35/92

SUPREME COURT OF VICTORIA

ZAMBELIS v NAHAS

Nathan J

22 January 1991 — (1991) V Conv R P54-396

LANDLORD AND TENANT – LEASE OF RENTAL PREMISES – CLAIM FOR UNPAID RENT – CROSS-CLAIM FOR DAMAGES ARISING UNDER THE LEASE – CLAIMS HEARD TOGETHER – WHETHER APPROPRIATE – DISPUTE NOT SOLELY FOR RENTAL ARREARS – WHETHER COURT HAS JURISDICTION TO HEAR DISPUTE – WHETHER SHOULD BE REFERRED TO ARBITRATION – WHETHER MAGISTRATES' COURTS ARE COURTS OF PLEADING: *RETAIL TENANCIES ACT* 1986, S21; *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1986.

Section 21 of the *Retail Tenancies Act* 1986 (the Act) provides:

> "Any dispute between a landlord and a tenant arising under a retail premises lease, other than a claim by the landlord solely for the payment of rent...must be referred to arbitration..."

Z., a landlord of retail premises sued the lessee N., for arrears of rent. N. cross-claimed for damages for breach of the lease, alleging a failure to maintain the premises or to ensure free access. When the claims came on for hearing, the magistrate dealt with the matters together, ruled that the dispute between the parties was not related solely to the payment of rent, dismissed the complaint and ordered that the dispute be referred to arbitration. Upon appeal—

HELD: Appeal dismissed.
(1) As there was a common ground of dispute between the parties, the magistrate was correct in calling the two matters on together.

(2) Section 21 of the Act provides that all disputes relating to a retail tenancy must be referred to arbitration unless the claim relates solely to the payment of rent. In the present case, the issue between the parties was not limited solely to the payment of rent but the entitlement of the landlord to it. Accordingly, the magistrate had no jurisdiction to hear matter and was correct in referring it to arbitration.

(3) *Obiter*. An examination of the *Magistrates' Court Civil Procedure Rules* 1989 *in toto*, indicates that Magistrates' Courts in their civil aspect have become courts of pleading.

NATHAN J: [64,826] The *Retail Tenancies Act* No.106 of 1986 assigns disputes capable of being referred to arbitration to that process and directs that such disputes are not justiciable in any court, s21ss(4). An exclusion to this assignment is contained in s21(1) as follows:-

> "Other than a claim by a landlord solely for the payment of rent is to be so assigned."

In this case Zambelis was the landlord of a retail premises which he leased to the defendant, Nahas. On the 12th June 1990, he issued a default summons, returnable at the Magistrates' Court at Sandringham, claiming arrears of rent. The default summons was met by a notice of defence denying the debt and reciting in its particulars "that Nahas will cross-claim that the complainant has not allowed the defendant quiet and peaceful possession of the premises and, as a result, has suffered loss".

On the 31st August, 1990 Nahas issued a special complaint out of the same court and by its particulars pleaded that Zambelis had breached the retail tenancy in failing to maintain the premises or to ensure the tenant free access and accordingly he, Nahas, had suffered loss. Both the default summons and the special summons were made returnable for the same date and it appears, although I have no direct evidence of the fact, that the matters were called on contemporaneously by the Magistrate's clerk but, in any event, he proceeded to deal with the matters as if they were both before him, although I cannot find in the record any order consolidating the actions or requiring that they be heard simultaneously.

The Magistrate by an order entered into the Court's Registry, dismissed Zambelis' complaint and, in so doing, said as follows:

> "An action by a landlord comes within s21 of the *Retail Tenancies Act* 1986 if it is a claim solely for the payment of rent. Here, however, the action is defended on the basis of a breach of lease by the complainant. The lessee alleges that the lessor is in breach of the !case by not complying with the covenants and terms of the lease. Accordingly, there exists a dispute between the lessor and lessee which is not related solely to the claim for rent."

He ruled that he had no jurisdiction to hear the matter and that the claim and the cross-claim be referred to arbitration. It is from that decision that Zambelis has obtained an order nisi to review on the ground that the Magistrate erred in law in finding that the Act precluded him from hearing the default summons and so I have two nice issues before me.

The first is whether the procedure adopted by the Magistrate in dealing with the cross-action as if it was a set-off or as if the actions had been consolidated was appropriate or valid in the circumstances. Secondly, whether the default summons alleging arrears of rent and thus falling within the exception to s21 of the Act should have been heard as a separate, self-contained issue to the alleged breach of the lease asserted in Nahas' cross-action which would result in the issue being properly assigned to arbitration.

As to the first issue, I find that the Magistrate operated properly and correctly, although it might be said not in strict conformity with desired practices. Magistrates' Courts have now their own rules of procedures enacted as subordinate legislation in Statutory Rule No.199 of 1989. They commenced operation on the 1st September, 1990. They replace the former rules of 1980. However, an examination of them reveals sharp and distinct differences. The present *Magistrates' Court Civil Procedure Rules* are a reflection, very largely, of the Supreme Court Rules. They are set out by way of order and sub-rule and parts. An examination of them *in toto* indicates that Magistrates' Courts in their civil aspect have become courts of pleading. There is a statutory requirement in a claim that it be particularised in a way which brings to the defendant the substance of the claim enabling him to file a defence, as he must, together with particulars of it if the claim is to be joined.

By Order 4.02 a complaint must not only particularise the parties but contain a concise statement of the nature of the claim, the place of it and particulars of it together with the remedy. A defence is similarly adumbrated. By Order 6 claims may be joined and by Part II of that order, Rule 6.06, a Magistrates' Court is empowered as follows: **[64,827]**

> "If two or more complaints are pending in the Court, and—
> (a) some common question of law or fact arises in both or all of them: or
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> (b) the rights to relief claimed in those proceedings are in respect of or arise out of the same transaction or series of transactions; or
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> (c) for any other reason it is desirable to make an order under this Rule—
> the Court may order the proceedings to be consolidated, or to be heard at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them."

The substance reflects the Supreme Court Rules. I am satisfied in this case the Magistrate, by calling the two actions on together and hearing counsel in respect of both of them contemporaneously, in fact consolidated the two actions and dealt with them as if there was one. He was undoubtedly empowered to do so. It appears that neither counsel applied for an order for consolidation but it would be churlish to assume that the Magistrate did not, in fact, consolidate the actions as indeed common sense and expedition demand. In this case he had before him the notice of defence which referred to the impending cross-action, and of course he had the cross-action before him. It was apparent to him and not disputed by the parties, that the claim for rent was denied by Nahas on the ground for breach of the covenants.

There could hardly be a more common ground of dispute between landlord and tenant. Accordingly, I am satisfied the Magistrate operated correctly and I should not dispose of these proceedings as if the default summons could or should stand alone. It attracted, in response, the

special complaint, however both dealt with the same transaction and common issues of law and fact arise in both actions.

I turn to the second issue. Although it is a principle of statutory interpretation that courts should be hesitant to divest themselves of jurisdiction unless the legislation is plain (see *Halsbury* fourth edition Volume 44, paragraph 907) viz:

> "Unless by express words or necessary implication statutes should not be construed so as to take away the jurisdiction of superior courts."

I find the legislation crystal clear in the Act. All disputes relating to a retail tenancy, save those by a landlord solely for the payment of rent, must be referred to arbitration. In this case the dispute had broadened beyond the landlord's claim because it had attracted a defence dealing with performance of the covenants. The issue between the parties was not constrained or limited to the payment of rent or the quantum of the arrears, but the very entitlement of Zambelis to it. The substantive issue between them was the performance or otherwise of the landlord's covenants. In my view the Statute to be given some potency assigns such disputes to the arbitral process where a retail tenancy to which the Act relates, is in place. I find comfort in this decision from *536 Swanston Street Pty Ltd v Harbrut Pty Ltd & Ors* (1988) V Conv R 54-323.

The fact situation varies but the lessor issued a writ to recover arrears of rent, mesne profits and possession. Mr Justice Kaye there held that the claims could not be severed and accordingly the dispute had to be referred to arbitration. He said:

> "In this instance it is not possible to divide up the claim nor, indeed, does the section permit the division of the claim into several parts. The claim, as I have already indicated, is one for the payment of arrears of rent, mesne profits and possession. Those matters are very much in dispute ... It follows, therefore, that the premises, being retail premises are ones in relation to which sec 21 of the *Retail Tenancies Act* applies. Accordingly, the action against the first-named defendant must be stayed and the matter must be referred to arbitration."

It follows from that reading that the Order Nisi will be discharged. I am indebted to Mr Walton of counsel for a search of the authorities relating to this Act and its kindred legislation in other States. None of the authorities referred to me are directly in point, but as was proper, counsel brought them to my attention. The result of this decision is that unless a rental dispute relates to quantum or period of time, should a defendant seek to defend a claim on the grounds of alleging breach of covenants, the entire dispute is uplifted from this Court's jurisdiction and assigned to arbitration. I find that to be the intent and purport of the Act when it is examined as a whole. It does not relate to all retail premises but those which are defined and its purpose has been to give the tribunal established under it power to expeditiously and, it is hoped, cheaply dispose of landlord and tenant disputes. Its very purpose is to free the Court from the costly and time-consuming process of deciding issues of fact about performance of covenants which are essentially matters fit and proper for arbitration. In my view the results accord with the legislative intent.

The Order Nisi will be discharged.
