
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : SOMMERVILLE KALGOORLIE PTY LTD -v-
GULLAN PTY LTD [2021] WASC 14

CORAM : MASTER SANDERSON

HEARD : 5 NOVEMBER 2020

DELIVERED : 19 JANUARY 2021

PUBLISHED : 19 JANUARY 2021

FILE NO/S : CIV 1678 of 2020

BETWEEN : SOMMERVILLE KALGOORLIE PTY LTD
Plaintiff

AND

GULLAN PTY LTD
First Defendant

REGISTRAR OF TITLES
Second Defendant

Catchwords:

Property law - Application to extend caveat - Turns on own facts

Legislation:

Nil

Result:

Caveat extended

Category: B

Representation:

Counsel:

Plaintiff : H R Robinson
First Defendant : C Chenu
Second Defendant : No appearance

Solicitors:

Plaintiff : Haydn Robinson
First Defendant : Kings Park Legal
Second Defendant : No appearance

Case(s) referred to in decision(s):

Nil

MASTER SANDERSON:

1 This is the plaintiff's application for an extension of a caveat lodged over a property in Sommerville, a suburb in the city of Kalgoorlie - Boulder. The application is supported by an affidavit of Lyndon Edward Dyson sworn 16 June 2020. There is a no real dispute between the parties as to the material facts. The position is as follows.

2 Mr Dyson is a director of the plaintiff.¹ The sole director and secretary of the first defendant is Ian Frederick Johnson.² The subject land is opposite an IGA shop controlled by Mr Johnson.³ From about January 2015, Mr Dyson and Mr Johnson discussed the possibility of establishing a pharmacy on the subject land.⁴ Mr Dyson says he informed Mr Johnson that although Boulder already had one pharmacy, it could support a second. To establish a new pharmacy would require the grant of a Pharmaceutical Benefit Scheme number and this would require a new pharmacy to be allied with a medical centre including at least one doctor. Mr Johnson told Mr Dyson that while he did not know of any medical centre or any doctor who might be interested, if a suitable party could be found, he would take the idea of a second pharmacy further.⁵ Both agreed that once a new pharmacy was established it would be uncommercial for anyone else to establish a pharmacy. Both Mr Johnson and Mr Dyson could see the commercial opportunity a new pharmacy represented.⁶

3 The two men agreed they would participate in any redevelopment. They each appointed their own solicitors.⁷

4 Mr Dyson says he specified any entity he would use in the redevelopment would be the plaintiff.⁸ The discussions appear to have anticipated the plaintiff's participation being as a buyer of part of the redevelopment on the basis of it being eventually subdivided into strata title lots.⁹

5 In June 2015, the plaintiff's solicitor produced a draft deed granting right of first refusal for the plaintiff to buy a part of the

¹ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [1].

² Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [6].

³ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [8].

⁴ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [7].

⁵ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [9].

⁶ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [10].

⁷ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [12].

⁸ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [13].

⁹ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [14].

redevelopment. Mr Johnson said he preferred to retain all of the redevelopment and to lease to the plaintiff that part which was intended to be used as a new pharmacy. As a result it was agreed the plaintiff's participation would be as a tenant with an option to buy the leased premises.¹⁰

6 By 2017, Mr Johnson's solicitor had produced a disclosure statement for the proposed lease and the draft lease. Mr Dyson referred these documents to his solicitor and asked him to prepare a lease agreement. That was done as at 16 October 2017. At the time, the lessor was said to be Miracle Nominees Pty Ltd as trustee for the Miracle Property Trust, another entity controlled by Mr Dyson.¹¹

7 Negotiations continued through 2017 and Mr Dyson realised any lease should be in the name of the present plaintiff.¹² The documents were amended and a draft sublease referring to the plaintiff was produced by Mr Johnson's solicitor on or about 24 January 2018.¹³ By this time, Mr Dyson had introduced Mr Johnson to a doctor Jaggadish Krishnan who it was anticipated would be the doctor required to establish a medical practice.¹⁴ By now the elements of the agreement were in place. On 13 February 2018, Mr Johnson's solicitor sent to Mr Dyson a suite of documents which included an agreement to lease between the plaintiff as tenant, the first defendant as landlord and Mr Dyson as guarantor. The documents also included an agreement to lease between the first defendant as landlord and Spectrum Health Group Pty Ltd and doctors Krishnan and Gopalan.¹⁵ Mr Dyson signed the documents on behalf of the plaintiff and it is his understanding Spectrum Health Group and doctors Krishnan and Gopalan did the same.¹⁶

8 Thereafter progress was slow. Between paragraphs 29 and 39 of his affidavit Mr Dyson sets out some details of the contact he had with Mr Johnson. For present purposes those details are not relevant. What is relevant is that in January 2020 Mr Johnson informed Mr Dyson that although the development of the land was proceeding, he did not intend to grant the pharmacy lease to the plaintiff but instead proposed to grant

¹⁰ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [15].

¹¹ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [17].

¹² Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [21].

¹³ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [22]; Annexure LED4.

¹⁴ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [24].

¹⁵ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [25]; Annexure LED5.

¹⁶ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [27].

a lease to Chemist Warehouse.¹⁷ The first defendant's position was confirmed in a letter from its solicitor to the plaintiff on 9 January 2020.¹⁸

9 A copy of the relevant caveat appears as attachment LED 2 to Mr Dyson's affidavit. The interest claimed by the plaintiff is said to arise by virtue of:

An agreement for lease dated in or about 2018 between the registered proprietor as lessor and the caveator as lessee for a term of 5 years commencing on the date of practical completion of the building being constructed or to be constructed on the land described together with 2 option terms each of 5 years.

10 The first defendant contends that the agreement for lease (which throughout the submissions was abbreviated to AFL) terminated on non-fulfilment of a condition subsequent contained in the AFL.¹⁹ The condition in question is found in cl 2 of the AFL. That clause reads as follows:²⁰

2.1 Conditions subsequent

This deed is subject to and conditional upon on or before the Condition Date:

- (a) the Landlord obtaining from every applicable Authority, all necessary statutory, building and other approvals required for the construction of the Development and its permitted use as specified in this deed;
- (b) the Landlord obtaining finance approval to complete the Development, with any such finance approval to be obtained within 60 days of the fulfilment of the condition in clause (a); and
- (c) any terms or conditions imposed by an Authority on the statutory, building and other approvals required for the construction of the Development are acceptable to the Landlord in its sole discretion.

2.2 Benefit of Conditions

The Conditions are for the benefit of the Landlord.

¹⁷ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [40].

¹⁸ Affidavit of Lyndon Edward Dyson sworn 16 June 2020 [41]; Annexure LED11.

¹⁹ First defendant's submissions filed 27 October 2020 [3].

²⁰ Affidavit of Lyndon Edward Dyson sworn 16 June 2020; Annexure LED7.

2.3 Satisfaction of Conditions

The Landlord will use its best reasonable endeavours in relation to the satisfaction of the Conditions and notify the Tenant as soon as reasonably practicable after each is satisfied.

2.4 Non-fulfilment of Conditions

If any of the Conditions are not satisfied on or before the Condition Date then, unless the party benefiting from the Condition waives the necessity for that Condition to be satisfied:

- (a) this deed will terminate;
- (b) any moneys paid by the Tenant to the Landlord under this deed will be repaid together with all accrued interest less any duty and taxes payable on accrued interest;
- (c) each party shall be released from its obligations to perform further this deed; and
- (d) no party will have any claim against any other party.

11 It is the first defendant's position that as a consequence of the conditions subsequent not being fulfilled the AFL has terminated. In response, the plaintiff has seven, separate, but interrelated submissions. They are as follows:²¹

- 1. an estoppel has arisen so that the first defendant is estopped from relying on non-satisfaction of the condition;
- 2. by reason of the estoppel, the time for satisfaction of the condition is extended to the date either the plaintiff or the first defendant gave reasonable notice to the other of termination of the AFL;
- 3. the validity of the purported termination of the AFL in January 2020 is in contest as the termination did not provide for a reasonable period for the conditions subsequent to be satisfied;
- 4. the first defendant was required to use best endeavours in relation to the satisfaction of the conditions and whether it did so is a question of fact which can only be determined after discovery;

²¹ First defendant's submissions filed 27 October 2020 [4].

5. the first defendant notified the plaintiff prior to January 2020 of the satisfaction of the conditions 'by conduct';
6. the plaintiff continues to have the right to enforce the AFL and has a right to a lease; and
7. the first defendant has engaged in misleading or deceptive conduct and unconscionable conduct.

12 There was no difference between the parties as to the applicable principles. The plaintiff must establish there is a serious question to be tried and the balance of convenience favours the extension of the caveat. It is the first defendant's position that the plaintiff fails on both grounds. Furthermore, the plaintiff calls into question the undertaking as to damages provided by the plaintiff. The defendant says there is no adequate evidence the plaintiff could meet an award of damages and costs if its action was ultimately unsuccessful.²²

13 The first defendant points out that cl 2.1(b) (which counsel described as the 'finance condition') required finance approval to be obtained within 60 days of cl 2.1(a) being satisfied.²³ The 'condition date' is defined in the AFL as 31 March 2018.²⁴ The first defendant accepts that by October 2017 the first defendant has commenced the process of obtaining building and other approvals. Therefore the condition in cl 2.1(a) had been satisfied by the condition date.²⁵ In turn, that meant the latest date for approval of finance would be 60 days after the condition date.²⁶

14 The first defendant relies on an affidavit of Ian Frederick Johnson sworn 17 September 2020. Mr Johnson says that his bankers are St George Bank.²⁷ He then says at par 30:

I have other finance arrangements with the Bank but I was advised by my relationship manager at the Bank, namely Brett Douglas, that the Bank was not prepared to provide finance for the project at that stage.

15 That is the extent of the evidence Mr Johnson offers about reasonable endeavours he made to obtain finance. This being an interlocutory application it is not appropriate for me to make any

²² First defendant's submissions filed 27 October 2020 [54].

²³ First defendant's submissions filed 27 October 2020 [19].

²⁴ First defendant's submissions filed 27 October 2020 [18].

²⁵ First defendant's submissions filed 27 October 2020 [20].

²⁶ First defendant's submissions filed 27 October 2020 [21].

²⁷ Affidavit of Ian Fredrick Johnson sworn 17 September 2020 [29].

findings of fact. What I have to determine is whether it is arguable Mr Johnson and the first defendant did not make reasonable endeavours to obtain finance. Given the paucity of evidence offered by Mr Johnson – he being the only person other than his bankers who might be in a position to offer any evidence on this issue – it is clearly arguable the first defendant was in breach of its obligations under cl 2.1(b).

16 Allowing then there is a serious question to be tried as to whether or not the first defendant was in breach of its contractual obligation to use its best endeavours to obtain finance. The question is whether that translates to an interest in land such as would justify the lodging of a caveat. In fact, looking at the other grounds upon which the plaintiff puts its claim – be that estoppel, waiver or ongoing contractual entitlement – the question is whether or not the caveat can be sustained. Here it is important to remember the interest which the plaintiff seeks to protect, is a leasehold interest in yet to be constructed premises. If a building was to be constructed on the premises, then it may be the plaintiff could obtain an injunction to prevent the first defendant leasing those premises to anyone but the plaintiff, the lease to the plaintiff being on the terms and conditions in the AFL. A caveat could then be lodged to protect the plaintiff's leasehold interest. That being the case, there would seem to me, to be no logical reason why the plaintiff could not lodge a caveat to protect an interest created by the AFL rather than the lease itself.

17 In all the circumstances I am satisfied there is a serious question to be tried. I am also satisfied the balance of convenience favours the plaintiff. The whole point of a caveat is to protect the proprietary interest of, in this case, a potential lessor. If the caveat was not in place and the property was sold by the first defendant to a third party who took without notice of the plaintiff's interest, any right or entitlement of the plaintiff to a lease may be lost. In those circumstances, there is no question but that the balance of convenience favours the plaintiff.

18 Nor am I satisfied there is any substance in the first defendant's attack on the wherewithal of the plaintiff to meet any undertaking as to damages. Any doubts about that issue are put to rest by the affidavit of Trent Clinton Wheadon and Elise May Wheadon sworn 19 November 2020. Appearing as attachment TCW/EMW 1 to that affidavit is a document entitled 'Statement of position'. That document clearly indicates the plaintiff has adequate resources to meet any damages for which it might become liable.

MASTER SANDERSON

19 In passing, I should note the caveat lodged by the plaintiff is a subject to claim caveat. Clearly in these circumstances that is appropriate. It means that the first defendant is in a position to transfer the property but can only do so subject to the plaintiff's claim.

20 Clearly this is a matter which should be progressed to trial as soon as possible. The matters at issue are very narrow. On publication of these reasons the parties ought confer with a view to agreeing a program to allow for a trial at the earliest possible date.

21 The costs of this application should be reserved.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CB
Associate to Master Sanderson

19 JANUARY 2021