 was the relevant provision to determine the vendor's claim to the unpaid deposit money.

The purchaser was only liable to pay the unpaid deposit money to a maximum of 10% of the purchase price less the deposit moneys paid, namely $937,500 plus interest and costs to the vendor. As a result, the court did not consider the application of the law against penalties in respect of this deposit.

The application of s 55(2A) of the Conveyancing Act

Because of the construction the court placed on the interpretation of the Contract, the issue of whether or not the amount of the deposit constituted a penalty did not need to be considered by the court. In the words of Darke J:

> No question of penalties arises in these circumstances. It is well settled that forfeiture of a 10% deposit does not attract the jurisdiction of a court of equity to relieve against

> penalties and forfeitures (see *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (above) at [26]; *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578–9).[4]

The court's construction of the Contract limited the amount of the deposit to 10% of the purchase price.

Section 55(2A) of the Conveyancing Act provides:

> In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon.

The effect of s 55(2A) is to create a jurisdiction to relieve against forfeiture of a reasonable deposit that was unknown in equity.[5]

The court set out the following principles when applying s 55(2A):[6]

- "The jurisdiction under s 55(2A) does not give to a court an overall discretionary supervision of monetary adjustments between parties to a contract under which a deposit was paid but which has been terminated. A vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under s 55(2A) unless it is unjust and inequitable to permit him to retain it."[7]
- "It is not necessary to demonstrate special or exceptional circumstances in order to justify an exercise of the discretion under s 55(2A) (see *Harkins v Butcher* (2002) 55 NSWLR 558; [2002] NSWCA 237 at [77]; *Havyn Pty Limited v Webster* (above) at [149]). However, a proper approach to the discretion must appreciate the legal context of the established nature of a deposit as an earnest of performance in conveyancing transactions (see *Havyn Pty Limited v Webster* (above) at [150]–[151])."[8]
- "The purchaser must therefore do more than merely show that the deposit has been forfeited, and that it will thus result in a "windfall" to the vendor as will usually be the case. The Court should not take an approach to ordering the return of deposits under s 55(2A) which weakens the proper function of a deposit in providing a sanction so that purchasers treat the making and completing of contracts with due seriousness: *Wilson v Kingsgate Mining Industries* [1973] 2 NSWLR 713 at 735, *Fraser v L O'Malley & Sons Pty Ltd* [1975] 2 BPR 9133 at 9139–40. In so saying, I am not to be understood as putting a gloss upon the plain words of s 55(2A), but merely highlighting the critical importance of a judge exercising the wide discretion according to its plainly beneficial purpose to consider "justice" and "fairness" in their proper context."

The court applied the test under s 55(2A) to consider whether it was just and equitable for the vendor to retain the deposit. The court held that it was appropriate in the circumstances for the vendor to recover a deposit amount totalling 10% of the purchase price of the Contract. In reaching this conclusion, Darke J considered such factors as that the purchaser had the benefit of legal advice and entered into the Contract well aware of the risk of losing the deposit. Also, the purchaser was in a position to adequately protect their interests and their persistent defaults were not attributable to the conduct of the vendor.

However, it should be noted the court suggested that its position under s 55(2A) may have differed had the terms of the Contract allowed the vendor to keep or recover the whole of the stipulated 20% deposit.

Practical takeaways

The drafting of contractual terms and any subsequent deeds of variation is incredibly important and these should be reviewed with care to ensure that what is reduced in writing is a true and accurate reflection of the intentions of both parties.

The issue of the amount of the deposit payable under a contract needs to be carefully considered by the drafter of the contract. A deposit that exceeds 10% of the purchase price will more than likely be considered to be a penalty and not capable of forfeiture to the vendor.

Peter Beekink
Partner
Lavan
peter.beekink@lavan.com.au
www.lavan.com.au

Jean-Marc Papineau
Lavan
www.lavan.com.au

Footnotes

1. *Rushcutters Bay Developments Pty Ltd v Dragon Asset Investment Pty Ltd (No 2)* [2017] NSWSC 866; BC201705238.
2. Above n 1, at [45].
3. Above n 1, at [47].
4. Above n 1, at [64].
5. Above n 1, at [68].
6. Above n 1, at [69], [70] and [71] per Darke J.
7. Above n 1, at [69] per Darke J.
8. Above n 1, at [70] per Darke J.

Australian
Property Law
Bulletin

When an agreement is no agreement at all: Nurisvan Investment Ltd v Anyoption Holdings Ltd

Hayden Dunnett *UNIVERSITY OF QUEENSLAND*

The use of extrinsic evidence, particularly the subsequent conduct of the parties, is a live issue in contract law. While such conduct can be used to prove the formation of a contract, it cannot, as a general rule, be used to interpret the provisions of a contract.[1] Difficult issues arise in cases where both the formation of a binding contract and the effect of that contract are put in issue. *Nurisvan Investment Ltd v Anyoption Holdings Ltd*[2] is one such example.

The case concerned the sale of a company, FIBO, which held an Australian financial services licence. Nurisvan (vendor), the sole shareholder of FIBO, entered into a "Binding Heads of Agreement" (Agreement) with Anyoption (buyer) in December 2014. The Agreement provided that the parties would enter into a share purchase agreement.

Curiously, the Agreement, expressed in the form of a deed, did not contain an execution panel for the vendor, however, FIBO and the buyer did sign the Agreement. Some 10 months later and almost as many draft share sale agreements exchanged, the vendor took the position that it was not bound by the Agreement.

The trial judge found for the buyer and made an order for specific performance requiring the parties to enter into a share purchase agreement on the terms set out in the Agreement.

The vendor appealed on a number of grounds, including that there was no concluded agreement reached between the parties, and that the Agreement (if a concluded agreement between the parties) was merely an agreement to agree.

A concluded agreement existed between the parties

The vendor argued that the Agreement, in the form of the deed, was not capable of being enforced as a contract because the vendor was not a party to it. It is well settled that defective or incompletely executed deeds can take effect as a contract so long as the requisite elements exist.[3] The vendor thus attempted to draw a distinction between documents signed defectively, which could take effect as a contract,[4] and documents not signed at all which were said to be unenforceable.

The Court of Appeal rejected this argument, finding that the Agreement was capable of being enforced as a contract. Significance was placed on the commercial context of the arrangement, noting that it would be incongruous if the Agreement was not an arrangement between the parties.

Finding that the deed could be enforced as a contract meant the court had to consider whether the Agreement could be enforced against the vendor, who had not signed the Agreement.

The trial judge found the vendor was a party to the Agreement, however the conclusion was based on the surrounding circumstances including subsequent communications between the vendor and buyer.[5]

The Court of Appeal noted that the authorities allow recourse to post-contractual conduct to identify whether a contract was formed.[6] Their Honours noted that:

> … there is no settled view in the authorities whether post-contractual conduct may be relied on to found or support an inference as to the identity of a party to the contract.[7]

A number of obiter comments were made to the effect that post-contractual conduct, despite being unavailable for the interpretation of the Agreement, could be used to identify the parties to the contract.[8] Ultimately the court found that without the vendor being a party to the Agreement, the commerciality of the arrangement would be defeated; "the post-contractual conduct of the parties was relevant … to the existence of the contract itself".[9]

The Agreement was an agreement to agree

Establishing the Agreement was a contract enforceable against the vendor necessitated an inquiry into how binding the Binding Heads of Agreement was under the classic *Masters v Cameron*[10] categories. The buyer had argued that the Agreement manifested an intention to immediately be bound (a category 1 contract) as opposed to an agreement to agree, as proffered by the vendor.

Determining the nature of the Agreement is a process of interpretation,[11] requiring consideration of the plain and ordinary meaning of the words having regard to the text, context and surrounding circumstances.[12] This was made clear by the High Court in *Masters v Cameron* where it was said that no special terms were required to bind the parties, rather, the binding nature of the contract depends upon the intention disclosed by the language the parties have employed.[13]

Before considering the terms of the Agreement, the Court of Appeal noted the important distinction to be drawn between the issues of formation and intention. This distinction was brought to light by Gleeson CJ in *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* where his Honour opined:

> It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see, eg, Masters v Cameron (at 360). That is not the same as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract.[14]

The Court of Appeal then went on to state that the intention of the parties must be determined by the Agreement alone.[15] Subsequent negotiations have consistently been considered in other cases where a *Masters v Cameron* issue has arisen.[16] However, the court distinguished these cases on the basis that the "contract" formed only part of a series of correspondence between the parties.[17]

Based on the Agreement, the Court of Appeal ultimately concluded that the Agreement was merely an agreement to agree, as it used language suggesting further negotiations were required, those negotiations would be conducted in good faith, and that many of the finer details were yet to be worked through.[18]

Should subsequent negotiations be excluded?

On first principles there is nothing uncontroversial with the Court of Appeal's decision. However, after concluding that the Agreement was an agreement to agree, the Court of Appeal did consider the parties' subsequent negotiations to justify its decision. The Court of Appeal stated that the one qualification to the notion that the intention must be determined by the Agreement alone:

> … is that the subsequent negotiations and communications between the parties, and in particular the draft Share Sale Agreements that passed between them, would be relevant, from an evidentiary point of view, to demonstrate the nature and extent of the terms, that might be necessary for the conclusion of Share Sale Agreements, that were not included in the [Agreement]. That issue would be relevant to the question whether the parties, in December 2014, could be said to have bound themselves contractually by the [Agreement].[19]

The difficulty in the Court of Appeal's decision is twofold. It sought to first distinguish the present case from previous cases on the basis that the Agreement was the only document from which the intention of the parties could be found. However, there were nine drafts exchanged between the parties and the Agreement formed a small part of the many communications between the parties' legal representatives.

Second, despite the court's statement that the intention of the parties must be determined by the Agreement alone, the "qualification" and court's use of the subsequent negotiations to justify its decision meant that these negotiations were ultimately relevant to the nature of the intention of the parties. The court's readiness to distinguish well-regarded authority therefore appears to be artificial, particularly given the trial judge concluded that the total agreement between the parties was partly in writing and partly implied.[20]

Conclusion

Despite the difficulties in the Court of Appeal's reasoning, the circumstances are again a reminder of the treacherous path traversed by parties entering into "Heads of Agreement". While the High Court in *Masters v Cameron* noted there are no special terms required to make a contract binding,[21] the use of a heads of agreement or equivalent, such as a memorandum of understanding or letter of intent, should always be carefully considered.

Hayden Dunnett
BEcon/LLB (Hons)
University of Queensland

Footnotes

1. *Maynard v Goode* (1926) 37 CLR 529 at 538; *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 446; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 348; and *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582.
2. *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141; BC201704616.
3. *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680. See further N Seddon *Seddon on Deeds* Federation Press, 2015 p 111.
4. Above n 2, at [56].
5. Above n 2, at [76]; see *Anyoption Holdings Ltd v Nurisvan Investment Ltd* [2016] VCC 1339.
6. *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 77. For a more recent example see *Feldman v GNM Australia Ltd* [2017] NSWCA 107; BC201703917 at [90]–[91].

7. Above n 2, at [77].
8. *Pethybridge v Stedikas Holdings Pty Ltd* (2007) Aust Contract R 90–263; [2007] NSWCA 154; BC200705100; *Lederberger and Scheiner v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509; [2012] VSCA 262; BC201208017; *Tomko v Palasty* [2007] NSWCA 258; BC200708315; and *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2015] NSWSC 354; BC201502735.
9. Above n 2, at [84].
10. *Masters v Cameron* (1954) 91 CLR 353.
11. Above n 2, at [106].
12. *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; (2015) 325 ALR 188; [2015] HCA 37; BC201509888. Although there is some ambiguity in the High Court's approach, see T Lockwood and H Dunnett "High Court prospects a duffer: Mount Bruce Mining v Wright Prospecting" (2016) 30(10) *APLB* 162.
13. Above n 10 at 362.
14. *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548.
15. Above n 2, at [110].
16. *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 97,011 at 9147, 9149 and 9154–56; *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 at 670; and above n 14.
17. Above n 2, at [110].
18. Above n 2, at [115]–[117].
19. Above n 2, at [111].
20. Above n 2, at [72].
21. Above n 10 at 362.

Australian
Property Law
Bulletin

Diakou Nominees Pty Ltd v Gouger Street Pty Ltd — the principle (or lack) of legal certainty

Les Gray *and* ***Tatjana Giutronich*** *BAKER MCKENZIE*

Is it possible for a lease to trigger the application of the Retail and Commercial Leases Act 1995 (SA) (Act) during a lease term even though the Act did not apply to the lease at the beginning of the term?

South Australian retail leases

In general terms, a retail shop lease is a lease of a premise at which goods are sold, or services are provided, to the public. However, not every retail shop lease triggers the application of the Act. Section 4(2) of the Act lists various scenarios where the Act does not apply to a retail lease — for example, where the annual rent liability exceeds a certain amount.

Prior to 4 April 2011, s 4(2)(a) of the Act provided that the Act "does *not* apply to a retail shop lease if … the rent payable under the lease exceeds $250,000 per annum".

The Act was amended by the Retail and Commercial Leases Variation Regulations 2010 (SA) which came into force on 4 April 2011. The Regulations prescribed an amended amount of $400,000 for the purposes of s 4(2)(a) of the Act.

In *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd*,[1] the Supreme Court of South Australia had to consider the proper construction of s 4(2)(a) of the Act, in particular, whether the increase in the annual rent threshold from $250,000 under the Act to $400,000 impacted a lease which exceeded the threshold at the time it was entered into, but which was below the threshold following the Regulations.

Facts

On 1 September 2006, the Talbot Hotel Group Pty Ltd (Talbot) as tenant and Diakou Nominees Pty Ltd (Diakou) as landlord entered into a lease of commercial premises, known as the Talbot Hotel. The lease was for a term of 5 years commencing on 1 September 2006 and contained options for six rights of renewal each for a further 5-year term.

The lease provided for an initial annual rent of $250,000 (exclusive of GST) and contained among others the following provisions which benefited the landlord:

- a 5-yearly rent increase (with a ratchet preventing any decrease) where upon renewal the annual rent would be reviewed to be the greater of the current market rent and a fixed 4% increase; and
- a right to receive payments from the tenant on account of land tax and an obligation on the tenant to pay land tax.

The lease was assigned by Talbot to Schillvest Pty Ltd in 2007. In 2012, receivers and managers were appointed to Schillvest, who subsequently assigned the lease to Gouger Street Pty Ltd (Gouger Street). Gouger Street commenced occupation of the Talbot Hotel on 2 July 2013.

As at 4 April 2011 and all times thereafter, the rent payable under the lease was less than $400,000.

The tenant exercised its first option and the lease was renewed for a further term of 5 years commencing on 1 September 2011. When the lease was renewed on 1 September 2011, the rent remained less than $400,000 per annum.

Issues to be determined by the court

The issue for determination was whether the Act commenced to apply to the lease from 4 April 2011, when the amendments commenced, notwithstanding that was part way through the lease term. As at 4 April 2011, the annual rent payable fell within the threshold amount prescribed in s 4(2)(a) of the Act.

This was a significant commercial issue for the parties because if the Act commenced to apply from 4 April onwards, then the provisions of the lease stated above would no longer be enforceable and the landlord would no longer be allowed to:

- review rent in accordance with whichever two methods of calculating the change would result in the higher rent (s 22(3)(c));
- prevent a decrease in rent (s 22(4)); and
- recover land tax from the tenant (s 30).

Submissions of the parties

Gouger Street submitted that the Act applied to all post-1995 retail shop leases except whenever the annual rent payable exceeded the threshold as prescribed from

time to time. In the alternative, Gouger Street submitted that the exercise of the option to renew the lease brought a new lease into operation on 1 September 2011. The Act therefore applied to the new lease because it came into existence after the increase in the threshold for the purpose of s 4(2)(a) of the Act.

Diakou submitted that parliament did not intend the Act to apply to the lease in circumstances where the Act did not apply to the lease at its commencement and the parties had acquired existing rights and obligations under the lease. Such rights and obligations were not to be interfered with by a subsequent amendment to the Act, increasing the prescribed sum for the purpose of s 4(2)(a) of the Act.

Diakou further submitted that the parties to the lease entered into a commercial arrangement whereby rights and obligations in relation to payment of rent from time to time and other obligations such as land tax were created which were potentially binding for a period of 35 years. Diakou also submitted that both the common law and s 16 of the Acts Interpretation Act 1915 (SA) (AIA) prevented the amendments to the Act effected by the Regulations from retrospectively altering the existing rights and obligations of the parties created by the lease.

Diakou submitted that there were no grounds to conclude that the Act applied to any renewal or extension of the lease after 4 April 2011 on the basis that this was a new lease.

Considerations of the court

The court found that the Regulations had amended the Act within the meaning of s 16 of the AIA. The key issue was the effect of the amendment. The court cited Dixon CJ in the case of *Maxwell v Murphy* to outline the position at common law, which is also enshrined in s 16 of the AIA:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to the facts of events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.[2]

The court also cited *Australian Education Union v General Manager of Fair Work Australia*[3] for the conclusion that parliament will use clear language if it retrospectively falsifies legal rules that, at the time, people used to order their affairs, exercise their rights and incur liability and obligations.

The court looked to parliament's intentions and first considered the subject matter of the Act. The Act sought to regulate the commencement, performance and renewal of such leases. The court held that the relationship of parties to a lease was expected to change over time and as a result, the parliament intended that the Act would continue to speak to the particular factual matrix in existence over the life of the lease.

The court emphasised the fact that s 4(2)(a) could be modified at any time. The court outlined how varying thresholds could, for example, mean that the Act could apply, cease to apply, then once again apply to the same lease. A consideration of the purpose of the Act also supported this construction, with the legislature intending that the application of the Act would be subject to variation from time to time at the will of the executive.

The court held that in amending s 4(2)(a) of the Act, the parliament manifested plainly a legislative intention to affect those pre-existing "rights" as from the time the annual rental payable pursuant to the lease no longer exceeded the prescribed amount. The Act would operate prospectively in the sense that the Act would interfere with those rights created by the lease from the date of the amendment and not before.

The court further considered Gouger Street's alternative contention and found that even if the court's primary conclusion was incorrect, the Act would apply from 1 September 2011. The court held that the exercise of an option to renew is considered by the common law to be the entry into a new lease and not the extension of a pre-existing lease. This lease was therefore entered into after the amendment to s 4(2)(a) and the Act was applicable as the rent was below the threshold.

Conclusion of the court

The court held that the lease was subject to the operation of the Act on and from 4 April 2011, and as renewed from 1 September 2011, with the consequences that:

- section 22 of the Act operates upon the September 2011 rent review, which is the subject of cl 4.10 of the lease; and
- section 30 operates to preclude Diakou from recovering payment for or reimbursement for land tax levied on and from 4 April 2011.

Outlook and practical impact

This court's decision has important implications for the rights and liabilities of the parties to a retail shop lease, and potentially affects the legal certainty of contractual arrangements between such parties. In coming to its decision, the court stated that the purpose of the Act is the protection of the lessees of retail shop leases, and that parliament presumably decided to limit that protection to lessees who do not enjoy a certain equality of bargaining power with lessors.

The decision is also of interest insofar as it had the result of the Act applying to a lease during its term when

it had not applied at the commencement of the lease. This is what the court saw as a result of the Act's prospective operation. Conversely, the decision supports a construction that even if the Act had applied at the commencement of a lease (if the annual rent did not exceed the prescribed amount), it would not apply where during the life of the lease the annual rental came to exceed the prescribed amount, with the effect that the Act would cease to apply to a lease during its term.

The South Australian Parliament responded to the court's decision by enacting the Retail and Commercial Leases (Rent Threshold for Application of Act) Amendment Bill 2017 (SA) (Amendment Bill). In the Amendment Bill, parliament has clarified that the Act does not apply to a retail shop lease:

- that was entered into or renewed before 4 April 2011, or renewed after that date pursuant to a right or option of renewal conferred by a lease entered into before that date; and
- to *which, immediately before 4 April 2011, the Act did not apply by virtue of the fact that the rent payable under the lease exceeded $250,000 per annum*,

if the rent payable under the lease exceeds $250,000 per annum, or a greater amount prescribed by the Regulations.

Similarly, the Act now does not apply to a retail shop lease of the kind referred to above, where the rent payable did not exceed $250,000 per annum before 4 April 2011 but which exceeds $400,000 per annum (the current threshold), or a greater amount prescribed by the Regulations.

The parliament's response in these circumstances demonstrates quite clearly the importance of clarity in the drafting of legislative provisions in order to prevent their scope from being extended beyond the intention of the legislators.

In addition, the decision serves as a reminder to parties to retail leases that, absent statutory provisions to the contrary, a lease renewal is regarded by the common law as a new lease, and not an "extension" of a now-expired lease.

It remains to be seen whether the decision (and the parliament's response) will have relevance in jurisdictions where the application criteria of the relevant retail leasing legislation include rent thresholds (eg, in Victoria, where the threshold is $1 million) or, by analogy, to other application criteria which may change over time.

Les Gray
Senior Associate
Baker McKenzie
les.gray@bakermckenzie.com
www.bakermckenzie.com

Tatjana Giutronich
Associate
Baker McKenzie
tatjana.giutronich@bakermckenzie.com
www.bakermckenzie.com

The authors gratefully acknowledge the assistance of David Jones (Partner) and Sophie Lim (Associate), Baker McKenzie, in the preparation of this article.

Footnotes

1. *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd* [2017] SASC 72; BC201703851.
2. Above n 1, at [35], citing *Maxwell v Murphy* (1957) 96 CLR 261 at 267.
3. *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117; (2012) 286 ALR 625; [2012] HCA 19; BC201202647.

Be careful what information you pass on during negotiations — you may not be able to rely on a disclaimer

Dr Eileen Webb *CURTIN UNIVERSITY*

A recent decision in the Queensland Supreme Court provides a timely reminder to persons involved in commercial negotiations to ensure that if representations are "passed on" from another source, those representations must be accurate. Failure to do so will not necessarily be neutralised by a disclaimer.

Makings Custodian Pty Ltd v CBRE (C) Pty Ltd[1] involved the sale of a suburban shopping centre. At issue was whether the first defendant, CBRE, the property manager of the shopping centre or the second defendant, Orchid Avenue Realty Pty Ltd (OARE), the real estate agent that handled the sale, had engaged in misleading or deceptive conduct pursuant to s 52 of the Trade Practices Act 1974 (Cth).[2] More specifically, it was alleged that information provided regarding the financial performance of the centre was misleading. In summary, the plaintiffs' action in relation to the real estate agent was successful but did not succeed as against the property manager.

The case provides an interesting discussion of the circumstances where a person will, and will not, be said to be merely "passing on information for what it is worth" and the effectiveness of disclaimers on promotional materials provided by real estate agents. The case also provides an instructive application of the High Court decision in *Butcher v Lachlan Elder Realty Pty Ltd*[3] (*Butcher*).

The offending representations

In this case, CBRE and the real estate agent provided information about the centre, including financial information, to the plaintiff. The agent was more proactive, initially providing a brochure and then a considerable amount of additional information, including an information memorandum. The information memorandum contained details of the net rental, the rent payable under each of the leases and an annual estimate of outgoings. Crucially, the information memorandum contained a formal disclaimer clause that stated the information had not been independently checked by the agent, the information was merely being passed along and that prospective purchasers were to make their own enquiries. It was expressly stated that the source of the information was the seller.

What was not revealed, however, was the fact that the centre was in financial difficulties, most tenants were paying reduced rental and the property had no likelihood of increasing profitability in the foreseeable future. Also, the disclaimer was situated at the end of the lengthy information memorandum.

Intermediaries passing on information

The agent argued that the financial information was being passed on and that it was a mere intermediary.[4] In circumstances where a person passes on information, the ultimate consequences will depend on whether the information was simply being passed on by a person regarded as a "mere conduit"[5] "for what it is worth"[6] or whether the representation is conveyed in circumstances in which the person making the statement would be regarded by the relevant section of the public as adopting it.[7] The issue was discussed at length by the High Court in *Butcher*.

Application to the facts

Passing on information

The court distinguished *Butcher* holding that the agent could not, in the circumstances, be regarded as simply passing on the information without adopting or endorsing it. The agent was a high profile agency on the Gold Coast, the information memorandum specifically stated that it had been prepared by the agent and the name of the agent was prominently displayed. The agent's logo was prominently displayed throughout the information memorandum and other material. In this sense, the case bears similarity to the decision in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*[8] where the real estate agent held itself out as, inter alia "consultants to institutional investors and to developers of major properties". In such a case the court noted that:

> … an estate agent which holds itself out [in such a way] would not be regarded by potential purchasers of properties as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity".[9]

The effectiveness of the disclaimer

Again the facts were distinguished from the findings in *Butcher*. It was held that the disclaimer and references to the sources of the material were expressed in formal legal language and were situated at the end of a long and complex legal document. On the facts, the disclaimer and the source of information clauses would not have alerted a reasonable purchaser that the information was simply being passed on.

Conclusions

The case is instructive in that it highlights that persons promoting properties cannot simply rely on assertions that they are acting as intermediaries, even where the assertion is supported by a disclaimer. The ultimate decision is always a question of degree, but the case underscores the necessity for agents to ensure that prospective purchasers are fully aware that the information has been sourced elsewhere and independent enquiries should be made. This could be achieved through a prominent disclosure that the information is being passed on — that is, at least, proportionate to the surrounding business logos. There should also be a conspicuous, plain-English disclaimer again placed prominently in the document.

Dr Eileen Webb
Associate Professor
Curtin University
Eileen.Webb@curtin.edu.au
www.curtin.edu.au

Footnotes

1. *Makings Custodian Pty Ltd v CBRE (C) Pty Ltd* [2017] QSC 80; BC201703634 per Dalton J.
2. Since the repeal of the Trade Practices Act 1974 (Cth) and the introduction of the Competition and Consumer Act 2010 (Cth), the equivalent provision is s 18 of the Australian Consumer Law (Sch 2). The only difference is that the reference to "corporation" has been amended to "person". This amendment would not have had any effect on the findings of this case.
3. *Butcher v Lachlan Elder Realty Pty Ltd* (2014) 218 CLR 592; (2004) 212 ALR 357; [2004] HCA 60; BC200408200.
4. *Yorke v Lucas* (1985) 158 CLR 661; (1985) 61 ALR 307; BC8501069.
5. *Gardham v George Wills & Co Ltd (No 1)* (1988) 82 ALR 415 at 427.
6. Above n 5 at 426; and *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41–249.
7. Above n 5 at 427 per French J; and *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*, above n 6.
8. *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*, above n 6.
9. *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*, above n 6 at 41,359.

Woolworths Ltd v About Life Pty Ltd

Marie Boustani *BBRC WORLD and* ***Stephen Pallavicini*** *ACCREDITED PROPERTY SPECIALIST*

This is a case[1] about a right of first refusal. It involves "questionable" drafting of the rights, the conversion of in personam rights to rights in rem, competing equities and postponing conduct. The grantor of the right, About Life Pty Ltd, plays a passive role in the proceedings. Harris Farm Markets Double Bay Pty Ltd (Harris Farm) was the main protagonist in the case as will be seen below.

Woolworths operated a supermarket in Double Bay, NSW from February 1967. In December 2011, a related entity of Woolworths, Fabcot Pty Ltd, Woolworths Property Double Bay Pty Ltd and Woollahra Municipal Council (Council) entered a deed to develop Woolworths supermarket, some land owned by Woolworths near the supermarket and some land owned by the Council. By 4 June 2014, the stage one works under the deed had been completed by Fabcot, and Woolworths ceased to trade from the supermarket it had operated since February 1967. It began to trade from new premises.

The development also contemplated a lease of premises to Woolworths Thomas Dux grocery shop. For commercial reasons, Woolworths decided not to proceed with the Thomas Dux offering and approached About Life with a view that About Life would take a lease of the premises intended for Thomas Dux. About Life agreed to take a lease of the premises. The Council consented to the proposal. Woolworths guaranteed to the Council About Life's obligations as tenant under the proposed lease for 5 years.

About Life and Woolworths entered into a deed in March 2014 where About Life granted to Woolworths in cl 2.5(a) a right of first right of refusal to lease the About Life premises if About Life wished to assign the lease or proposed any dealing or action which would result in a third party occupying the premises. Clause 2.5 deals with other possibilities of disposal but they are not relevant for current purposes.

The Council and About Life entered into a deed of agreement for lease on 16 May 2014. Under the lease, About Life could not assign the lease without the consent of the Council. Around 21 April 2017, About Life sought the Council's consent to assign the lease to Harris Farm. A contract for sale of business was entered into between About Life and Harris Farm on 21 April 2017. About Life did not make the offer it was required to make to Woolworths. It did not advise Harris Farm of the right of first refusal.

Woolworths gave evidence that it had agreed to transact with About Life because it saw the About Life offering as complementary to its offering to customers. By early 2017, it viewed the About Life premises differently from its view in 2014. It felt it could establish a food offering similar to that of About Life if the opportunity presented itself. By failing to comply with the right of first refusal, Woolworths had lost a valuable right — loss of control over the balance of the term of the About Life lease, which included options, for 77 years.

In the proceedings, Harris Farm sought an order for specific performance of its contract with About Life. Harris Farm also claimed that it had an equitable interest in the About Life lease and that Woolworths did not have such an interest. If Woolworths did have an interest, it ranked in priority behind the Harris Farm interest. Harris Farm also alleged that Woolworths had breached an undertaking it had given to the Australian Competition and Consumer Commission (ACCC) on 8 September 2009 that it would not "enter into a lease agreement that includes one or more restrictive provisions". Harris Farm also sought damages against About Life as a further remedy. This question was not considered during the proceedings — it was deferred to a later time.

Woolworths sought an order restraining About Life from transferring its lease to Harris Farm unless it has first offered to assign the lease to Woolworths and Woolworths did not accept the offer.

Did either Harris Farm or Woolworths have an interest in the About Life lease? If they did, who had priority? Had there been any postponing conduct?

Harris Farm argued:

- clause 2.5 of the deed:
  - — was void or unenforceable for illegality or as being contrary to public policy because it breached Woolworths's undertaking to the ACCC;
  - — was void for uncertainty;
  - — breached public policy because it restrained the free alienability of land; and
  - — was only a right in personam;
- Harris Farm had an equitable interest in the lease because under its sale contract it had a right for specific performance; and

- even if Woolworths's interest preceded Harris Farm's interest in time, it had engaged in postponing conduct. It had given About Life the indicia of title without taking steps, which it could have done to put a purchaser on notice and it was in breach of the ACCC undertaking.

Harris Farm contended that cl 2.5 is void for uncertainty because it is silent as to what it is that is to be offered to Woolworths and is silent on the terms on which the offer is to be made. For example, it did not state the price or the terms and conditions.[2] Further, it had contracted to acquire the business of About Life and not the lease. The right of first refusal granted to Woolworths did not extend to a sale of business where the acquisition of the lease was part of a sale contract. Woolworths argued that the clause was not void. All that was required was for it to be offered the property on the same terms as those offered by About Life to Harris Farm. The consideration for the sale of the lease is the assumption by it of the "burden and benefit" of the continuing contracts listed in the sale of business agreement.

His Honour carefully examined cl 2.5 and concluded the following:

- it was poorly drafted — cl 2.5(a) referred to a right by About Life to lease the premises. It had no right to do so. That was the Council's right. The correct meaning was a right to take an assignment of the lease;
- a "businesslike" interpretation[3] of the clause is that Woolworths had the option to accept or refuse the terms on which About Life proposed to dispose of its interest. The sale of business contract included the terms on which About Life proposed to dispose of its interest in the lease; and
- a similar approach was taken to cl 2.5(b) (sublease by About Life), cl 2.5(c) (surrender by About Life) and cl 2.5(d) (termination by the Council).

That a clause is open to many interpretations does not make it void for uncertainty. It is only so if it "is so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention".[4] This was not so in the case before the court. About Life was required to offer Woolworths the same chance to enter into the agreement that About Life offered to Harris Farm.

Did cl 2.5 breach the undertaking given by Woolworths to the ACCC? The court accepted Woolworths's arguments that it did not as:

- the undertaking requires a contract that is a lease agreement between a lessor of supermarket space, being the shopping centre owner, and a supermarket operator. The "lessor" of supermarket space is an entity that has "proprietary rights in respect of the shopping centre generally" and that must be the shopping centre owner. About Life is not a shopping centre owner;
- the deed between Woolworths and About Life was in respect of one space only — the space occupied by About Life. The ACCC undertaking assumes two spaces — one occupied by the supermarket and additional supermarket space;
- the deed between Woolworths and About Life was not a lease agreement. Even if it was, Woolworths was not a party to it as a lessee;
- at the time the deed was entered, the About Life premises was not located where the old Woolworths supermarket was located but in a different building and both buildings were not a composite shopping centre; and
- the object of the undertaking is to remove restrictions that have an effect of competition. Clause 2.5 did not have this purpose. Its purpose was to allow Woolworths to regain the About Life premises.

In obiter Emmett AJA examined whether cl 2.5 was void or unenforceable for statutory illegality. He concluded that it was not on the following grounds:

- section 87B of the Competition and Consumer Act 2010 (Cth) does not prohibit a breach of undertaking. It confers a power on the ACCC to seek orders from the Federal Court if the ACCC thinks there has been a breach. The Federal Court then has a discretion as to the orders it will make. One of those orders could be compensation which would be consistent with the agreement being enforceable;
- a breach of the undertaking does not mean there is a breach of s 45 of the Competition and Consumer Act. That would be for the Federal Court to determine; and
- there was no evidence that Woolworths entered into the deed with cl 2.5 knowing that it was in breach of the undertaking to the ACCC.

Did cl 2.5 offend the principle that private property[5] should be freely alienable and thus was void? The court determined that it did not. If it did prevent alienation, the deed allowed the clause to be either read down or severed. In any event the principle did not render void Woolworths's claim to be offered an assignment of the lease.

What was the right that Woolworths held under cl 2.5(a)? All agreed that the right of first refusal did not

create an equitable interest.[6] There were four steps in exercising the right of first refusal:

1) the bare contractual right;
2) the wish to dispose requiring an offer to be made;
3) the offer; and
4) acceptance of the offer.

At the final stage there would be a proprietary right as the grantee could specifically enforce the offer. If one assumes stage 2 is an element of stage 1, then the critical question is whether stage 3 gave rise to an interest. An order could be sought to make the offer (similar to a call option) or an order could be made not to dispose of the property without making an offer.

Woolworths argued that once triggered, the right could confer an interest in property. Harris Farm argued that even though the trigger for the exercise of the first right of refusal may have been pulled, that of itself did not give rise to a proprietary right as the lease had not been assigned. The court noted that the interest of a party acquiring real property is "commensurate" with the availability of specific performance. Both Woolworths and Harris Farm had enforceable contractual rights and that Woolworths's right arose prior to Harris Farm's right. Once About Life performed its contractual obligations, those contractual rights are converted into proprietary interests. Who would prevail? The general principle is the first in time — *qui prior est tempore, potior est iure.* As the equities were equal — that is there was no postponing conduct by either — Woolworths's right prevailed. The court could not find any behaviour by either party which was either unconscionable or inequitable so as to deprive that party of its right. Woolworths had parted with a benefit to have a lease granted by the Council in return for a right of first refusal. Harris Farm had not yet parted with the sale price. Harris Farm might have a damages claim against About Life.

From a practical conveyancing perspective, Harris Farm undertook the usual enquiries in relation to the lease. It was told by About Life that there were no restrictions. Woolworths had not lodged a caveat. Harris Farm argued that a reasonable party would assume that the first right would be in the lease which had been registered. These arguments were rejected. The lease was not a representation that there were no other arrangements between About Life and Woolworths. There was no basis to expect that About Life would not disclose to Harris Farm its contractual obligations. Practitioners should focus on the drafting of any right of first refusal. Practitioners should also reconsider what is the appropriate way of dealing with and ascertaining the existence of such rights which may be invisible to the public eye.

As at the date of writing, orders are still being made by the court. It is also possible that Harris Farm may appeal.

Marie Boustani
Head, Lease Administration — Retail Property Group
BBRC World

Stephen Pallavicini
Accredited Property Specialist

Footnotes

1. *Woolworths Ltd v About Life Pty Ltd* [2017] NSWSC 1117.
2. See above n 1, footnote 10 of paragraph 88 for a list of cases which show the types of words used to create a valid right of first refusal. A right of first refusal is often called a right of pre-emption or a promise not to dispose of property until that property has been offered to the grantee and the grantee has rejected the offer. It is stated at above n 1, at [102] that such a right:

   > … without more, signifies that the grantor promises that it will not dispose of the property … to a third party except on terms no less favourable than the terms on which the grantor has offered to dispose of the property to the grantee and the grantee has rejected [the] offer.

3. *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; (2015) 325 ALR 188; [2015] HCA 37; BC201509888 at [47].
4. Above n 1, at [101], citing *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436–37.
5. *Hall v Busst* (1960) 104 CLR 206; and *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665; (2011) 16 BPR 30,111; [2011] NSWCA 396; BC201110344.
6. *Pritchard v Briggs* [1980] Ch 338; and *Sahade v BP Australia Pty Ltd* (2004) 12 BPR 22,149; (2005) NSW ConvR 56–113; [2004] NSWSC 512; BC200404009.

For editorial enquiries and unsolicited article proposals please contact Tim Patrick at timothy.patrick@lexisnexis.com.au or (02) 9422 2584
Cite this issue as (2017) 32(7) *APLB*
SUBSCRIPTION INCLUDES: 10 issues per volume plus binder www.lexisnexis.com.au
SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067
CUSTOMER RELATIONS: 1800 772 772
GENERAL ENQUIRIES: (02) 9422 2222
ISSN 0817-2854 Print Post Approved PP 255003/00769