

SUPREME COURT OF QUEENSLAND

CITATION: *Kanjo Group Pty Ltd v Aurukun Shire Council* [2012] QSC 352

PARTIES: **KANJO GROUP PTY LTD**
(plaintiff)
v
AURUKUN SHIRE COUNCIL
(defendant)

FILE NO/S: Cairns Registry No 282 of 2010

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 30 October 2012

DELIVERED AT: Cairns – *ex tempore*

HEARING DATE: 29, 30 October 2012

JUDGE: Chief Justice

ORDERS: **1. the action is dismissed**
2. the plaintiff pay the defendant’s costs of and incidental to the proceeding, to be assessed on the standard basis unless agreed

CATCHWORDS: Repudiation of sub-lease by sub-lessee – whether an intended renunciation – acceptance by sub-lessor – whether person communication repudiation was acting with authority of sub-lessee

COUNSEL: M A Jonsson for the plaintiff
P J Davis SC, with D P Morzone for the defendant

SOLICITORS: Preston Law for the plaintiff
Bottoms English for the defendant

[1] The defendant is the lessee of land at Aurukun occupied by the Three Rivers Tavern. Unable by law to hold a tavern licence itself, the defendant invited an expression of interest by an independent operator to lease the tavern lands and operate the tavern. In late August 2008, the plaintiff’s director Ms Nicole Lawrence and her partner Mr Sam Kanjo visited the Aurukun community to inspect the facility, and on the 1st of September 2008 the plaintiff offered to take a sublease for 10 years with a 10-year option for renewal. The defendant accepted the plaintiff’s offer, and the plaintiff made a formal application for a liquor licence.

- [2] The parties entered into a sublease which provided for a 10-year term commencing, as the parties acknowledged before me, from the notification of the issue of the requisite liquor licence. The permitted use was licensed premises and food sale.
- [3] The licence never issued. On the 5th of December 2008, the defendant resolved that the plaintiff have the right to operate the restaurant and takeaway operations at the tavern from 15th January 2009, and that when that takeaway was operating successfully, another takeaway operating within the town was to cease. The tavern, I point out, is a little distance out of town. As it happened, the plaintiff commenced food supply from the tavern on 1st March 2009, but had commenced food supply from the Aurukun Retail Store within the town over the Christmas 2008-New Year period.
- [4] Various problems led to a meeting between representatives of the parties on 26th of February 2009 at the offices of the defendant's solicitors, Bottoms English in Cairns, at which it was agreed that amendments would be made to the sublease. They were never effected. A proposed amended sublease was prepared, but the plaintiff was not satisfied that it reflected what had been agreed in Cairns. It did not, in fact, accord in various respects with what had been agreed, for example, as to the exclusivity of the plaintiff's food supply business, its motor vehicle rights and so on.
- [5] The plaintiff has not contended in its pleading that this denied the defendant a capacity to accept any subsequent repudiation by the plaintiff. The defendant's point, rather, was that this circumstance bore on whether there had been a repudiation by the plaintiff. Reference was additionally made to the defendant's failure to provide the plaintiff with a listing of the chattels and equipment necessary to operate the tavern, but the term of the sublease had not commenced by 2nd March because the liquor licence had not issued, and it is the fact that the plaintiff was prepared to and did execute the sublease without schedule 4 being included.
- [6] I mention 2nd March because it was on that day that a critical meeting took place at which the defendant contends the plaintiff repudiated the subcontract agreement. That critical meeting took place at the defendant's offices. It was attended by Mr Kanjo, the Chief Executive Officer of the defendant Mr Bensch, and the mayor, Mr Pootchemunka, since deceased. The proposed amended sublease was presented at that meeting. Mr Kanjo's account of the meeting appears in paragraphs 116 to 122 of his affidavit. He said that the plaintiff would not agree to the proposal. Mr Bensch's account is in paragraph 95 of his affidavit. He said that a furious Mr Kanjo withdrew his agreements and offers and said that he would be leaving, that he wanted to terminate all his arrangements and was leaving Aurukun. Mr Kanjo raised what would occur with the stock he had just purchased. The mayor accepted his termination of arrangements, and said that consideration would be given by the defendant to the position with the stock.
- [7] In his oral evidence-in-chief, Mr Kanjo said that he may have made the statements attributed to him by Mr Bensch, but said that he did not agree with a lot of it, and in particular that the mayor did not say that he accepted the withdrawal. Under cross-examination, Mr Kanjo departed further from Mr Bensch's account in respects to which I will come.

- [8] On 3rd March 2009, the following day, the defendant resolved to confirm the mayor's release of the plaintiff and Mr Kanjo from the sublease. Mr Bensch later that day telephoned Mr Kanjo and informed him of the council resolution, whereupon Mr Kanjo said that he had changed his mind and wanted to stay on, which he had wanted to communicate to Mr Bensch earlier in the day. He had endeavoured to do so without success. Mr Kanjo accepted in that regard the content of paragraph 101 of Mr Bensch's affidavit.
- [9] The defendant contends that the plaintiff, through Mr Kanjo, repudiated the sublease, by Mr Kanjo's statements at the meeting on 2nd March, and that the defendant accepted that repudiation as terminating the contractual arrangements it had with the plaintiff. The plaintiff contends that what Mr Kanjo said should not be regarded as repudiatory.
- [10] The plaintiff contends that it was the defendant which repudiated the sublease by its subsequent conduct: exercising its statutory right to exclude the plaintiff and Mr Kanjo from the community by notices dated 11 March 2009 and 3rd March 2009, respectively Exhibits 3 and 2; by the defendant's solicitors' letter of 5 March 2009 to the Office of Liquor, Gaming and Racing advising that the defendant had withdrawn the occupancy rights of the plaintiff as applicant for the liquor licence, and that the defendant objected to that application; and by the defendant's solicitors' letter of 13th March 2009 asserting that there was no subsisting agreement between the parties.
- [11] The plaintiff claims damages for breach of the sublease. On 11th October 2011 the Court made orders so that the question of the alleged liability of the defendant be determined separately from and in advance of the determination of any other questions, such as the amount of any damages. The liability issues are those which arise from the defendant's denial of paragraphs 2, 3, 4, 5, 9, 10 and 11 of the statement of claim.
- [12] In these reasons for judgment, while not addressing every aspect of the pleaded cases, I focus on the way the trial was run and the real issues ventilated in the course of the trial.
- [13] It is appropriate at this stage to address the question whether Mr Kanjo was acting as agent of the plaintiff at the meeting on 2nd March 2009 and thereafter. The plaintiff had two directors, Ms Lawrence and her then 20-year-old daughter Amira. Ms Lawrence gave substantial evidence warranting the conclusion that Mr Kanjo was acting for the plaintiff company throughout, including at that meeting. At relevant times, Mr Kanjo was an undischarged bankrupt. His own evidence included assertions that the directors of the plaintiff left all negotiations to him. On the evidence of Ms Lawrence, I conclude that in all negotiations, up to and including the meeting of 3rd March 2009 and thereafter, Mr Kanjo was acting on behalf of the plaintiff company and within the limits of his authority. It is right to characterise Mr Kanjo as the plaintiff's driving force and its de facto controller.
- [14] In his oral evidence, Mr Kanjo rejected Mr Bensch's evidence that at the meeting on 2nd March 2009, Mr Kanjo said that he was terminating his arrangements with the defendant and leaving Aurukun. I did not accept Mr Kanjo as a credible witness, for reasons which I will shortly express, but I considered it significant that Mr

Kanjo did accept Mr Bensch's evidence that on the following day Mr Kanjo told him that he had changed his mind and wanted to stay on. That appears in paragraph 101(c) of Mr Bensch's affidavit. That does not sit comfortably with Mr Kanjo's rejection of the evidence that at the second March meeting he said he was leaving.

- [15] I list now the considerations from which I concluded that Mr Kanjo was not a credible witness. He has numerous convictions for deceit, which he attributed in his evidence to his gambling addiction. His credit account with the bookmaker Mr Waterhouse illustrates the depth of that gambling problem. As Mr Kanjo put it, he has had to do anything he can to find money. When he told Mr Bensch in the early stages that he was a wealthy man, he claimed when challenged in his evidence, disingenuously, to have been referring to his family, not in the sense of their being wealthy people, but their being his family. Mr Kanjo failed to tell Mr Bensch that he was a chronic gambler and a bankrupt. Then he went on to present the plaintiff as being a company with 20 years' experience in the setting up of cafes and restaurants. It was actually a \$4 company with no assets, which had been incorporated only a few months previously. Yet Mr Kanjo promised that it would be investing more than \$500,000 in various initiatives at Aurukun. When pressed about that in cross-examination, he said that the source of the moneys would be the income which the business would generate over the ensuing two years, and that was not, to my mind, credible. There are other matters. Mr Kanjo retained a driver's licence which included a false birth date. He used that to support a \$400,000 credit application made to Mr Waterhouse, plainly to complicate any attempt at recovery should he default. Aware that he could not seek credit without disclosing his bankruptcy, he signed a guarantee in favour of Island and Cape in relation to its supply of goods to the plaintiff. He again in his evidence disingenuously disclaimed the seriousness of the most recent conviction for fraud in 2012, describing himself as the victim of a technicality.
- [16] I did not on the other hand accept all of Mr Bensch's evidence. There was ill-feeling between him and Mr Kanjo which may have influenced some of Mr Bensch's recollection. I am satisfied, for example, that contrary to Mr Bensch's evidence, Mr Kanjo went to Aurukun early with at least the acquiescence of council officers. See the letter of the Acting Chief Executive Officer, Mr Ewart, of 22nd December 2008 welcoming Mr Kanjo to Aurukun. I am also satisfied that it was Mr Bensch who gave Mr Kanjo the proposed draft amendments to the sublease at the meeting on 2nd March 2009, contrary to Mr Bensch's disavowal of paragraph 170 of his own affidavit. Those matters notwithstanding, I was generally satisfied as to the creditworthiness of Mr Bensch, and otherwise where his evidence differed from that of Mr Kanjo, I preferred the evidence of Mr Bensch.
- [17] I particularly mention Mr Bensch's evidence to the effect that, where appropriate, the mayor did not maintain a silence at the sorts of meetings in question in this proceeding, but was prepared to, and did, express his own view of matters.
- [18] If the words said by Mr Kanjo are taken at face value, they plainly evince an intention not to be bound by the contract constituted by the sublease; indeed they go so far as to renounce it. While dissatisfaction with the proposed amendment was the immediate catalyst, Mr Kanjo did not just withdraw from that negotiation, but from the entire contractual relationship.

- [19] Mr Jonsson, who appeared for the plaintiff, referred to evidence tying the plaintiff's intended departure from the community to the inadequacy of the proposed amendment. The difficulty about that is Mr Kanjo's insistence that all agreements and offers were withdrawn, that all arrangements were terminated and that he was leaving. The present position goes beyond the erroneous interpretation situations with which *Green v Sommerville* [1979] 141 CLR 594 at 611, and *Sweet & Maxwell Limited v Universal News Services Limited* [1964] 2 QB 699 at 733-4 were concerned.
- [20] Mr Jonsson submitted however that Mr Kanjo's statements should nevertheless not reasonably have been interpreted as repudiatory, effectively because Mr Kanjo was simply venting frustration in the heat of a very angry moment, that his utterances were merely statements of present and transient intent. See *Hochster v De La Tour* [1853] 118 English Reports 922 at 926.
- [21] There is substance to the point made for the defendant in response that when the mayor said twice after hearing Mr Kanjo that he accepted the termination, Mr Kanjo made no effort before leaving the meeting to change his position. Mr Kanjo must by then have known that he was being taken seriously.
- [22] Certainly Mr Kanjo was very angry. That was because he no doubt perceived there would be real difficulty in ensuring the exclusive food supply rights he wanted, pending the grant of the liquor licence. That was a very important consideration from his point of view. The deterioration in his relationship with the defendant's Chief Executive Officer, Mr Bensch, was also not propitious, in circumstances where the plaintiff needed the defendant's support to secure a liquor licence. The context included other simmering disputes about the vehicle, the state of the tavern and the profitability of the plaintiff's venture if another entity ran the supermarket.
- [23] In that regard, two months earlier on 7th January 2009, Mr Kanjo had told Mr Bensch that if the plaintiff lost the tender for the supermarket, which is what occurred, the plaintiff might as well call it a day and get out of Aurukun. That provides significant background to the position Mr Kanjo ultimately adopted at the meeting on 2nd March.
- [24] One asks whether Mr Kanjo's statements on 2nd March, viewed objectively, would convey to a reasonable person in the position of this defendant repudiation or disavowal of the contract, taking account among other matters of the resultant loss of proprietary rights. See *Laurinda Proprietary Limited v Capalaba Shopping Centre Proprietary Limited* [1989] 166 CLR 623, 658, *Keswick Developments Proprietary Limited v Keswick Island Proprietary Limited* [2012] 2 QR 114, paragraphs 59 to 61, and *Apriaden Proprietary Limited v Seacrest Proprietary Limited* [2005] 12 VR 319, paragraph 64. It is important to note that this is not a breach case, but one of renunciation.
- [25] That a sentiment is expressed in anger does not necessarily exclude its being an intended statement of position. That may be more so where the statement is made in a commercial situation by contrast with a personal or domestic situation. But that is a very general suggestion, and the situation needs to be assessed by reference to the circumstances peculiar to it.

- [26] It is the fact that the plaintiff continued to trade after the events of 2nd March, but that is referable to concern not to sacrifice stock. It was also arguably consistent with Mr Kanjo's repenting of the position he had adopted on 2nd March, but then the die was unequivocally cast leading to the eviction notices obliging the plaintiff to leave. I do not consider that the circumstance that Mr Kanjo made his statements without the benefit of legal representation, and in the absence of the plaintiff's directors, excluded their reasonably being regarded as repudiatory or that the drawing of such a conclusion should have been suspended at least pending his consulting those directors.
- [27] The plaintiff was prepared to, and did, present Mr Kanjo as its driving force and de facto controller, and that is the way he was quite reasonably seen by the representatives of the defendant. Also, the plaintiff should be seen to have chosen to allow Mr Kanjo to proceed as he did without legal representation.
- [28] There is no basis for concluding that the mayor's immediate acceptance was an opportunistic exploitation of what the mayor should reasonably have regarded as mere sounding-off by Mr Kanjo which did not bear significantly on the commercial landscape occupied by the two parties. On one view, Mr Kanjo's anger may have underscored his determination to hold to the position he was expressing.
- [29] I consider, in summary, that the defendant was reasonably entitled to proceed on the basis that Mr Kanjo meant what he said and meant to hold to the position which he had expressed.
- [30] In the result, the plaintiff on 2nd March 2009, through its agent Mr Kanjo, plainly disavowed, in the sense of repudiated, its contractual arrangements with the defendant, and by the mayor, the defendant accepted that repudiation, an acceptance endorsed by the defendant by resolution the following day prior to, if it matters, the plaintiff's communication to the defendant of any retraction of the plaintiff's repudiation. The defendant's subsequent actions were consistent with the termination of its relationship with the plaintiff.
- [31] The plaintiff has failed to establish the liability upon which its proceeding depends. The action is consequently dismissed.
- ...
- [32] I order that the plaintiff pay the defendant's costs of and incidental to the proceeding, to be assessed on the standard basis unless agreed.