



Local Court New South Wales

Short Case Title: Zanrush Pty Limited v Donovan Sendall

Jurisdiction: Civil

Date of Hearing: 09/11/2011

Place of Hearing: Downing Centre

Date of Decision: 20/12/2011

Judgment of: Magistrate Bradd

File number: 2011/000933394

Parties: Zanrush Pty Limited and Donovan Sendall

Catchwords: Lease for a period of five years with guarantor – not registered – occupation and payment of rent – tenancy at will – tenant terminates tenancy – another tenant takes up occupation and pays rent – tenant vacates within five year period owing rental and outgoings – whether guarantor of first tenant obligated to meet guaranteed obligations of the lease or indemnity

Legislation Cited: Real Property Act 1900; Real Property Regulation 2008; Conveyancing Act 1919

Cases Cited: Chan v Cresdon Proprietary Limited [1989] 168 CLR 242; Dockrill v Cavanagh [1945] 45 S.R. (N.S.W.) 78; Walsh v Lonsdale 91882) 21 Ch. D. 9; Barecall Pty Limited v David Hoban [2010] NSWCA 269; Total Oil Products (Australia) Pty Ltd v Robinson [1970] 1 N.S.W.R. 701; Ankar Proprietary Limited v National Westminster Finance (Australia) Limited [1986-1987] 162 CLR 549

Legal Representation: Mr Alexander for the Plaintiff
Ms Chan for the Defendant

JUDGMENT

Background

- 1 The case concerns the enforceability of a guarantee given by Mr Sendall to Zanrush Pty Limited (Zanrush).
- 2 In 2004, Zanrush entered into an agreement with Mirage Graphics Pty Limited (Mirage Graphics) for the lease of unit 8, 1 Hordern Place, Camperdown for a term of five years, with an option to renew for a period of five years. Donovan Sendall was named as the guarantor. At the time, Mr Sendall was the sole director and shareholder of Mirage Graphics.

Lease not registered

- 3 As Zanrush intended the land, known as unit 8, 1 Hordern Place, Camperdown, to be leased for a term exceeding three years, Zanrush was required to execute a lease in the approved form.¹ No issue has been taken that the lease is not in the approved form: as per Real Property Regulations, 2008.² It is common ground that the lease was not registered under the Real Property Act.³ The effect of the lease being in the approved form, but not being registered under the Real Property Act is that lease is evidence of an equitable lease.⁴ A tenancy from year to year arises from entry into occupation and payment of rent under an informal lease, including an unregistered lease under the Real Property Act.⁵ By virtue of s. 127(1) of the Conveyancing Act, 1919, where conditions would have previously brought into existence a tenancy from year to year, they

¹ Real Property Act 1900; s. 53

² Real Property Regulation 2008; r.5; and Schedule 2

³ Real Property Act 1900 ss. 42 and 53

⁴ Chan v Cresdon Proprietary Limited [1989] 168 CLR 242 at 248

⁵ Ibid

shall bring into existence a lease at will terminable by a month's notice expiring at any time.⁶

- 4 Counsel for the plaintiff asserts that the section⁷ only applies: "if there is a tenancy, and no agreement as to its duration", whereas the term of the subject lease is for a period of five years. The history of the law prior to the introduction of the section⁸ is described in the judgement of Jordan C.J. in *Dockrill v Cavanagh*⁹, wherein he states:

The phrase "and no agreement as to its duration" means no agreement as to its duration, which at common law, is incorporated in the lease for all purposes... Hence, where the common law would have previously incorporated into the lease such of the terms of an agreement dehors the lease as were applicable to a lease from year to year, it will now incorporate such as are applicable to a lease at will terminable by a month's notice. And where the agreement dehors the lease provides for a term of years, then, if when the period of that term comes to an end, the lease at will has not already been terminated by a month's notice, it is now that lease which becomes automatically terminated without notice.

- 5 *Dockrill v Cavanagh* has been cited with approval in *Chan v Cresdon* for the propositions that:

It is well settled that entry into occupation followed by payment under an agreement for a future lease brings into existence a common law tenancy from year to year, so long as the payment of rent is referable to a yearly tenancy.¹⁰

And:

It has been held that the effect of s. 127(1) is that where conditions would previously have brought into existence a tenancy from year to year, they shall instead bring into existence a lease at will terminable by a month's notice expiring at any time.¹¹

⁶ Ibid at 249

⁷ Conveyancing Act s 127(1)

⁸ Ibid

⁹ *Dockrill v Cavanagh* [1945] 45 S.R. (N.S.W.) 78

¹⁰ *Chan v Cresdon Proprietary Limited* [1989] 168 CLR 242 at 248

¹¹ Ibid at 249

6 In *Chan v Cresdon* it is stated that:

At common law the tenancy from year to year was liable to termination by notice to quit before the expiration of the term contracted for ... A similar tenancy from year to year arises from the occupation and payment of rent under an informal lease, including an unregistered lease of land under the provisions of the Act.

For the purposes of this case "the Act" should be read as a reference to the Real Property Act, 1900.

7 As the subject lease is not registered, a tenancy from year to year has been brought into existence when Mirage Graphics occupied the land and paid rent. The fact of the lease having a term of five years means that it will be determined at the end of the term, unless it has been terminated by a month's notice expiring prior to the end of the term.¹²

What effect does the fact of the lease not being registered have on the guarantee?

8 Counsel for the plaintiff raises the point that an agreement for lease will be treated as an equitable lease for the term agreed upon.¹³ The decision in *Walsh v Lonsdale* "involved no more than giving the Judicature Acts a procedural operation".¹⁴ The issue of the liability of Mr Sendall depends on the wording of the lease. The provisions relating to the guarantee are set out in clause 19.

9 The term "Guaranteed Obligations" is defined. The term "Guaranteed Obligations" means all express and all implied obligations of the Lessee to the Lessor in connection with **the Lease** or any transaction contemplated by it, including:

(a) the obligations in connection with the Lessee's occupation of the Premises under **this Lease**;

¹² Ibid at 248

¹³ Ibid at 252

¹⁴ Ibid at 255

(b) the obligation to pay Annual Rent, the Lessee's Proportion of Operating Expenses together with any of the moneys payable by the Lessee under **this Lease**;

(c) the obligations for all loss and damage on any breach, repudiation or termination of this Lease by reason of default by the Lessee under **this Lease**; and

(d) any indemnity given by the Lessee under **the Lease**;

10 Clause 19.3 Guarantee states:

The Guarantor unconditionally and irrevocably guarantees to the Lessor performance, payment and satisfaction of the Guaranteed Obligations.

11 Clause 19.4 Obligations states:

If the Lessee does not perform, pay and satisfy the Guaranteed Obligations on time in accordance with the terms of **this Lease**, then the Guarantor agrees to perform, pay and satisfy the Guaranteed Obligations to the Lessor on demand from the Lessor (whether or not a demand has been made on the Lessee). A demand may be made at any time and from time to time.

12 Clause 19.4 states in part: "in accordance with the terms of this Lease", which means that the obligations of Mr Sendall are only brought about in the terms of the subject lease, "in its character as a lease",¹⁵ however only a lease at law meets the description of "this lease" for the purposes of the guarantee.¹⁶ As stated in *Chan v Cresdon*¹⁷ though the unregistered instrument is itself ineffective to create a legal or equitable estate or interest in land before registration, the section¹⁸ does not render the unregistered lease inoperative. So an antecedent agreement will be effective, in accordance with the principles of equity, to bring into existence an equitable estate or interest in land. But it is that antecedent agreement, evidenced by the unregistered instrument, not the instrument itself, which creates the equitable estate or interest.

¹⁵ Ibid at 256

¹⁶ Ibid

¹⁷ Ibid at 257

13 In accordance with the law in *Chan v Cresdon*, the fact or the subject lease being unregistered and the guarantee being referable to "the Lease" and "this Lease" means that Mr Sendall has no obligations, because all the guaranteed obligations are referable to "this Lease". The term "the Lease" does not distinguish the subject lease from the lease in *Chan v Cresdon*, the term "the Lease" is a reference to the unregistered instrument, not the antecedent agreement, which created the equitable estate or interest.

14 The plaintiff contends that clauses in the lease relating to waiver and merger are relevant to its claim.

15 Clause 14.4 No waiver states:

The Lessor's entitlement to recover damages from the Lessee will not be affected or limited, amongst other things, by any of the following:

(a) if the Lessee abandons or vacates the Premises;

16 Clause 14.5 Damages over entire Term states:

The Lessor is entitled at any time at its discretion to institute legal proceedings against the Lessee or any other party claiming damages for loss and damage over the entire Term including the period before and after abandonment, termination, repudiation, acceptance of repudiation or surrender by operation of law referred to in this clause, whether the proceedings are instituted before or after such event or conduct.

17 Clause 14.6 Non merger states:

This clause 14 continues after termination of this Lease and does not limit any other right or remedy the lessor may have after termination.

18 Clauses 14.3 to 14.6 do not assist Zanrush as it does not have a recognised lease, it is only the antecedent agreement that is recognised as evidence of an equitable lease. It cannot claim damages without prior

¹⁸ Real Property Act s 41

registration of the instrument, otherwise it is not effective to pass an estate or interest.¹⁹

- 19 The plaintiff submits that Clause 19.8 of the subject lease provides a complete answer to the defence. The clause provides that:

The liabilities of the Guarantor as a guarantor, principal debtor or indemnifier under this guarantee and indemnity are not affected by anything which might otherwise affect them at law or in equity, including one or more of the following:

(i) non-execution by the Lessor or non-registration of the Lease;

As I understand the facts, Mirage Graphics did not fail to pay rent and outgoings due to the lessor; consequently, the Guarantor has no liabilities under the guarantee and indemnity.

What is the effect of Mirage Screen Printing occupying the premises?

- 20 On 30/05/2006, an email was sent from Mirage Graphics to David Taylor, of Taylor Nicholas Pty Ltd, the agent for Zanrush stating:

As of the 01/06/06 Mirage Graphics Pty Ltd will now be known as Mirage Screenprinting Pty Ltd... We intend to trade out of Unit 8/1 Hordern Place CAMPERDOWN under the current lease arrangement. Please advise what the process is from here or if you require any further information.

- 21 Mr Taylor did not take any action on receipt of the email. From June 2006, Mirage Screen Printing paid Zanrush the rent and outgoings due on the lease.
- 22 In October 2006, a court order was made for the winding up of Mirage Graphics.
- 23 Mirage Screen Printing remained in occupation of the premises until June 2009, but from November 2008, no rent or outgoings was paid to Zanrush.

¹⁹ Real Property Act 1900 s 42

- 24 When Mirage Screen Printing took over occupation of the premises, the lease was not assigned to it, nor was the lease registered, consequently, Mirage Screen Printing became a tenant at common law subject to s. 127(1) of the Conveyancing Act. Mr Sendall never signed a guarantee to become a guarantor for Mirage Screen Printing. Mr Sendall never became subject to the "Guaranteed Obligations" in relation to Mirage Screen Printing.
- 25 Clause 19.8 of the subject lease does not change the position, because Mr Sendall was not a Guarantor for Mirage Screen Printing.
- 26 Furthermore, in relation to both Mirage Graphics and Mirage Screen Printing, the clause does not change the position, because the instrument of lease is not recognised at common law or in equity. *Barecall Pty Limited v Hoban*²⁰ confirms that there was no effective guarantee because the lease was not registered.²¹

The Indemnity

- 27 An indemnity is a contract whereby the promisor (the guarantor) undertakes to the promisee (Zanrush) to save the promisee harmless from such loss as the promisee might suffer as the result of entering into a transaction with a third party at the request of the promisor.²²
- 28 Clause 19.5 Indemnity states:

(a) As a separate undertaking, the Guarantor irrevocably and unconditionally indemnifies the Lessor against all liability, loss, costs, charges or expenses (including damages awarded to the Lessor against the Lessee) incurred in connection with:

(i) a breach of the Lease by the Lessee including any breach to pay money;

²⁰ *Barecall Pty Limited v David Hoban* [2010] NSWCA 269

²¹ *Ibid* at 20

(ii) if any of the Guaranteed Obligations are not able to be met by, are not recoverable from or cannot be enforced against the Guarantor under clauses 19.3 and 19.4 or the Lessee, or are not performed, paid and satisfied for any reason;

(iii) the Lessee's occupation of the Premises

(iv) any representation or warranty by the Lessee in the Lease being incorrect or misleading when made or given; or

(v) if the Lessee becomes bankrupt or insolvent or has a liquidator appointed and the trustee or liquidator of the Lessee disclaims the Lease. No disclaimer relieves the Guarantor of its obligations under this indemnity.

29 The indemnity does not apply because Mr Sendall was not the Guarantor for the third party, Mirage Screen Printing. Even if there had been an agreement between Zanrush and Mirage Screen Printing, the indemnity would have no effect because the lease would have been materially altered without consulting Mr Sendall.²³

Estoppel by Convention

30 The plaintiff makes a claim under the principle of estoppel by convention. The plaintiff says that both Zanrush and Mr Sendall agreed or assumed that the lease would apply to Mirage Screen Printing, and Mr Sendall, the sole director and shareholder of Mirage Screen Printing was the Guarantor for Mirage Screen Printing, therefore both parties are estopped from denying that the Mr Sendall is liable to pay the rent and outgoings not paid by Mirage Screen Printing.²⁴

31 There is no doubt that Zanrush adopted that assumption that Mirage Screen Printing were taking over the lease, with Mr Sendall as guarantor, otherwise one would expect that they would have required Mirage Screen Printing to enter into a new lease, and Mr Sendall to sign a guarantee. Did Mr Sendall adopt the same assumption? There is no direct evidence on

²² Total Oil Products (Australia) Pty Ltd v Robinson [1970] 1 N.S.W.R. 701

²³ Ankar Proprietary Limited v National Westminster Finance (Australia) Limited [1986-1987] 162 CLR 549

²⁴ Waterman v Gerling Australia Insurance Company Pty Ltd (2005) 65 NSWLR 300 at [78]

the point. The email to David Taylor is from Mirage Graphics, there is no correspondence from Mirage Screen Printing to the effect that it is taking over the lease, and there is no correspondence from Mr Sendall, save for the email stating that Mirage Screen Printing had vacated the premises. If one takes the view that Ms Goodwin was the agent of Mirage Screen Printing she could only bind Mirage Screen Printing, she could not bind Mr Sendall, as guarantor. There is no evidence that Mr Sendall knew or intended that Zanrush act on the assumption that he would guarantee and indemnify Mirage Screen Printing.²⁵ The email, which is signed, "Roslyn", being Ms Goodwin, the partner of Mr Sendall, specifically requests that Mr Taylor, the agent of Zanrush, advise them of any process, however the email was unanswered. The circumstantial evidence, based on the email evidence is that Mr Sendall made no assumptions.

- 32 The email Mr Sendall sent to Mr Taylor after Mirage Screen Printing had vacated the premises does not assist Zanrush, because in the email, Mr Sendall is speaking as agent for Mirage Screen Printing, not himself. Furthermore, the information contained in the email is evidence after the fact of termination of the tenancy and does not evidence that Mr Sendall had adopted the same assumption as Zanrush at the time Mirage Screen Printing took up occupation the premises.

Conclusion

- 33 In relation to the lease between Zanrush and Mirage Graphics, Mr Sendall has no obligation as a guarantor, or under the indemnity due to the non-registration of the lease. Mr Sendall is not a guarantor in relation to the tenancy of Mirage Screen Printing. Zanrush has not established estoppel by convention. The verdict of the court is for the defendant.
- 34 The plaintiff is to pay the costs of the defendant, who seeks costs on an indemnity basis. If a party wishes to be heard on the issue of costs, the

²⁵ Ibid at [83]

party should give the other party seven days notice of an intention to apply for a costs hearing, and then apply to the registry for such a hearing.