37/01; [2001] VSC 179

SUPREME COURT OF VICTORIA

EMHILL PTY LTD & ANOR v BONSOC PTY LTD

Balmford J

10, 11 May, 4 June 2001

CIVIL PROCEEDINGS – RETAIL PREMISES LEASE – CLAIM FOR ARREARS OF RENT AND DAMAGES FOR COST OF REINSTATEMENT OF PREMISES – LESSEE NOT NOTIFIED THAT OPTION TO RENEW NOT EXERCISABLE – LESSOR PURPORTED TO RENEW LEASE BY NOTIFICATION TO LESSOR'S AGENT – CLAIM OF LESSOR UPHELD – WHETHER MAGISTRATE IN ERROR: *RETAIL TENANCIES ACT* 1986, S14(3).

B. filed a complaint in the Magistrates' Court claiming from E. arrears of rent and outgoings in respect of three leases and damages for the cost of reinstatement of the premises. A similar claim was made against C. who executed guarantees for the performance of the obligations of E. under all leases. E. claimed damages for wrongful termination of two of the leases in that B. failed to notify E. in writing of the date after which the option to renew the lease for a further term was no longer exercisable E. purported to exercise the options in two leases by a letter sent to B's agent. Evidence was given by a person employed by B's agent that he went through the premises at the conclusion of the lease by E. and observed that certain parts of the interiors had been removed or changed. A person named Cook executed guarantees for the performance of the obligations of E. under the leases. The magistrate upheld the claim by B. and dismissed the counterclaim by E. Upon appeal—

HELD:

1. Under s14(3) of the *Retail Tenancies Act* 1986 ('Act'), if a retail premises lease contains an option exercisable to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable. B. failed to provide notification to E. as required by s14(3). The conduct of E. did not alter the effect of the failure of B. to serve a notification on E. in accordance with s14(3). In those circumstances, the magistrate was in error in holding that E. was unable to seek redress against B. for non-compliance with s14(3) of the Act. Further, the magistrate erred in law in failing to find that E. was able to raise as a defence the failure of B. to serve the necessary notice pursuant to s14(3) of the Act.

2. In relation to the claim for damages for reinstatement of the premises, it was open to the magistrate to conclude that there was evidence to find that the damage occurred to the premises by the time E. vacated the premises.

3. There is no general rule in relation to guarantees. The question must always be one of construction of the particular guarantee. In the present case, the guarantee provided that "the lessor shall be at liberty to act as though the guarantor was the principal debtor". In those circumstances, it was open to the magistrate to find that Mr Cook was liable under the guarantees despite the fact that there had been no demand served on Mr Cook prior to the issue of the proceeding.

BALMFORD J:

Introduction

1. This is an appeal pursuant to section 109 of the *Magistrates' Court Act* 1989, which provides that a party to a civil proceeding in the Magistrates' Court may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding.

2. This matter arises out of the lease by the respondent ("Bonsoc") to the firstnamed appellant ("Emhill") of three adjoining units in Gladstone Street, South Melbourne. The lease of Unit 1 ("the Unit 1 lease") was for a term of three years commencing on 1 November 1993. The lease of Unit 2 ("the Unit 2 lease") was for a term of two years commencing on 1 November 1994. The lease of Unit 3 ("the Unit 3 lease") was for a two year term commencing on 22 January 1996. The secondnamed appellant ("Mr Cook") executed guarantees for the performance of the obligations of Emhill under all three leases.

3. In November 1998 Bonsoc filed a Complaint in the Magistrates' Court claiming from Emhill arrears of rent and outgoings in respect of all three leases and damages, being the cost

of reinstatement of the premises. A similar claim was made against Mr Cook under the terms of the guarantees.

4. In its Amended Counterclaim filed on 13 August 1999 Emhill claimed damages for wrongful termination of the Unit 1 and Unit 2 leases, in that Bonsoc had failed to provide a notification to Emhill pursuant to section 14(3) of the *Retail Tenancies Act* 1986 as in force at all relevant times ("the Act"), and accordingly those leases did not expire on 31 October 1996, but continued in existence until three months after the giving of such a notice.

5. The order appealed from is the order of Mr D Reynolds, Magistrate, in the Magistrates' Court of Victoria at Melbourne on 25 February 2000, that the appellants pay Bonsoc on the claim $27,630.30 for rent, outgoings and reinstatement of premises together with interest of $8,182.90 and costs of $9,398.00 and that the counterclaim of Emhill be dismissed.

6. By Order made on 12 April 2000 Master Wheeler found that the questions of law shown by the appellants to be raised by the appeal were (omitting references to exhibits and to the reasons for decision of the Magistrate):

> (a) whether the Learned Magistrate erred in law in holding that by reason of the conduct of Emhill as tenant it was unable to seek redress against Bonsoc for non compliance with section 14(3) of the *Retail Tenancies Act* 1986 ("the Act")?
>
> (b) whether the Learned Magistrate erred in law in failing to find or consider that Emhill as tenant was able to raise as a defence the failure of Bonsoc as landlord to serve the necessary notice pursuant to section 14(3) of the Act?
>
> (c) whether there was any evidence to support the Learned Magistrate's findings that: (i) Emhill as tenant was obliged to reinstate the ceiling panels to Unit 2; (ii) the said ceiling panels were in any different condition at the end of the lease to their condition at the commencement of the lease for Unit 2?
>
> (d) whether there was any evidence to support the Learned Magistrate's finding that Emhill as tenant was liable for the balance of the reinstatement works?
>
> (f) whether the Learned Magistrate erred in law in finding that Mr Cook was liable under the guarantees for the leases for Units 1 and 2 when it was common ground there had been no demand served on Mr Cook prior to the issue of the proceeding?

The appellants did not proceed to argue question (e) which can accordingly be ignored.

Questions (a) and (b)

7. The relevant provisions of section 14 of the Act are set out below. The Act was repealed by section 50 of the *Retail Tenancies Reform Act* 1998 ("the Reform Act"). However, by virtue of section 4 of the Act and section 52(1) of the *Reform Act*, the Act continues to apply to the leases with which this appeal is concerned, and to the dispute giving rise to the appeal.

> **14. Options to renew**
> (3) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable at least 3 months before that date.
>
> (4) If a landlord fails to notify a tenant as required by sub-section (3), the retail premises lease is to be taken to provide that the date after which the option is no longer exercisable is the day that is 3 months after the landlord gives the tenant the notice required by that sub-section and, if that date is later than the date of the expiry of the term of the lease, the lease continues, subject to sub-section (9), until that date.
> …
>
> (8) The terms and conditions upon which a lease that continues by virtue of sub-section (4) … is held are the same as those upon which the lease was held immediately before it was continued.
>
> (9) If a landlord fails to notify a tenant as required by sub-section (3) … , the tenant may, by written notice given to the landlord, determine the lease as from any day that is -
> (a) not earlier than the expiry of the term of the lease; and

> (b) not later than the day to which the lease would otherwise have continued by virtue of sub-section (4) ...

It is not in issue that each of the Unit 1 and 2 leases was a "retail premises lease" in terms of sub-section 3(4) of the Act and contained an option of the kind described in sub-section 14(3), and that no notification in accordance with that provision was served on Emhill by Bonsoc.

8. Emhill purported to exercise the options in both leases by a letter sent to Dixon Kestles Pty Ltd, the agent acting for Bonsoc in respect of the properties, on 15 July 1996, which was within time. However, the Magistrate found, on the authority of the decision of O'Bryan J in *Alroth Pty Ltd v Forty Fourth Proposal Pty Ltd* (unreported, decided on 29 October 1986) that the giving of notice to the agent rather than to the landlord did not constitute a valid exercise of the options. That finding is not in question. I note that the option clause in the two leases are relevantly in the same form as those with which the Court was concerned in *Alroth*.

9. The transcript of the proceeding in the Magistrates' Court, including the reasons for decision of the Magistrate, has clearly not been prepared by a professional transcription service, and contains a number of manifest errors. The relevant passage on page 14 of the transcript of the reasons follows, with some corrections included in square brackets which represent what appear to me to be likely to have been the words used by the Magistrate:

> Emhill was aware of the requirement under the lease provided and notification of intention to exercise the options to renew not less than three months prior to the expiration of the term as evidenced by the letter of 15th July 1996 addressed to Di[x]on Kestles which is Exhibit E. In light of the decision [of O'Bryan J in *Alroth*] giving notice to the agents rather than the landlord does not constitute a valid exercise of the option. I note the ???????? of Mr Justice [Byrne] in the unreported decision in March 1989 at Braddon Pty Ltd ats Seakrist who considers [an] estoppel waiver or agreement may obviate compliance with the section 14 notice. In the exchange of correspondence between the solicitors for the landlord and tenants of September and October 1996 while there is reference on behalf of Emhill to rights under the Retail Tenancies Act there is no specific reference to the section 14 notice requirement. I understand the evidence of Mr Peirce, Emhill's solicitor at the time to be that in 1996 he had not consulted Counsel regarding the Retail Tenancies Act provisions. By letter of the 16th October 1996 to the Plaintiff's solicitors, Emhill's solicitors asserted to their client or Emhill's solicitors rather arrived that their client [re]serve its right to be granted a renewal [of] the leases of units 1 and 2 but in a letter two days later notices were given of Emhill's intention to vacate units 1 and 2[. O]n the 13th November 1996 Emhill did vacate units 1 and 2. I'm satisfied that by the reason of foregoing circumstances that Emhill is unable to seek redress against Bonsoc for non-compliance [with] section 14 [of] the Act. The preconditions for the valid exercise of the options [to] renew the leases for units 1 and 2 were not fulfilled and the leases were determined by [ef]fluxion of time.

10. It is common ground that where the transcript reads "Braddon Pty Ltd ats Seakrist" the Magistrate was referring to paragraphs 21 and 22 of the judgment of Byrne J in *Apriaden Pty Ltd v Seacrest Pty Ltd* [1999] VSC 34; (1999) V Conv R ¶54-598 which read, so far as relevant:

> 21. In the circumstances of this case, the meaning of s14(3) is clear. A notice must be given at least three months before the last date for exercise of the option. If such a notice is not given, an ineffective exercise of the option does not [a]ffect this failure. ...
>
> 22. I put to one side the possibility that the impact of this legislative regime may be affected by waiver, estoppel or some agreement between the parties. These matters did not arise in the present case and no argument was presented as to them. Accordingly, I express no view as to this.

It does not appear to me that His Honour, who was careful to state that he expressed no view on the matter, is expressing the view that "estoppel waiver or agreement may obviate compliance with the section 14 notice". The matter went on appeal (*Seacrest Pty Ltd v Apriaden* [2000] VSCA 75; (2000) 1 VR 567; [2000] V Conv R 54-625) and the members of the Court of Appeal, like Byrne J, had no need to decide the point.

11. I note, however, that Ormiston JA said at 577:

> ... agents and solicitors should warn client lessors that the statute requires a notice in all cases. It cannot be for the lessor to determine finally whether or not an option is exercisable; nor does the statute allow the lessor to assume at least that the lessee knows of its rights because of some informal

> intimation from the lessee that it will (or will not) exercise the option on time. … If the lessee does exercise the option, the section will become irrelevant; if it does not exercise it, the only relevant intimation by a lessee is one which will satisfy sub-s 14(9) …

Brooking JA, with whom Ormiston and Phillips JJA agreed, said at 573-4:

> [The introductory words of sub-s (4)] state the only express condition of the operation of sub-s (4). In the present case, the only express condition of the operation of sub-s (4) having been fulfilled, the sub-section is to operate according to its tenor unless it can be said that some event has occurred which, on the proper construction of the section, is by implication to have some effect that can be precisely stated by way of cutting down the operation of the sub-section: *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 302; (1988) 38 A Crim R 412 per McHugh J. …
>
> It is unnecessary for us to decide what effect the purported exercise of the option on 29 January 1998 would have had if it had been in all respects effectual, although I may say that I have little doubt that, one way or another, it would have been possible to arrive at a satisfactory resolution of the question how sub-s (4) was to be squared with the effective exercise of the option, on the basis that Parliament must have intended that the statutory extension of the term should not stand in the way of the creation of the new term upon which the parties had agreed. But, as I say, that is not this case on the facts.

12. None of those passages can be relied on as authority for the proposition put forward by the Magistrate. What they indicate is that, taking into account the purpose of the legislation, Parliament must have intended that in circumstances where no notice had been given under section 14(3), a valid exercise of the option should nevertheless be honoured. As in *Apriaden*, that is not this case on the facts. The conduct of Emhill does not alter the effect of the failure of Bonsoc to serve a notification on Emhill in accordance with section 14(3). Accordingly, the answer to each of questions (a) and (b) must be Yes.

Questions (c) and (d)

13. In *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 Stephen J said:

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring, CJ, in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41).

14. Counsel referred me to numerous passages in the evidence before the Magistrate setting out observations of damage to the premises. None of those passages mentioned the time at which the observations had been made. However, the following extract from the evidence of Mr Pratt, from Dixon Kestles Pty Ltd, Bonsoc's agent, appears at page 6 of the transcript of the hearing before the Magistrate, (with emphasis added):

> Mr Pratt: <u>At the conclusion of the lease when I went through the premises</u> substantial areas of the suspended ceiling had been removed and partitions had changed as well Magistrate: Sorry, the . . . Mr Pratt: Areas of the suspended ceiling had been removed, the partitioning had been changed or removed and then we subsequently found that the air conditioning system had been removed as well.

15. Mr Pratt gave evidence that after Emhill left, Units 1 and 2 were let for a short time to a tenant called "Rooster Productions". He was unable to say whether the property had changed during that time. He had arranged for Mr Humphris, a builder, to give a quote for reinstatement, and it appeared from correspondence that that arrangement was made some seven months after Emhill vacated the property.

16. The submission of Mr Connor, for the appellants, was that this evidence indicated that

there was a period of seven months between Emhill's vacating the premises and Mr Pratt's inspection, during which period the premises were occupied by Rooster Productions. Accordingly the Magistrate could not, in his submission, be satisfied as a reasonable man that any damage requiring reinstatement had occurred during Emhill's lease.

17. However, one would expect that the agent would have had the premises inspected when they were vacated, as the evidence of Mr Pratt indicated was done. The passage cited in paragraph 14 above is clear evidence on which the Magistrate could find that damage had occurred to the ceiling and otherwise by the time of the conclusion of Emhill's lease. Accordingly, the answer to questions (c) and (d) must be Yes.

Question (f)

18. The Unit 1 and Unit 2 leases are effectively identical, while the Unit 3 lease is drafted in different terms. Thus question (f) does not relate to the Unit 3 lease. The first sentence of the guarantee clause in the Unit 1 and 2 leases occupies the greater part of one A4 page, and is followed by two short sentences, with no paragraphing. For present purposes, the clause may, for ease of reading, be summarised, abbreviated and paragraphed as follows, with emphasis added:

> [In consideration of the lessor having agreed to lease to the lessee at his request, the guarantor agrees that the lessee will pay to the lessor the rent and other moneys payable by the lessee and perform the conditions of the lease] and if at any time default shall be made in the punctual payment of the said rental … the guarantors [*sic*] will on demand pay to the lessor the whole of such rental and other moneys … and … if at any time default shall be made in the … performance of any of the … conditions of the said lease … the guarantor will on demand pay and make good all losses … incurred by the lessor … and … the guarantor will indemnify … the lessor from and against all loss of rental … and expenses … and the guarantor agrees that … the guarantor shall not be released by … any thing whatsoever which under the Law relating to the sureties [*sic*] would but for this provision have the effect of releasing the guarantor … In order to give effect to this guarantee the guarantor declares that the lessor shall be at liberty to act as though the guarantor was the principal debtor and the guarantor hereby waives all or any of its [*sic*] rights and sureties which may be at any time inconsistent with any provision hereof. Where the guarantor comprises two or more parties … bind … jointly and each of them severally.

19. The drafting of the clause is, as already indicated, less than perfect. The question before me arises from the conflict between the two undertakings by the guarantor to pay "on demand", emphasised above by single underlining, on the one hand and the two passages emphasised by double underlining, including the "principal debtor" clause, on the other hand.

20. As Walton J said in *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358; [1975] 1 WLR 1474 at 1482, "When faced by a document which is on its face badly drawn, the court is always in a difficult position". His Honour at 1483 assumed, expressly without deciding, that the "principal debtor" clause obviated the necessity for a demand to be made before the issue of proceedings. In that case, it was not necessary for him to decide the point, however, because the making of the demand changed a liability to pay a debt by instalments into a liability to pay the whole debt at once. That being so, he found the making of the demand to be a necessary prerequisite of the cause of action.

21. In *Re Taylor; Ex parte Century 21 Real Estate Corporation* [1995] FCA 1335; (1995) 130 ALR 723 at 726-7 Burchett J in the Federal Court referred to the emphasis in high modern authority on the construction of the particular document and continued:

> In *Moschi v Lep Air Services Ltd* (also called *Lep Air Services v Rolloswin Ltd*) [1973] AC 331 at 344; [1972] 2 All ER 393, Lord Reid said: … I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means. Lord Diplock said (at 349): Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends upon the words in which the parties have expressed the promise. Even the use of the word "guarantee" is not in itself conclusive. It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to mis-describe what is in law a contract of indemnity and not of guarantee. Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from its being classifiable as a guarantee. Every case must depend upon the true construction of the actual words in which the promise is expressed.

His Honour went on at 730 to consider the authorities and concluded that "No generalisation is possible: the question must always be one of construction of the particular guarantee."

22. In *MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (in liquidation) & Ors* [1993] Ch 425; [1993] 3 All ER 769; [1993] 3 WLR 220 Hoffman LJ at Ch 436 expressed his agreement with what he described as the "provisional view" of Walton J and continued:

> The right to a demand before liability can accrue is not inherent in the nature of suretyship and will not be implied unless expressly provided. There seems accordingly no reason why the parties should not modify the effect of such a provision.

On appeal, Dillon LJ said at 447 that the question was essentially one of the construction of the contract.

23. In *Benson-Brown v Smith* [1999] VSC 208 Ashley J was concerned with a document essentially similar to the leases with which I am concerned. He considered the authorities to which I have referred and at [147] found that the clause requiring a demand was inapplicable to a claim under the "principal debtor" clause. He gave a number of reasons for that finding, of which the following are relevant to the matter before me:

- that it was open to the parties to define the nature of their relationship;

- that the courts have at times been influenced by the language freely chosen by men of business;

- that there is a definite trend against treating a principal debtor arrangement as requiring, save in circumstances which plainly require it, an obligation to make demand before pursuing a claim; and that no such circumstances arose in the case before him;

- that even if an attempt to create a principal debtor failed, it did not mean inevitably that there must be demand before a claim was pursued; the fact that the parties had attempted to create such an arrangement might be thought to tell strongly against the need for a demand, it being a usual concomitant of such an arrangement that prior demand was not required.

24. In that case, His Honour also noted that the "principal debtor" clause expressly set up a separate and additional obligation. This is not the case with the clause with which I am concerned. However, in my view, the inclusion of that clause as a separate sentence, in the context of the guarantee read as a whole, is an indication that that was what the parties intended.

25. Mr Connor submitted that Mr Cook was sued as guarantor and not as principal debtor and accordingly could not be bound as principal debtor. However, the effect of the second last sentence of the guarantee is not to transform the guarantor into the principal debtor, but to render the lessor "at liberty to act as though the guarantor were the principal debtor", which is not the same thing.

26. In my view, when the contract is construed in the light of the matters set out in paragraphs 24 and 25 above, the answer to question (f) must be No.

27. In summary, I find the answers to the questions before me to be:
(a) Yes (b) Yes (c) Yes (d) Yes (f) No.

28. I invite submissions from counsel as to the orders to be made as a result of my findings and as to costs.

APPEARANCES: For the Appellants Emhill Pty Ltd & Anor: Mr CA Connor, counsel. Lewis & Weir, solicitors. For the Respondent Bonsoc Pty Ltd: Mr GD Bloch, counsel. Holding Redlich, solicitors.
