36/84

SUPREME COURT OF VICTORIA

RIPKA PTY LTD v MAGGIORE BAKERIES PTY LTD

Gray J

26, 27, 30 April, 1-4, 7, 11 May 1984 — [1984] VicRp 53; [1984] VR 629

LANDLORD AND TENANT – LEASE - BREACH OF – CLAIM FOR POSSESSION – LEASE TERMINATED BY LESSEE'S REPUDIATION – WHETHER DOCTRINE OF REPUDIATION APPLIES TO LEASES – WHETHER CONDUCT OF LESSEE SUFFICIENT TO JUSTIFY REPUDIATION – ACCEPTANCE OF REPUDIATION BY LESSOR – WHETHER LESSOR'S SUBSEQUENT CONDUCT AMOUNTED TO WAIVER OF LESSEE'S BREACH.

Due to M.'s default in payments of rent of leased premises, R. accepted M.'s repudiation, terminated the lease and sought a writ of possession. Upon the return of the writ, M. argued that the principle that a contract may be terminated by the acceptance of a repudiation has no application to a lease. Further that M.'s conduct did not amount to a repudiation of the lease, and that the lessor's subsequent conduct amounted to a waiver of M.'s breach.

HELD: Order that a writ of possession issue.
(1) The principle that a contract may he terminated by the acceptance of a repudiation has general application to leases, and applies to the lease between the parties.
***Highway Properties Ltd v Kelly Douglas & Co Ltd* (1971) 17 DLR (3d) 710; [1971] SCR 562, applied;**
***Total Oil GB Ltd v Thompson Garages (BH) Ltd* [1972] 1 QB 318; [1971] 3 All ER 1226, not followed.**

(2) The lessor's conduct subsequent to the written notice of acceptance did not amount to a waiver of the lessee's breach.

(3) The lessee's default in rent and other payments evidenced an inability to perform the contract.

GRAY J: *[After setting out the facts and dealing with the question whether there was evidence of representation by the lessor sufficient to found an estoppel, His Honour continued]:* … **[11]** The next issue which calls for consideration is whether the principle that a contract may be terminated by the acceptance of a repudiation has any application to a lease. There appears to be no direct authority upon this point in Australia. The question has been answered affirmatively in the Supreme Court of Canada and negatively by the Court of Appeal in England. **[12]** The judgment in the Canadian case *Highway Properties Ltd v Kelly Douglas & Co Ltd* (1971) 17 DLR (3d) 710; [1971] SCR 562 was delivered on 1st February 1971. The judgment of the Court of Appeal in *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 WLR 979; [1971] 3 All ER 1226) was delivered on 7th October 1971, but the *Highway Properties case* was not referred to.

In the *Highway Properties case*, the judgment of the Court was delivered by Laskin J. In what was later described by Lord Wilberforce as "an instructive judgment" – *National Carriers Ltd v Panalpina Ltd* [1980] UKHL 8; [1981] AC 675 at 696; [1981] 1 All ER 161 at 172; [1981] 2 WLR 45 at 49; [1981] ANZ Conv R 73 Laskin J considered the Canadian, Australian, English and American authorities which touched upon the question and concluded at p721 –

> "It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land."

In the *Total Oil case*, the appeal was from the grant of an interlocutory injunction restraining a service station operator obtaining petrol from a source other than the plaintiff company. The defendant held the premises under a lease which provided that all motor fuel should be supplied by the plaintiff. After a dispute about payments for fuel, the plaintiff, contrary to the terms of the lease, insisted on a bank cheque prior to delivery. The defendant obtained fuel supplies

elsewhere. The plaintiff applied for an interlocutory injunction. The defendant contended that the plaintiff had repudiated the lease by demanding payment before delivery, which repudiation **[13]** had been accepted. If this analysis was correct, the lease itself would be terminated, which was a consequence not desired by the defendant. When the matter reached the Court of Appeal, the principal judgment of the Court was delivered *ex tempore* by Lord Denning MR. After pointing to the difficulty created for the defendant by the application of the repudiation doctrine, Lord Denning dealt with the matter in the following terms, at p324 -

> "The second point is: what is the effect of the repudiation by the oil company which was accepted by the dealer? Does it put an end to the lease? I think not. A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance. There is no authority on the point, but there is one case which points the way. It is *Leighton's Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493; [1943] 2 All ER 97 *sub nom. Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221; [1945] 1 All ER 252. Lord Russell of Killowen and Lord Goddard at pp234 and 244, were both of opinion that frustration does not bring a lease to an end. Nor, I think, does repudiation and acceptance."

The passage quoted represents the extent of the Court's consideration of the present point. The statement concerning *Cricklewood's case* is somewhat incomplete because although Lord Russell and Lord Goddard were of opinion that frustration could not apply to a lease, Lord Wright and Viscount Simon LC were of the contrary view. Lord Porter expressed no view, so judicial opinion was equally divided. In any event, the question of the applicability of the frustration doctrine to a lease has now been settled in England. **[14]** In the *National Carriers case* (*supra*) the House of Lords held that the frustration doctrine was applicable to a lease. At p690, Lord Hailsham said-

> "I conclude that the matter is not decided by authority and that the question is open to your Lordships to decide on principle. In my view your Lordships ought now so to decide it. Is there anything in principle which ought to prevent a lease from ever being frustrated? I think there is not. In favour of the opposite opinion, the difference in principle between real and chattel property was strongly urged. But I find it difficult to accept this, once it has been decided, as has long been the case, that time and demise charters even of the largest ships and of considerable duration can in principle be frustrated."

At p96, Lord Wilberforce refers with approval to the passage in Laskin J's judgment in the *Highway Properties case* to which I have already referred. At p703, Lord Simon refers to Laskin J's judgment as being "Less directly in point but important and relevant for its general reasoning". At p716 Lord Roskill also cites the stated passage in Laskin J's judgment in support of his opinion. In my view, the judgments delivered in the *National Carriers case* implicitly accept the correctness of the judgment in the *Highway Properties case*.

Nowhere is to be found any reference to the contrary judgment in the *Total Oil case*, although it was cited in argument. Having regard to the removal of the foundation (*Cricklewood's case*) upon which the *Total Oil* judgments were based, I consider that the *Highway Properties case* stands as the foremost direct authority relevant to the present point. Furthermore, it has enjoyed the recent uncritical references by the judges of the House of Lords to which I have referred.

[15] The present point was recently raised in the High Court in *Shevill v The Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620; [1982] 56 ALJR 793; [1982] 42 ALR 305. In the result, the Court held that the lessee's conduct did not amount to a repudiation. But in determining that question, the members of the Court assumed the applicability of repudiation to a lease. At p794, Gibbs CJ said –

> "This argument proceeded on the basis that the general principles of the law of contract, so far as they are relevant to the questions that arise in this case, are equally applicable to leases. A contrary view was expressed in *Total Oil v Thompson Garages* [1972] 1 QB 318; [1971] 3 All ER 1226, where Lord Denning MR said, at p324, that repudiation which is accepted does not put an end to a lease; he said that a lease, being a demise, does not come to an end like an ordinary contract on repudiation and acceptance, and drew an analogy with the case of frustration. The learned authors of Brooking and Chernov: *Tenancy Law and Practice in Victoria* (2nd ed), at p197, dispute this view and cite a number of cases, from New Zealand and Canada as well as from Australia, which in their opinion support the conclusion that a lease may be determined by an acceptance of a repudiation. I need not enter upon this controversy. I am content to assume that the ordinary principles of contract law are applicable."

The passage in Brooking and Chernov to which Gibbs CJ refers, contains references to a number of decisions in which the applicability of repudiation to a lease seems to have been accepted. I refer in particular to the Victorian cases – *Parsons v Payne* [1945] VicLawRp 3; [1945] VLR 34 at 39; [1944] ALR 359; *Australian Safeway Stores Pty Ltd v Toorak Village Development Ltd* [1974] VicRp 32; [1974] VR 268 at 274; (1973) 31 LGRA 112. One apparent instance of the doctrine of repudiation being applied to a lease is provided by *Wilson v Finch Hatton* [1877] 2 Ex D 336. In that case the defendant had entered into a lease of a furnished house. Upon arriving at the premises, **[16]** the defendant found the house in a dilapidated condition. He declined to occupy the house or pay rent. In an action to recover rent, the jury found for the defendant. Upon appeal, the issue was whether there was an implied condition to the lease that the premises were habitable. In the course of the judgment of Kelly CB (at 342) he said,

> "The same reason when applied to the present case, shews clearly that the lessee of this house is entitled to repudiate the lease because she did not get what she contracted for."

The case does not appear to have been discussed in the present context. It may be, as Mr Hayne contends, that it is a special case depending upon an implied condition precedent relating to the inception of a tenancy only. However, no such limitation emerges from the judgments. In the cases, both in relation to repudiation and frustration, the view is sometimes expressed that the fact that a lease creates an interest in land stands in the way of extending contractual remedies to a lease. This objection was brushed aside by the judgments in the House of Lords in the *National Carriers case* in relation to frustration and by the Canadian Supreme Court in the *Highway Properties case* in relation to repudiation.

In this case, Mr Hayne adopted the same ground for his submission that repudiation does not apply to a lease. **[17]** When pressed to indicate what difficulty flowed from the fact that an interest in land is created, he pointed to problems which he contended may arise in the case of an assignment of the term or the reversion. He submitted that if A leases land to B and B assigns the term to C, then a repudiation by B may imperil the interest in land acquired by C upon the assignment. This is said to be so because if B repudiates his obligations under the lease and A accepts the repudiation the estate in C will be brought down, because it derives from the interest of B. This may be accepted, however unlikely such a state of affairs may appear. But the same result will follow if A terminates his lease with B for any other reason, e.g. by Notice under the lease. In *National Carriers* Lord Hailsham (at p691) cited with approval the following passage from the judgment of Atkin LJ in *Matthey v Curling* (1922) 2 AC 180 at 199-200 -

> " ... it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events – namely, those which in an ordinary contract work a frustration."

Moreover, as Dr Pannam pointed out, upon B assigning the term to C, A and C can sue each other on the covenants in the lease provided that they touch and concern the land. *Spencer's case* [1583] EWHC J53 (KB); 77 ER 72; [1583] 5 Co Rep 16; [1558-1774] All ER Rep 68. If A assigns the reversion to X, X may sue or be sued by B upon the covenants in the lease, provided the covenants have "reference to the subject matter of the lease" Section 141 *Property Law Act* 1958. **[18]** Accordingly, the assignees of both the leasehold estate and the reversion are liable upon and are entitled to the benefit of the covenants in the lease despite the fact that there may be no relationship of contract. In practice, in the case of the assignment of the term by B to C, some form of novation is likely to occur by reason of a payment of rent by C to A or otherwise. In the absence of novation, a payment of rent by C to A may be treated as a payment by B.

In view of the foregoing, I am not persuaded that any significant problem stemming from the assignability of interest, will flow from the application of the repudiation doctrine to a lease. It is well established that the repudiation doctrine extends to a contract for the sale of land, notwithstanding that the purchaser obtains an equitable estate in land, capable of being transformed into a legal estate by a decree for specific performance – *Walters v Cooper* [1967] VicRp 64; [1967] VR 583; *Poort v Development Underwriting (Victoria) Pty Ltd (No.2)* [1977] VicRp 52; [1977] VR 454. The repudiation principle also applies to an agreement to give and take a

lease, which likewise can be ordered to be specifically performed. *Dimond v Moore* [1931] HCA 12; (1931) 45 CLR 159; [1931] ALR 177; *Leitz Leeholme Stud Pty Ltd v Robinson* [1977] 2 NSW 544; *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1982] NSW Conveyancing Reports 655- 99. The foregoing considerations have persuaded me that the doctrine of repudiation has general application to leases. However, for the purposes of this case, it is only necessary to **[19]** hold that the doctrine applies to the present lease in which the lessor and lessee are the original contracting parties.

The next question is whether the conduct of the lessee, as at 29th February 1984, amounted to a repudiation of the lease sufficient to enable the lessor to bring the lease to an end by its acceptance of the repudiation. It is true, as Dr Pannam submitted, that the lessor can rely upon any repudiatory conduct of the lessee, whether or not it was known to the lessor at the time of acceptance – *Chitty on Contracts* 25th edn. Vol. 1 para 1599; *Aidinis v Hotchin* [1971] SASR 446. However, I do not find it necessary to go beyond the matters known to the lessor which are particularized in its Notice of acceptance of repudiation given to the lessee on 29th February 1984. At that time, the rent was in arrears to the extent of $160,488.80. This meant that approximately half the rent had been paid over an eight month period. A further amount, in excess of $35,000 for rates, taxes and stamp duty remained unpaid. These defaults were accompanied by repeated statements on behalf of the lessee that it was unable to pay the rent due and the other charges. Furthermore, a number of the lessee's cheques were dishonoured upon presentation.

The various ways in which a contract may be repudiated has been recently considered by the High Court in *Shevill's case* [1982] HCA 47; (1982) 149 CLR 620; (1982) 42 ALR 305; 56 ALJR 793. In the judgment of Gibbs CJ, in which Murphy and Brennan, JJ agreed, it is pointed out (at p795) that a **[20]** repudiation occurs if a party, even if he wishes to perform the contract, shows himself unable to do so in a way that makes further commercial performance of the contract impossible. In this case, the massive defaults in rent and other payments, coupled with a stated inability to pay, does, in my opinion, evidence an inability to perform the contract. Furthermore, when one has regard to the lessor's obligations to its financiers, it can be said that the default goes so much to the root of the contract that it makes further commercial performance of the contract impossible.

The remaining live issue concerns a defence based upon certain events which occurred after the issue of the writ. The plaintiff's claim in the action for possession is based upon the applicability of the repudiation doctrine to this lease. Because of the uncertainty in that area, the plaintiff's advisers decided to mount an alternative claim based upon a termination of the tenancy under the terms of the lease.

Clause 3(a) of the lease is, so far as presently relevant, on these terms –

> If and whenever the rent hereby reserved or any part thereof shall be in arrears for fourteen days and the Lessor has made a legal or formal demand for the payment thereof ... it shall be lawful for the Lessor after providing to the Lessee fourteen days in which to rectify (the) breach to determine this Lease."

The cumbersome nature of this provision has caused most of the difficulty in this case and forced the plaintiff to rely upon the repudiation doctrine. On 4th April 1984, the plaintiff served a written demand for rent upon the defendant. On the following day **[21]** a notice was given to the defendant requiring it to remedy the breach within fourteen days. Each document expressly stated that the plaintiff contended that the tenancy had been terminated on the 29th February 1984 and that the document was only to have effect if the Court held otherwise. In due course, a fresh writ was issued on Easter Saturday in which the alternative claim for possession was made.

Mr Hayne was given leave to amend the defence in this action, to plead a waiver of the defendant's breach and an election on the plaintiff's part to treat the tenancy as being on foot. Mr Rayne contended that the plaintiff's conduct was consistent only with a recognition of the existence of the lease and that the expressed disclaimers were of no effect. He referred to such cases as *Segal Securities Ltd v Thoseby* [1963] 1 QB 887; [1963] 2 WLR 403; [1963] 1 All ER 500 where acceptance of rent "without prejudice" was held to operate as a waiver. But in all the cases referred to by Mr Hayne, the lease or contract had not been terminated when the conduct said to be a waiver occurred. If I am correct in the opinion already expressed, this tenancy came to an

end on 29th February 1984. In that event, it follows that no question of waiver or election can therefore arise. Upon that view of the facts, the plaintiff's notices given in April 1984 are mere nullities. This inescapable conclusion is expressed in a number of decided cases. In *Majala Pty Ltd v Ellas* [1949] VicLawRp 19; [1949] VLR 104; [1949] ALR 192 Herring CJ (at p109) (at p197 ALR) said -

> "Once, then, it is established that the lessor has knowledge of the existence of a cause of forfeiture and of his consequent right to re-enter, he has an election, and the doing of an unequivocal act in either direction determines that election for ever."

There are a number of judicial statements to precisely the same effect. Among them are:- *Evans v Enever* [1920] 2 KB 315 per Coleridge J at p320; *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347 per Russell J at p358; *Thorburn v Buchanan* (1871) 2 VR (L) 169; 2 AJR 109 per Barry ACJ at p173 VR.

Accordingly, I have no hesitation in concluding that the tenancy, having been brought to an end on 29th February 1984 was not brought to life by any subsequent event.

Solicitors for the plaintiff: Schetzer, Brott and Co. Solicitors for the defendant: Darvall McCutcheon.
