

## FARM LEASING: RIGHTS OF FIRST REFUSAL

Any right of first or last refusal in a lease should be precisely and clearly defined. In particular, the lease should specify the point at which the right lapses, the events that can trigger the right (including any variation), and how an offer is to be made and accepted.

The nature and extent of a first right of refusal clause in a lease of farming land was considered by the Full Federal Court of Australia in [\*Oetra Nominees Pty Ltd v Chipper\* \[2007\] FCAFC 92](#).

A tenant argued that, although it had rejected an offer to purchase the property under a right of first refusal, it was entitled to a second offer based on varied terms after the Owner had made a variation to the contract of sale it had entered into with a third party purchaser.

### Background

Peter Smyth (Smyth) was the registered proprietor of a farm in Western Australia comprising approximately 1,200 acres. Smyth leased the land to Mr and Mrs Chipper (Tenant) by way of a sub-lease. For tax purposes, Smyth structured the lease as a sub-lease with Oetra Nominees Pty Ltd (“Oetra”), a private company owned by the Smyths, and the trustee of the Peter Smyth Family Trust.

The head-lease (between Smyth and Oetra) and the sub-lease (between Oetra and the Chippers) contained a right of first refusal on identical terms. Clause 6(d)(ii) provided that the Tenant would have *“the first right of refusal to purchase the land for the same consideration and conditions as the Property is offered for sale to any other proposed purchaser”*. The clause required the Lessor to *“first give notice of [its] intention to sell the Property”* to the Lessee.

The Lessor put the farm up for sale and found a buyer (Red Valley Pty Ltd) who was prepared to pay \$1,445,000.

While there were a series of offers and counter-offers between the Lessor and the Chippers, the Lessor informed the Chippers of an impending sale with the Purchaser and offered to sell the farm to them for the same price. The Chippers rejected the offer.

Later, the Lessor and the Purchaser varied the terms of the contract of sale. The variation granted the Purchaser an extension of time to consider its satisfaction with the Lease terms, as well as an extension of time to pay the deposit. The variation did not alter the total amount of the purchase price.

Having considered the varied terms, the Chippers argued that the variation enlivened a new right to purchase on terms comprising that variation.

In July 2006, the Chippers commenced proceedings in the Federal Court to restrain the sale from the Owner to the Purchaser and to seek specific performance of a sale from the Owner to them.

The Chippers claimed that, notwithstanding a binding contract had been entered into between the Purchaser and the Owner after they had refused to purchase the property on the same terms, **any** subsequent variation made prior to settlement on terms **more favourable** to the Purchaser (except in circumstances of *de minimis*) triggered a new right to purchase on terms comprising those of

the variation.

The trial judge agreed. On appeal, the Full Federal Court disagreed.

**Findings at Trial:** [Chipper v Octra Nominees Pty Ltd \[2006\] FCA 1633](#)

Jessup J held that even though a binding contract for sale is made with the Purchaser after the holder of the right of first refusal declines to purchase on the same terms, the subsequent negotiation of a variation of contract with the Purchaser on more favourable terms than the original contract should be regarded as a new offer to purchase enlivening the otherwise dormant or exhausted right of first refusal.

His Honour concluded that the Vendor's obligation to give the Lessee an opportunity to be the first to refuse is not necessarily brought to an end by execution of a binding contract for sale between the Vendor and the third party purchaser, but that it continues to operate in respect of a binding contract which has been varied.

Red Valley Pty Ltd appealed this decision to the Full Court of the Federal Court.

**Findings on Appeal:** [Octra Nominees Pty Ltd v Chipper \[2007\] FCAFC 92](#)

The Full Court (allowing the appeal) held that the reference to "sale" in the first right of refusal clause related to the entering into of a binding sale contract, rather than at the point of the actual transfer or conveyance of the property. The Vendor's obligation was discharged on entry into the initial contract for sale. Any pre-emptive right that was exhausted before the initial contract was entered into was not revived as long as the contract stayed on foot.

The Full Court reasoned that:

- Sale occurs upon "*entry into the binding contract for sale which exhausts the right of first refusal and not the "completion", "transfer" or "conveyance" of the property...*" [at para 54]
- *[T]he variation in this case was not significant and not capable of giving rise to a right of rescission or termination, nor does it constitute a new offer to sell .... Any pre-emptive right which was exhausted before the contract was made is not revived as long as the contract, as varied, remains on foot*" [at para 55].
- "*The right is of first refusal, not of first and last refusal. Thus, in the absence of any suggestion of bad faith, prior arrangement, fraud, mistake or misrepresentation, the contract may be later varied between the grantor and the third party purchaser, and this will not revive the right so that a new offer must be made on the varied terms to the grantee. The right is exhausted when an offer to sell is rejected and the offer or a less advantageous offer is accepted by a third party.*" [at para 56]
- "*If the submission advanced by the Chippers [was] accepted then substantial commercial uncertainty [would] ensue in situations where, in the time between the signing of the contract of sale and final settlement, a variation is agreed upon by the parties to the*

*contract of sale, even though the contract of sale is not terminated or rescinded*”[at para 56]

Accordingly, the Court concluded that the Chippers had no interest in the property and that the land could be sold to Red Valley Pty Ltd without having to be re-offered to them.

Notably, the Court did not specify whether a “significant” variation was capable of enlivening the right of rescission or termination, nor whether it was capable of constituting a new offer to sell.

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