28/88

SUPREME COURT OF VICTORIA — FULL COURT

FINIS & ORS v FITZWILLIAM SQUARE PTY LTD

Fullagar, Gray and Tadgell JJ

9 May 1988

LANDLORD AND TENANT – RENT – RECOVERY – PREMISES RELET – WHETHER PREVIOUS TENANCY TERMINATED – WHETHER LESSOR ENTITLED TO CLAIM UNPAID RENT – WHETHER LESSOR MAY RECOVER DAMAGES FOR BREACH OF THE LEASE.

F. leased his shop to FSP/L ('Co.') for 3 years at a certain weekly rental. Some ten months later the Co. vacated the shop and returned the keys. About two months later, F's agents relet the shop to R. who paid an amount of rent but left after 11 days. The shop then remained unoccupied for 18 months when it was let to M. Subsequently, F. caused the issue of a default summons claiming from the Co. the unpaid rent and other charges payable under the lease; no claim was made for damages for breach of the lease. At the hearing, the Magistrate found that the lease was terminated when F. relet the premises and that F. thereby accepted the Co.'s repudiation of its obligations under the lease. Accordingly, the claim for rent could not be maintained and the Magistrate dismissed the claim. Upon appeal from an order of Brooking J dismissing an appeal from an order of Master Barker refusing an application for an order nisi—

HELD: Appeal dismissed.
1. When the shop was relet to R., the previous tenancy was brought to an end and the claim for rent could not be maintained. As the claim for rent was a claim in respect of a debt or liquidated demand rather than a claim for damages for breach of the terms of the lease, no error was shown on the part of the Magistrate in dismissing the claim.

2. *Obiter*. There would appear to be no impediment to the lessor's now claiming damages for breach of the lease.

FULLAGAR J: **[1]** I will ask Gray J to deliver the first judgment.

GRAY J: This is an appeal against an order of Brooking J who, on 19th August 1987, dismissed an appeal from an order of Master Barker made on 3rd August 1987. **[2]** The appellants had made application to Master Barker for an order to review an order of the Mildura Magistrates' Court made on 1st July 1987. Master Barker was not satisfied that a *prima facie* case of error on the part of the learned Magistrate had been made out and refused the application for an order nisi. Upon the appeal from that refusal Brooking J was also unsatisfied of *prima facie* error and dismissed the appeal from the Master. We have no record of His Honour's reasons beyond an abbreviated endorsement appearing on counsel's brief [[1988] VicRp 25; [1988] VR 183 (19 August 1987)]. However, the endorsement indicates the gist of His Honour's conclusion, because paragraph 2 of counsel's note reads as follows:

> "Brooking J then held that, on the material before the Court no *prima facie* error law:
> (a) that the lease was terminated in April 1984;
> (b) read as a whole, the pleadings indicated a claim for rent not damages for repudiation;
> (c) since the lease terminated in April a claim for rent could not be maintained thereafter."

The statement of His Honour's conclusion must be considered in the light of the evidence before the Magistrate. The affidavit of the appellants' solicitor in support of the application sets out a summary of the evidence before the Magistrates' Court. This evidence consisted of the evidence of only one witness, namely Vincenzo Finis, one of the present appellants. The affidavit shows that the appellant swore that he and other members of his family make up the appellants. He said that the appellants are the owners of land at 143 Ninth Street, Mildura, on which a brick shop is erected. The appellants carry on the business of leasing the shop in partnership. He produced a lease dated 26th April 1983, in **[3]** which the shop was let to the defendant company. The lease was for a period of three years commencing 22nd November 1982, at a rental of $260 per week to be paid monthly in advance. The defendant company went into occupation of the shop as lessee under the lease and paid rent up to, as the Magistrate later found, 22nd March 1984.

The appellant swore that the defendant company vacated the shop in February 1984 and returned the keys to the appellants' solicitors. The appellants thereafter notified their letting agents, Messrs Collie & Tierney (Mildura) Pty Ltd, that the shop had been left empty by the defendant company and asked their agents to secure a new lessee. They also placed an advertising sign in the shop window indicating that the shop was available for re-letting. The shop remained empty for a short period until some date in April 1984 when the agents allowed one Ring, a travelling clothes retailer, into the shop. The precise legal characterisation of Ring's occupation of the premises became a matter of debate at the hearing. I will return to that in a moment.

Ring, in the result, only occupied the shop for about eleven days. After his departure the shop remained vacant until it was re-let to a Mr and Mrs Merrett by lease commencing 1st December 1985. In the meantime, certain repairs and renovations were carried out to the shop, which repairs and renovations cost about $10,000. In cross-examination, the appellant conceded that Ring had paid a sum of $600 rent for his period of occupation to the appellants' agents. A document found its way into **[4]** evidence which evidenced the payment of the net rental by the appellants' agents to the appellants, which payment was not made until early 1987.

That was the gist of the evidence before the Magistrate, and it appears from the appellant's affidavit that a submission was made on behalf of the defendant that the appellants had brought the lease to an end by re-letting the premises to Ring. It was submitted that the new letting terminated the lease to the defendant company and brought the defendant's obligation to pay rent to an end. This argument found favour with the Magistrate who found as a fact that Ring had occupied the premises as a tenant of the defendant, and that fact did indeed bring the defendant's lease to an end.

It seems that the counsel for the appellants made a submission to the Magistrate that notwithstanding the significance of the letting to Ring, the appellants were not barred from recovering damages for breach of the lease, which damages would be represented by the amount of rental remaining unpaid until the final letting to Mr and Mrs Merrett.

The difficulty with that contention seems to me that although the appellants' claim was for the sum of $11,747.66, which in money terms is equivalent to the rent which would have been paid under the lease had the lease extended till the letting to Mr and Mrs Merrett, the claim is expressly put as one for rent and other charges payable under the lease. The claim is not one for damages for breach of the lease by the defendant.

The Magistrate considered his decision and produced carefully expressed written reasons. The opening paragraph **[5]** makes it clear that His Worship treated the claim before him quite correctly in my view, as one limited to a claim for moneys due for rent and other charges under the lease. As I see it, the learned Magistrate having found that Ring entered the subject premises not as the licensee but as a tenant, he was entirely justified in treating that fact as an acceptance by the appellants of the repudiation by the defendant of its obligations under the lease. The defendant's conduct in simply leaving the premises and returning the keys could not be a more unequivocal act of repudiation, and it presented the appellants with an option to accept that repudiation and treat it as thus bringing the lease to an end, or to treat the lease as remaining on foot and claiming rent and other charges pursuant to the lease.

It is an inescapable inference from the evidence, as the Magistrate found, that the appellants, by re-advertising the premises for re-letting and soon after re-letting the premises elected to accept the defendant's repudiation and to thereby bring the lease to an end. That did not, of course, preclude the appellants from claiming damages for breach of the lease, which damages could include the amounts lost by the appellants in not receiving rent for the periods the premises remained vacant up until the ultimate letting to Mr and Mrs Merrett.

The claim for damages could also include other losses or expenses incurred by the appellants as a consequence of the defendant's breach. However, no such claim was made in the proceedings before the Magistrate, although it was apparently submitted by counsel that the Magistrate could **[6]** include in his award an amount of damage calculated in accordance with the losses suffered by the appellants on account of the premises remaining vacant. The Magistrate's reasons make it clear that he did not entertain such a claim, nor could he, having regard to the state of the

pleadings. Furthermore, it appears to me s9 of the *Magistrates (Summary Proceedings) Act* 1975 produces the result that the Magistrate could not entertain a claim for damages for breach of the lease in the proceedings before him. The proceedings were constituted by a default summons issued pursuant to s9(1), in which claims are confined to claims in respect of a debt or liquidated demand. In my view the claim for damages for breach of the terms of the lease is not a complaint in respect of a debt or liquidated demand within the meaning of s9(1). The latter consideration is of no particular importance, because regardless of whether the Magistrate had jurisdiction or not, no such claim was made in the summons. Although counsel made a submission that such damages should be awarded, the Magistrate was perfectly entitled to decline that invitation.

There is no doubt at this time that the whole range of contractual remedies is available to regulate the relationship of landlord and tenant. Until the early nineteen seventies there were substantial differences of judicial opinion on this point, but any doubts have been removed by a series of decisions culminating in the judgment of the High Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1984-1985) 157 CLR 17 at p29; (1985) 57 ALR 609; (1985) 59 ALJR 373 Mason J, in a passage with which the other members of the Court agreed, said this:

> **[7]** "Accordingly, the balance of authority here as well as overseas, and the reasons on which it is based, support the proposition that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases. However, it has been suggested that the presence of an express proviso for re-entry in a lease excludes any other right of termination of the lease by the lessor. Thus, in *Rosa Investments Pty Ltd v Spencer Shier Pty Ltd* [1965] VicRp 13; (1965) VR 97, it was held that at common law re-entry is necessary to forfeit a lease unless dispensed with by contract. The better view is, in my opinion, that re-entry is essential only where the parties stipulate that advantage shall not be taken of a forfeiture except by an entry upon the land ... If it be accepted that the principles of contract law apply to leases, it is not easy to see why the mere presence of an express power to terminate should be regarded as excluding the exercise of such common law rights as may otherwise be appropriate. It is, of course, open to the parties by their contract to regulate the exercise of the common law right to determine for repudiation or fundamental breach. But in this case, the parties have not attempted to do so."

The facts before the Court in *Tabali's case* were that following a sustained period of non-payment of rent, the landlord issued a writ seeking possession, and also claimed damages. It was held that damages could be awarded in those circumstances because the full range of contractual remedies was applicable. Even more recently, the Court of Appeal in New South Wales in *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 held that damages were recoverable in circumstances closely resembling the present set of facts. The District Court Judge had held that the lessee's actions amounted to repudiation, which repudiation had been accepted by the lessor when the premises were re-let in October of 1980. He held therefore that the lessee was liable for rent until that acceptance, and after that date, for damages for loss of the lessor's contractual rights under the lease. The Court of Appeal by a majority dismissed the lessee's appeal, upholding the view taken by the District Court Judge.

[8] It is sufficient to say that the acts treated as repudiation by the District Court Judge were less unequivocal than the acts of repudiation demonstrated by the lessee company in this case by walking away from the premises and returning the keys. As I see the position, the appellants have failed to show, even on a *prima facie* basis, that the Magistrate fell into error in finding that the appellants had let the premises to Ring and that that conduct amounted to an acceptance of the lessee's repudiation of the lease. His Worship was, in my view, quite correct in determining that the landlord's act of re-letting brought the tenancy to an end. Accordingly, I am not satisfied that Brooking J was in error in failing to be satisfied that the Magistrate was shown to be *prima facie* in error.

I should perhaps add that in my view there is no impediment to the appellants commencing fresh proceedings upon a special summons returnable at the Mildura Court to recover any damages which they can show flow from the defendant company's breach of the lease. It may be that some argument may be raised that the matter is *res judicata* or that an issue estoppel has been created. However, it appears to me that the Magistrate had before him, and understood that he had before him, a claim confined to a claim for rent under the lease. A claim for damages for breach of the lease is a quite separate cause of action. It appears to be capable of being maintained in fresh proceedings.

The argument of Mr Searle seemed to me to betray some confusion between the lessor's claim for rent and other **[9]** charges under the covenants of the lease and their potential claim for damages for breach of the lease. The latter claim was not before the Court in Mildura, was not understood to be before the Court by the learned Magistrate and was not dealt with by the Magistrates' Court. In relation to the claim for rent and other charges pursuant to the terms of the lease, I repeat that I am not satisfied the Magistrate fell into error in the way he disposed of the proceedings, and for my part I would dismiss the appeal.

FULLAGAR J: I ask Tadgell J to give his judgment.

TADGELL J: I agree with the conclusions expressed by Gray J that this appeal should fail. I add only a very few words of my own. We were much pressed in argument with the decision of the High Court in *Buchanan v Byrnes* [1906] HCA 21; (1906) 3 CLR 704; 12 ALR 341, and with a number of cases which have applied it, both in this country and overseas. The central submission on behalf of the appellants was that the Magistrate's decision was at odds with *Buchanan v Byrnes*, in particular because that case decided, to quote the headnote:

> "In an action for damages for breach of covenants contained in a lease, it is no defence to show that after breach the lease was surrendered by operation of law."

In my view, the Magistrate did not act contrary to that statement of law. He approached the case at first, and concluded it, upon the footing that the claim before him was a claim for rent. His Worship concluded that the liability for rent extended only to the period from 22nd March 1984, until 17th April 1984, on which latter date the lease which gave rise to the defendant's obligation to pay rent was terminated. **[10]** Brooking J came to the same conclusion. His Honour decided that, considered as a whole, the pleadings indicated a claim for rent, not a claim for damages for repudiation of a lease. I agree with that, and really that is the end of the case.

The Magistrate was never invited to consider a claim for damages. There was no application made to him to amend the default summons to allow it to be treated, for example, as a special summons, to the extent that that might have been necessary in order to include within it an added claim for damages for breach of the lessee's covenant. Such an application might have been entertained by him, and I think might, as a matter of discretion, have been allowed pursuant to s157 of the *Magistrates (Summary Proceedings) Act* 1975. It might perhaps have been necessary to allow an adjournment if the defendant had sought it, before allowing the complainants to make what might well have been fairly radical surgery upon their originating process. Be that as it may, nothing at the time was attempted.

It seems to me that there was evidence upon which the Magistrate could find, and could properly find, that the lease between the appellants and the respondent was terminated, as he did in fact find. I do not say that the evidence compelled that conclusion, but certainly it was a conclusion that was well open to the Magistrate. On that basis, I am of the opinion that the appeal should fail.

FULLAGAR J: I agree that the appeal should fail, substantially for the reasons that have been given by each of the other members of the Court. I would point out an obvious feature of this case; it is an appeal ultimately from the dismissal of an *ex parte* application, and accordingly the arguments we have heard have been those addressed to us by one counsel only. It is subject to that reservation and warning that we all, I think, take the view that it may well be open to the appellants to proceed now by fresh proceedings to claim damages. The Order of the Court will simply be: appeal dismissed.
