42/01; [2001] VSC 138

SUPREME COURT OF VICTORIA

AUSTRALIAN RURAL GROUP LTD v ALLEN

Balmford J

5 March, 9 May 2001

CIVIL PROCEEDINGS – LEASE OF LAND FOR 5-YR PERIOD – LAND SUB-LET TO ANOTHER PERSON FOR PURPOSE OF OSTRICH FARMING – SUCH PERSON AGREED WITH COMPANY OWNED BY LESSOR TO PROVIDE HUSBANDRY SERVICES – PERSON LATER ABANDONED LAND – LESSOR CONTINUED TO RUN FARM – NO RENT PAID BY LESSEE – CLAIM MADE AGAINST LESSEE – UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

In April 1997, A. leased their land to ARG (at a rental of $6000pa) for a period of five years for the purpose of raising and breeding ostriches. ARG sub-let the land to McM who was to be the manager of the project. McM entered into an agreement with LP (a company wholly controlled by A.) to provide husbandry and management services. In April 1998, McM abandoned the land; however, LP continued to bill individual investors for agistment fees. No steps were taken by A. to find alternative uses for the land. No rent was paid by ARG to A. pursuant to the lease. A. claimed damages from ARG in the sum of $30,000 being rent for the whole period of the lease. The magistrate found that A. was entitled to $15,000 rent for the period to October 1999 but not to any compensation for loss of future rental. The magistrate was not satisfied that A. should have mitigated their loss. Upon appeal—

HELD: Appeal allowed.
The continuing presence of the ostriches on the land coupled with LP's collection of agistment fees from the investors constituted occupation of the land by LP with the consent of A. the lessor and was inconsistent with the continuing existence of the lease. The acceptance of the repudiation of the lease was contemporaneous with the non-payment of the rent and the abandonment of the land by ARG and accordingly, the lease terminated in April 1998. It followed, according to the ordinary principles of contract law that A. was required to mitigate its loss. After McM abandoned the land, LP continued to receive agistment fees from investors. Had the amount of the rent been transferred from LP to A. it could be said that those payments amounted to mitigation. A. did nothing to mitigate their loss and accordingly, the magistrate was in error in finding otherwise.

BALMFORD J:

1. This proceeding 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. The final order the subject of the appeal was made on 9 August 2000 in the Magistrates' Court at Swan Hill in proceeding number M02841904, in the following terms: "claim $15,000 and interest $1,010.95 costs $3,216.30". It is clear from the judgment of the Magistrate that the order for $15,000 on the claim was for rent and not for damages.

2. By Order made on 19 September 2000, Master Wheeler found that the questions of law to be decided were:

> Having regard to the whole of the evidence, ought the learned Magistrate to have held that:
> (a) the lease had been determined in or around April 1998?
>
> (b) the Respondents were entitled to damages as distinct from rent? and
>
> (c) the Respondents failed to take any steps to mitigate any loss they may have suffered?

3. The respondents ("the Allens") are the owners of fifty-six hectares of land at Culgoa ("the land"). By a lease made on 22 April 1997 the Allens agreed to lease the land to the appellant ("ARG") for a period of five years from that date at a rental of $6,000 per annum payable half yearly in advance. The lease provided that "the land shall be used to raise and breed ostriches in pens". On that day ARG sub-let the land at the same rental to McMan Ostrich Limited ("McMan") which was to be the manager for the ostrich farming project and McMan went into possession.

4. On the same day McMan entered into an agreement ("the farming agreement") with Lone Pine Ostriches Pty Ltd ("Lone Pine"), a company wholly controlled by the Allens. Lone Pine was to provide husbandry and management services to McMan in return for agistment fees to be paid to it by McMan. It was to have "unfettered access to the land" for the purpose of providing the services. The fees were calculated initially at $1,000 per annum for each ostrich run in a trio and $500 per annum for each ostrich run in a colony of 9. There was to be deducted from the total fees payable each year by McMan the sum of "$6,000 per annum being the rent payable pursuant to the lease". The effect was that the $6,000 rent retained by McMan was to be paid by it to ARG and by ARG to the Allens. Ostriches were acquired by McMan on behalf of individual investors and placed on the land in accordance with these arrangements. Mr Allen said that he assumed that the investors were paying the agistment fees to McMan.

5. However, McMan abandoned the land in about April 1998 and has not resumed occupation. The ostriches remained on the land. An administrator was appointed to McMan, and it appears that it subsequently went into liquidation. Lone Pine, at the suggestion of the administrator of McMan, billed the individual investors directly for the agistment fees, charging $2.74 per day for a breeder, which would equate to the $1,000 per year for an ostrich run in a trio, as provided in the farming agreement, and $500 to $700 for rearing birds. At the time of the hearing before the Magistrate there were still ostriches agisted on the land, with agistment fees in respect of those ostriches continuing to be paid to Lone Pine. Mr Allen in evidence said that he (by which he must be taken to mean Lone Pine) entered into the direct financial arrangements with the investors in order to keep the ostriches alive.

6. Mr Allen said in evidence that the Allens had taken no steps to find alternative uses for the land, although Lone Pine might have done so. He was cross-examined as to a transfer from the bank account of Lone Pine to the Allens' personal account of $6,000 on 1 July 1999 and a similar transfer of $3,000 on 26 July 1999, and said that those payments had nothing to do with the rent.

7. No rent was paid by ARG to the Allens pursuant to the lease. On 22 December 1999 the Allens brought proceedings in the Magistrates' Court against ARG claiming damages of $30,000, being rent for the whole period of the lease, from 22 April 1997 to 21 April 2002. The Magistrate found that they were entitled to rent in the amount of $15,000 for the period up to the last date for half yearly payment before the issue of the proceedings, that is, October 1999, but not to any compensation for loss of future rental. He was not satisfied, on the evidence, that they should have "mitigated their loss by re-aligning the entire structure of their ostrich enterprise to one of cropping", as ARG had submitted that they should.

8. The submission of Mr Salpic, for ARG, was that the lease from the Allens to ARG had come to an end in or around April 1998. The abandonment of possession by ARG, and its failure to pay rent, each constituted a repudiation, and the repudiation was accepted by the Allens in that their conduct thereafter was inconsistent with the lease continuing on foot. That being so, the Allens were entitled to damages and not to rent. They had failed to take steps to mitigate their loss, and accordingly no order for damages should be made.

9. Mr Salpic referred to *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17; (1985) 57 ALR 609; (1985) 59 ALJR 373 as authority for the proposition that ordinary principles of contract, including that of termination for repudiation or fundamental breach, apply to leases. In that case Brennan J said at CLR 48:

> The promisee's acceptance of the repudiation is an essential element in the cause of action for damages for anticipatory breach. That is because the liability in damages is substituted for the executory obligations to which acceptance of repudiation puts an end.

And at CLR 49:

> Once the lessee's interest is determined, there is no reason why damages should not then be recoverable, provided the lessor has not previously made an election to keep the lease on foot.

And at CLR 50:

> In the present case it was conceded that the service of the statement of claim determined the lessee's interest in the land. The statement of claim clearly accepted the lessee's repudiation and sought damages accordingly. Thus the elements of the lessor's cause of action were established. The assessment of damages by Lusher J conformed to principle.

10. There were three matters which Mr Salpic submitted were inconsistent with the lease being on foot. The first of these was the conduct of the Allens after April 1998 in licensing or impliedly licensing Lone Pine to use the land and to deal directly with the investors for the agistment fees. That conduct was clearly inconsistent with the continued existence of the lease from the Allens to ARG. The farming agreement between McMan and Lone Pine had come to an end on the liquidation of McMan, so that Lone Pine could not derive from that agreement any right to go on the land. The second matter was the claim by the respondents for damages and for rent for the unexpired portion of the lease. And finally, he submitted that the proceeding below was conducted on the basis that the only matter in issue was the question of mitigation, which would not have been relevant had the lease not been at an end.

11. In fact, as Mr Howden for the Allens conceded, counsel for the Allens in the hearing below acknowledged in his closing address that the lease had been terminated by the repudiation by ARG and acceptance of that repudiation by his clients. While the events relied on as constituting acceptance occurred at different times, I accept that the continuing presence of the ostriches on the land, coupled with Lone Pine's collection of agistment fees from the investors, constituted occupation of the land by Lone Pine with the consent of the Allens, which was inconsistent with the continuing existence of the lease. There is no evidence to suggest that there was any break in the presence of the ostriches, or that there was any period for which agistment fees were not collected. That being so, I find that the acceptance of the repudiation was contemporaneous with the non-payment of the rent and abandonment of the land by ARG, and accordingly that the lease was terminated in April 1998.

12. The answer to question 1 must accordingly be Yes. That being so, the respondents are entitled to damages rather than rent, and the answer to question 2 must also be Yes. It follows that, according to ordinary principles of contract law, the Allens are required to mitigate their loss.

13. After the disappearance of McMan and the termination of the lease, the agistment fees were paid directly to Lone Pine by the investors. Before those events, the agistment fees had been collected by McMan and paid to Lone Pine, less $6,000 per annum rent, which was paid by McMan to ARG which paid it to the Allens. Thus the agistment fees were the source of the rent paid to the Allens. After those events, Lone Pine received the whole amount paid by way of agistment fees and no provision was made for the payment of rent. Had the amount of the rent been transferred from Lone Pine to the Allens, who controlled Lone Pine, it could be said that those payments amounted to mitigation. This was not done and it is clear from paragraph 6 above that the Allens did nothing to mitigate their loss. Accordingly, the answer to question 3 must be Yes.

14. I invite submissions from counsel as to the orders to be made consequent upon these findings and as to costs.

APPEARANCES: For the Appellant Australian Rural Group Ltd: Mr C Salpic, counsel. Abbott Stillman & Wilson, solicitors. For the Respondents Allen: Mr K Howden, counsel. Garden & Green, solicitors.
