TTG Nominees Pty Ltd v Aileron Pastoral Holdings Pty Ltd [2020] NTSC 4

PARTIES:	TTG NOMINEES PTY LTD (ACN 163 811 345) v AILERON PASTORAL HOLDINGS PTY LTD (ACN 605 457 421)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 9 of 2016 (21657966)
DELIVERED:	31 January 2020
HEARING DATES:	25 and 26 November 2019
JUDGMENT OF:	MILDREN AJ

CATCHWORDS:

Tenancy – commercial lease – unpaid rent – breach of contract – repudiation of contract – trusts – liability of trustee – whether trustee can guarantee itself – termination of lease – whether defendant acted to repudiate the lease, entitling the plaintiff to terminate lease – whether plaintiff failed to mitigate loss after lease terminated – whether lease is a "business lease" – plaintiff entitled to non-paid rent and damages.

Business Tenancies (Fair Dealings) Act 2003 (NT) s 5(1), s 9(1), s 35, s 124, s 125, s 127, s 130, s 131, s 134
Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) s 8(1)
Conveyancing Act 1919 (NSW) s 129
Corporations Act 2001 (Cth) s 109X
Land Title Act 2000 (NT) s 70, s 71, s 125, s 184, s 188
Law of Property Act 2000 (NT) s 114(2), s 119, s 137

Property Law Act 1974 (QLD) s 124, s 152
Supreme Court Act 1979 (NT) s 84

Apriaden Pty Ltd v Seacrest Pty Ltd & Anor (2005) 12 VR 319; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Criss v Alexander (No. 2)* (1928) 28 SR (NSW) 587; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; *Heyman v Darwins Ltd* [1942] AC 356; *Laurinda Pty Ltd v Capabalaba Park Shopping Centre Pty Ltd* (1989) 163 CLR 623; *Marshall v Council of the Shire of Snowy River* (1994) 7 BPR 14; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Metal Fabrications (Vic.) Pty Ltd v Kelsey* [1986] VR 507; *Roper & Anor v Johnson* (1873) LR 8 CP 167; *Progressive Mailing House Pty Ltd v Tabali* (1985) 157 CLR 17; *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; *Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors* [2016] QCA 258, referred to

Ingram v Inland Revenue Commissioners [2000] AC 293; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, followed

World Best Holdings Ltd v Sarker [2010] NSWCA 24, considered

Jacobs' Law of Trusts, 7th Edition
Woodfall, *Landlord and Tenant*, 28th Edition, [1-1970]
K.P. McGuiness, *The Law of Guarantee*, [1.1], [2.1]

REPRESENTATION:

Counsel:

Plaintiff:	N Floreani
Defendant:	B Murphy

Solicitors:

Plaintiff:	Bowden McCormack
Defendant:	Flory Partners

Judgment category classification:	B
Judgment ID Number:	Mil20556
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

TTG Nominees Pty Ltd v Aileron Pastoral Holdings Pty Ltd [2017] NTSC 4
No. AS 9 of 2016 (21657966)

BETWEEN:

TTG NOMINEES PTY LTD
(ACN 163 811 345)
Plaintiff

AND:

AILERON PASTORAL HOLDINGS
PTY LTD (ACN 605 457 421)
Defendant

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 31 January 2020)

The plaintiff's claim

[1] The plaintiff was at all relevant times the registered proprietor of an estate in fee simple of NT Portion 3694 being the whole of the land comprised and described in Certificate of Title Register Book Volume 809 Folio 999, comprising an area of 21 square kilometres and 44 hectares (the land). The land is situated in the Northern Territory near Ti Tree.

[2] By a written agreement for lease entered into between the plaintiff and the defendant commencing on 26 April 2016, the defendant leased the land from

the plaintiff for a term of two years with a right of renewal for a further term of three years for an annual rental of $400,000.00. The lease was registered on the plaintiff's title on 28 April 2016.

[3] The plaintiff claims that the defendant took possession of the leased property on or about 26 April 2016; paragraph 6 of the Further Amended Statement of Claim. The defendant has admitted this paragraph: see paragraph 6 of the Second Further Amended Defence and Counterclaim.

The option to purchase

[4] In addition to the lease, the plaintiff granted to the defendant in its capacity as trustee for the Ti Tree Unit Trust an option to purchase the land for $5,000,000. According to clause 2.1, the option was conditional upon the lease becoming unconditional. There is no issue that the lease became unconditional by the time that the lease was registered. Clause 2.2 of the option provided that the option may be terminated by the plaintiff giving notice to the defendant at any time within 20 business days after termination of the lease.

[5] Pursuant to clause 4.2 of the lease the defendant was obligated to pay the annual rental by equal monthly instalments beginning on the first day of each month, with the first instalment to be paid on the commencement date, which in this case was 26 April 2016. Clause 4.3 provided that if an instalment is for a period of less than a month, "that instalment is that proportion of the Annual Rent which is the number of days in the period

bears to the number of days in the year." The defendant paid the first instalment due in April and for the May instalment totalling in all $36,666.66 but has not paid any rent since. The plaintiff's claim is for unpaid rent, damages for breach of contract and interest. The other relief sought in the Further Amended Statement of Claim was abandoned by the plaintiff's counsel at the trial.

[6] At the commencement of the trial, counsel for the defendant admitted liability. Both parties tendered a number of affidavits upon which they intended to rely. The affidavits contained a number of contentious assertions. Only two witnesses were called for cross-examination: Mr Randle Walker, the plaintiff's company secretary, and Mr Flory, the solicitor for the defendant. Neither of these witnesses were impressive. Mr Walker claimed to have little recollection of the matters in issue between the parties and Mr Flory repeatedly not only avoided answering difficult questions but also answered in the manner of an advocate rather than as an independent witness. Another problem is that there are a number of facts which I am unable to decide because the other deponents were not cross-examined on issues where there were disputes in the affidavit material. Except where the evidence is not controversial, I am left to draw such inferences as may be available from the established facts.

The action is brought against the defendant in its capacity as the trustee and in its capacity as a guarantor of the trust

[7] It is not in contention that the defendant was at the time of the execution of the lease, the trustee of a unit trust called the Ti Tree Unit Trust. It is unclear when that trust was established. According to the trust deed, which is undated, the trust deed was made on the date set out in Schedule 1 as the Effective Date. However, there is no date in Schedule 1 under the heading of the Effective Date. Nevertheless, the lease was executed by the defendant in its capacity as the trustee of the Ti Tree Unit Trust as the lessee, as well as in its own capacity as the guarantor of the lessee's obligations to the plaintiff. Curiously, the plaintiff has brought these proceedings against the defendant by naming the defendant as trustee of the Ti Tree Unit Trust as the first defendant, and the same defendant as the second defendant. The plaintiff claims that the second defendant is liable in its capacity as guarantor. Why this was thought necessary I do not know. At common law a contract of guarantee is by definition a contract by one person or corporate body to guarantee the performance of another.[1] The unit trust is not a corporate body. It is a deed of trust pursuant to which the trustee holds certain assets on behalf of the unit holders on the terms set out in the deed. The trustee in this case is not an agent for the beneficiaries of the trust for the purposes of the law of agency. That is because the trust deed specifically provides to the contrary: see clause 76.1. When a trustee contracts with third parties, the trustee is always personally liable to third parties, having, at

1 K.P. McGuiness, *The Law of Guarantee,* para 1.1 and 2.1.

most, a right of indemnity against the trust assets or in some cases, against the *cestui que* trust.[2] The exception to this is where the trustee makes it clear to the other contracting party that, in entering into the contract, the trustee is excluding his, her or its personal liability and is merely making the trust estate liable to the other contracting party. Something more is necessary than knowledge by the other contracting party that he or she is dealing with a trustee. As Lord Penzance said in *Muir v City of Glasgow Bank*:[3] "To exonerate him, it would be necessary to show that upon a proper interpretation of the any contract he had made, viewed as a whole – in its language, its incidents, and its subject matter the intention of the parties was apparent that his personal liability should be excluded; and that although he was the contracting party to the obligation the creditors should look at the trust estate alone." It is in this context that the presence of the guarantee given by the defendant is illuminative. It shows that the liability of the defendant was not limited only to the trust assets. Furthermore, there is nothing in the lease to indicate that the defendant's liability was intended to be limited to the trusts' assets. The fact of the matter is that the lessee is the defendant, albeit that it is registered as the lessee as trustee of the trust. Although clause 75 of the trust deed seeks to limit claims of creditors to the assets of the trust, there is no evidence that the plaintiff was ever made aware of the provisions of the trust deed. Albeit that it contracted in its

---

2 Jacobs' Law of Trusts, 7th edition, para 212; *Ingram v Inland Revenue Commissioners* [2000] AC 293 at 298, 299, 306.

3 (1879) 4 App Cas 337 at 368.

capacity as a trustee, the intention of the parties was that the defendant would be personally liable to the plaintiff, and therefore cannot guarantee itself. So much was effectively conceded by both counsel.

Purported change of trustee

[8] One of the defences originally pleaded by the defendants is that the defendant ceased to be the trustee of the unit trust on 26 June 2016 and therefore ceased to be the lessee. The present Second Further Amended Defence and Counterclaim no longer makes this assertion, but asserts that the effect of this was to release the defendant from its guarantee. There is evidence that Mr Craig Astill, the sole director of the defendant, signed a notice of resignation as trustee of the trust. The notice is dated 26 June 2016, and is addressed to the unit holders, TNT Agriculture Pty Ltd and RJR Legal Consulting Pty Ltd, and on its face purports to have been given by email to the directors of those companies. Clause 77.5(b) of the trust deed provides for the resignation of a trustee by the giving of one calendar month's notice or such shorter notice as the unit holders accept. The notice given was designed to take effect immediately. Whether or not the unit holders accepted the notice is not in evidence. There is no evidence that a new trustee was appointed. In those circumstances, if it had been necessary to do so, I would not be prepared to find that the defendant did lawfully cease to be the trustee of the unit trust. However, for reasons which follow, that does not matter.

[9] Secondly, even if there had been a change of the trustee, this would not *per se* release the defendant from its contractual obligations to the plaintiff as lessee, nor from its obligations as a guarantor, assuming that the guarantee has an independent legal existence. Something more would need to be shown. At the very least, it would be necessary to show that the plaintiff consented to the change and, possibly, that the change was recorded on the certificate of title. There is no evidence of this. As I have already observed, the lease was registered in the name of the defendant as a trustee, pursuant to s 125 of the *Land Title Act 2000*. If a new trustee had been appointed it would possibly be necessary to apply to change the name of the trustee on the title by recording an instrument of transfer to the new trustee. To effect a release from the plaintiff, this would require the defendant to transfer its interest in the lease to a new trustee, even if the transfer was not registered. This would require the plaintiff's consent: see clause 11 of the lease, and in particular, the procedure required by clause 11.2, none of which has been followed.

[10] Although this is no longer in issue because the defendant has admitted liability, it is necessary to refer to this because of the submissions made in relation to the outstanding issues between the parties.

The issues between the parties

[11] Counsel for the defendant submitted that the only issues between the parties were:

1. Did the defendant repudiate the lease by not paying the rent and was that repudiation accepted by the plaintiff?

2. If not, when did the lease terminate?

3. Did the plaintiff fail to mitigate its loss after the lease terminated?

4. What amounts should be awarded for outstanding rent, damages for breach of contract, and interest?

The alleged notice of termination of 23 June 2016

[12] The defendant claims that the lease was terminated by a notice given on 23 June 2016. The notice to which this refers was sent by Mr Randle Walker on behalf of the plaintiff by email that day at 9.22 am to Mr Flory, the defendant's solicitor, and stated, relevantly:

> This letter is a demand for APH to pay TTG the full sum that is currently outstanding, that is $78, 222.22.
>
> As you are aware, if the sum outstanding is not paid within 7 days of this demand, APH is in default of the lease, entitling TTG to terminate the lease.

[13] As at 23 June 2016, the defendant had not paid any rent at all. By email dated 1 June 2016, Mr Flory had previously indicated that he and Troy Dann, allegedly one of the ultimate beneficiaries of the Ti Tree Trust, but not himself a unit holder, "were trying to accelerate the purchase of the property under the option within the next 3 months and that is why there has been some delay on the rental …" Subsequently, by email dated 23 June 2016 at 12.28 pm Mr Flory advised that there had been "a hiccup with

investment funds from a particular investor" and seeking more time. This was responded to by Mr Walker by email on the same day at 1.07 pm that "the Letter of Demand stands and unless rectified the lease will be terminated in 7 days and the option will then terminate in 20 days." (For future reference I will refer to this email as the alleged termination email). By email sent on the same day to Mr Walker at 3.02 pm Mr Flory made an offer to bring the rent up to date by payments to be made on certain nominated dates in July 2016, and indicating his confidence in a firm commitment to exercise the option. This was responded to by Mr Walker by email sent at 11.25 am on 24 June 2016:

> The Directors have determined not to accept your compromise as detailed below [referring to the email of the previous day sent at 3.02 pm] and the Letter of Demand remains as advised.
>
> Do not send any further communication seeking compromise or dispensation to the legal obligations which were well understood by all parties when the lease and option were signed.

[14] The plaintiff denies that the alleged termination notice given amounted to a notice to terminate the lease which brought the lease to an end. Clause 15.1(a)(i) of the lease provides that the payment clauses, 4 and 6 of the lease, are essential terms of the lease. The obligation to pay the rent is contained in clause 4. Clause 15.2 provides that "the Lessee is in default of this Lease if it breaches an essential term of this Lease". Clause 15.3 provides that "the Lessor may, if the Lessee is in default terminate this Lease by notice". Clause 22.2(a)(iii) provides that notices under the lease are only given or made to a party under the lease if "emailed faxed to that

party at the email address (if any) specified for that party in item 10." The lessee's address for service in item 10 is, in relation to emails, richard.flory@caason.com, which is the address to which the original notice was sent. There is no provision in the lease providing for the time within which notice is required. I do not consider the email which was sent on 23 June enclosing the letter of demand operated to terminate the lease. All it did was to point out that failure to pay the rent would give rise to an entitlement to terminate the lease. However, it is arguable that the email from Mr Walker to Mr Flory at 1.07 pm on 23 June (the alleged termination email) operated as a notice which terminated the lease. Counsel for the plaintiff submitted that if it did, it was invalid because the notice given did not comply with the provisions of ss 125, 127 and 130 of the *Business Tenancies (Fair Dealings) Act 2003* (NT) (the BTFDA).

[15] Counsel for the defendant relied upon the decision of the Court of Appeal, Queensland, in *Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors*[4] for the following propositions: (1) that the ordinary common law principles relating to contracts apply to leases; (2) a lease is a contract which can be terminated at the option of the landlord by conduct of the tenant which repudiates the lease; (3) that such conduct gives rise to an option to the landlord to accept the repudiation (in which case the lease is terminated) or to hold the tenant to the terms of the lease (in which case the lease remains on foot); (4) that conduct which amounts to a breach of an

4 [2016] QCA 258.

essential term of the lease has the same effect; and (5) that the provisions of the BTFDA relating to termination by the giving of a notice to quit do not apply in such a case. *Wash Investments* followed the decision of the Court of Appeal of Victoria in *Apriaden Pty Ltd v Seacrest Pty Ltd & Anor*[5] where the previous authorities, particularly of the High Court of Australia in *Progressive Mailing House Pty Ltd v Tabali*,[6] *Shevill v Builders' Licensing Board*,[7] *Laurinda Pty Ltd v Capabalaba Park Shopping Centre Pty Ltd*[8] and *Chan v Cresdon Pty Ltd*[9] were discussed and analysed, as well as a number of other authorities from various state Supreme Courts and Courts of Appeal, and decisions from the United Kingdom and from Canada. I accept the first four of these propositions and although these authorities all deal with unregistered leases, I accept also that, subject to any statutory provisions to the contrary, the same principles must apply to leases registered under the Torrens title system. The fifth proposition depends upon the statutory provisions in question, bearing in mind that the statutory provisions in New South Wales, Victoria and Queensland are very different to the provisions of the BTFDA, to which I will come.

[16] There are three relevant statutes operative in the Northern Territory which deal with the subject of leases. They are the *Land Title Act 2000, The Law of Property Act 2000* and the BTFDA.

---

5 (2005) 12 VR 319; [2005] VSCA 139.

6 (1985) 157 CLR 17.

7 (1982) HCA 47; [1982] 149 CLR 620.

8 [1989] HCA 23; (1989) 163 CLR 623.

9 [1989] HCA 63; (1989) 168 CLR 242.

Statutory provisions- the *Land Title Act 2000*.

[17] Section 70 provides:

> **Re-entry by lessor**
>
> (1) If a lessor under a registered lease lawfully re-enters and takes possession under the lease or an Act, the lessor may lodge a request for the Registrar-General to register the re-entry.
>
> (2) The registering of the request for the re-entry does not release the lessee from liability in respect of a breach of any covenant, either express or implied, in the lease.

[18] Section 71 provides:

> **Surrendering a lease**
>
> (1) A registered lease may be wholly or partly surrendered by operation of law or by registering an instrument of surrender of the lease executed by the lessor and the lessee.
>
> (2) However, a registered lease may be surrendered by registering an instrument of surrender only with the consent of every mortgagee and sublessee of the lessee.
>
> (3) If an instrument of surrender is lodged, the Registrar-General must:
>
> (a) register the instrument; and
>
> (b) record the date of surrender specified in the instrument in the land register.
>
> (4) The interest of the lessee in a registered lease vests in the lessor on registering the instrument of surrender.
>
> (5) The Registrar-General may make an entry in the land register of the surrender of a lease on receiving an application in the prescribed form from the lessor and the lessor producing any evidence that the Registrar-General may require that the lessee has abandoned his or her occupation of the land comprised in the lease.
>
> (6) This section does not apply to a surrender or disclaimer under a law about bankruptcy.

[19] Section 184 provides:

An instrument does not transfer or create an interest in a lot at law until it is registered.

[20] Section 188 provides:

> (1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
>
> (2) In particular, the registered proprietor:
>
> (c) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.

[21] None of these provisions purport to alter the common law right of the landlord to terminate the lease for breach of an essential term; nor does the Act purport to limit in any way the conditions of a lease which the parties may agree upon; nor does the Act deal with recovery of premises, or the circumstances under which a lease may be terminated. Section 70 recognises that the landlord may lawfully re-enter and take possession of registered leases. It would seem, however, that the legal interest in the lease does not come to an end, at least so far as third parties are concerned, until the lease has been deregistered.

The *Law of Property Act 2000*

[22] Section 114(2) provides that certain provisions of the Act do apply to leases within the meaning of the BTFDA and certain other sections do not. Section 119 is a section that does apply, and s 137 is a section that does not apply. Section 114(1) provides also, in effect, that where there is a provision

capable of applying under both Acts, the provision in the BTFDA applies and the provision in the *Law of Property Act 2000* does not apply.

[23] Section 119(1) provides:

> (1) Unless otherwise agreed, there is in every lease of land made after the commencement of this Act implied the following powers in the Lessor:
>
> (d) that, subject to section 137, if:
>
> (i) the rent or a part of it is in arrears for not less than one month (although no formal demand has been made for its payment); or
>
> (ii) default is made in the fulfilment of a covenant, obligation, condition, or other term of the lease, expressed or implied, to be performed or observed on the part of the lessee, and continues for not less than 2 months, or the repairs required by a notice under paragraph (a) are not completed within the time specified in the notice,
>
> the lessor may re-enter the leased premises (or a part of the premises in the name of the whole) and determine the estate of the lessee in the premises.

[24] Given that s 137 does not apply to business leases, either the words "subject to section 137" are taken to be ineffective in such cases, or that the section must be read subject to any contrary provision in the BTFDA, via s 114(1). I will come to deal with the BTFDA later, but I observe that s 124 of the BTFDA bears some similarities to s 137.

[25] Section 137 provides:

> (1) A lessor must not exercise a right of re-entry and forfeiture under a lease unless:
>
> (a) the lessor is authorised to do so by an order of the Court made under subsection (3); or

(b) the lessee has abandoned or voluntarily given up possession of leased premises.

(2) If a lessee breaches a covenant, obligation, condition or agreement (whether express or implied) in the lease that gives rise to a right of re-entry or forfeiture on the part of the lessor and the lessor wishes to enforce the right, the lessor must serve on the lessee a notice that:

(a) specifies the particular breach complained of;

(b) if the breach is capable of remedy – requires the lessee to remedy the breach; and

(c) if the lessor claims compensation in money for the breach – requires the lessee to pay the compensation.

(3) If notice has been served on a lessee under subsection (2) and the lessee fails within a reasonable time after service of the notice to comply with the notice, the lessor may apply to the Court for an order for possession of the leased premises.

(4) If an application is made to the Court and the Court is satisfied that the lease has been terminated, the Court may make an order for possession of the premises.

(5) A notice served under this section is to be in the prescribed form.

(6) For the purposes of this section, a lease limited to continue for only as long as the lessee does not commit a breach of a covenant, obligation, condition or agreement in the lease takes effect as if it is a lease that:

(a) is for any term for which it may lawfully be in force; and

(b) contains a term giving the lessor a right of re-entry or forfeiture for breach of a covenant, obligation, condition or agreement in the lease.

(7) This section:

(a) applies to leases made before or after the commencement of this Act;

(b) applies despite there being a term giving the lessor a right of re-entry or forfeiture implied in the lease by operation of another Act; and

(c) has effect despite any term of a lease to the contrary.

(8) In this section:

(a) a reference to a lease does not include a reference to a lease or tenancy for a term not exceeding 1 year; and

(b) if a breach of a lease has occurred before the commencement of this Act – a reference to a covenant, condition, or agreement does not include a reference to a covenant, condition or agreement in the lease against the assigning, underletting, parting with the possession or disposing of the premises leased.

[26] In *Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors* the Queensland Court of Appeal considered a similar provision in s 124 of the *Property Law Act 1974* (Qld). Philip McMurdo JA said[10] (with the concurrence of Philippides JA and Daubney J):

> Section 124(1) does not create a right of reentry or forfeiture. Rather it imposes a condition on the exercise of such a right which is conferred by a lease. That is a right which is exercisable for a breach of a covenant, obligation, condition or agreement in the lease. Therefore s 124(1) is engaged only where a right of reentry or forfeiture is to be exercised on the basis of a *breach*. It is not engaged where a lessor seeks to reenter or forfeit the lease, not for the lessee's breach, but upon another ground.

[27] The Court went on to apparently accept, citing Meagher JA in *Marshall v Council of the Shire of Snowy River*[11] that there was no obligation to comply with s 124 in circumstances where the landlord was entitled to treat the lessee's conduct as amounting to a repudiation or a fundamental breach or a breach of an essential term entitling the landlord to terminate the contract, noting, however, that a different view was taken by Handley AJA in *World Best Holdings Ltd v Sarker*[12] in so far as it related to breaches of fundamental or essential terms of the contract. In that case, Handley AJA said, (with the concurrence of Tobias and Campbell JJA) after citing

10 [2016] QCA 258 at [22].

11 (1994) 7 BPR 14, 447.

12 [2010] NSWCA 24 at [31], [34], [39], [43], [44].

s 129(1) of the *Conveyancing Act 1919* (NSW) (which is very similar to s 137(2) and (3) of the *Law of Property Act 2000* (NT)):

> 31. The section applies in terms to the notice of termination. However the landlord relies on decisions that a lease, like any other contract, may be repudiated, and s 129(1) and its equivalents do not affect the right of an innocent party to accept a repudiation and terminate the lease…
>
> 34. Section 129 does not affect the landlord's remedies for non-payment of rent (s 129(8)). [*Pausing there I note that there is no equivalent provision to s 129(8) in any of the NT Acts.]* The High Court has not yet considered the effect of s 129 on the landlord's contractual right to terminate the lease for non-repudiatory breaches of other fundamental terms.
>
> [After referring at some length to the decision of *Marshall v Council of the Shire of Snowy River* and citing the passage from Meagher JA's judgment referred to earlier, his Honour said];
>
> 39. His Honour's reference to a termination by a landlord for fundamental breach, not amounting to a repudiation, was clearly dicta. The appeal was to be dismissed for reasons already given. The tenant did not have the protection of s 129 as he had in fact repudiated the agreement for lease and the landlord had accepted that repudiation. The landlord's remedies for non-repudiatory breaches of fundamental terms, other than for non-payment of rent, did not arise for decision.
>
> [After referring briefly to *Apriaden Pty Ltd v Seacrest Pty Ltd*, which his Honour said only dealt with termination for repudiation, his Honour continued]:
>
> 43. Breaches of contract or covenant, falling short of repudiation, fall squarely within the language of the section. The court must start with the Section and give full effect to its language. There is nothing, other than the dicta in *Marshall*, to support the view that compliance with the section is optional so that a landlord is free to choose between exercising an express right of termination or forfeiture which required compliance with s 129, and his common law right of termination for fundamental breach where that is not necessary.
>
> 44. A landlord cannot contract out of s 129(1) by making any or all of the tenant's covenants essential terms, and providing that any breach or fundamental breach thereof will give rise to a right of termination. Section 129 exists for the protection of tenants, and

subs (1) provides that it "shall have effect notwithstanding any stipulation to the contrary".

[28] The conclusions I have reached from all of this are as follows: (1) but for s 114(2)(d) of the *Law of Property Act 2000* s 137 of that Act would apply and could not be contracted out of. In my opinion, the position would be governed by the decision in *World Best Holdings*, discussed above. A notice would be required under s 137(2) to terminate the lease in the prescribed form.: subs (5), and no such notice was given. However, s 137 does not apply, and I consider that s 119(1)(d)(i) probably applies as if the words "subject to s 137" were omitted. In other words, if that provision applies, the landlord may if the rent is in arrears for not less than a month, re-enter the premises and determine the estate of the tenant. However, the plaintiff did not purport to re-enter the premises, so that provision is irrelevant. In any event, in the case of business leases, as we shall see, re-entry without a court order is forbidden by s 124 of the BTFDA. In my view, s 124 is a special provision and would take priority over s 119(1)(d)(i) which is general in nature, in accordance with the principle *generalia specialibus non derogant.* This would be consistent with s 114(1) of *the Law of Property Act 2000* which provides that if a provision of that Act and a provision of the BTFDA are capable of applying to or in relation to a business lease, the provision in the *Law of Property Act 2000* does not apply. I note also that non-compliance with s 124 is an offence.

The BTFDA

[29] The BTFDA deals with two main types of tenancies: retail shop leases and leases of business premises. A "business lease" is defined by s 5(1) to mean a retail shop lease or "any other agreement or contract (including a tenancy and sublease) under which business premises are let or hired to a person". "Business premises" are defined to mean "premises leased primarily for business purposes, whether or not the premises may be used as a residence under the business lease."[13]

[30] Business Tenancies are dealt with under Part 13 of the Act. Section 124 provides:

> A person must not, except in accordance with an order of a court, enter business premises of which the person has possession as a tenant under a business lease, or as a former tenant holding over after termination of a business lease, for the purpose of recovering possession of the premises, whether entry is effected peaceably of otherwise.
>
> Maximum penalty: 100 penalty units or imprisonment for 6 months.

[31] Section 125 provides for the giving of a notice to quit:

> A notice to quit given by a landlord is to be in writing and signed by the landlord or the landlord's agent authorised in writing.

[32] Section 130(2) provides:

> Subject to the terms of the business lease, it the lease was granted for a fixed term the landlord must specify as a ground for the giving of a notice to quit:
>
> (a) That the tenant has breached or failed to comply with a provision of the lease and the breach or failure to comply was such that the landlord was justified as treating the lease as at an end, or;

13 See s 5(1) of the BTFDA.

(b) That the term of the lease has expired.

[33] Section 130(3) provides:

> The period of a notice to quit premises is the period fixed by the lease or, where the rent is payable at regular intervals, the period of one such interval.

[34] Section 131 provides that once a valid notice to quit has been given, the landlord may at any time within 60 days after the expiry of the term of the notice apply to the Local Court for a warrant for possession.

[35] Section 134 provides that the rules under the law of contract relating to mitigation of loss or damage upon breach of a contract apply in relation to a breach of a business lease.

[36] Section 135, which is in Part 14 of the Act, provides for the services of notices. Essentially, the section requires service of a notice on a company by either personal service or by post in accordance with s 109X of the *Corporations Act 2001*. Essentially, that required either leaving or posting the notice to the company at its registered office, or personal service upon a director of the company.

Was the lease a "business lease"?

[37] This depends upon whether the premises were "leased primarily for business purposes, whether or not the premises may be used as a residence under the business lease." This definition looks at the purposes for which the lease was granted, rather than what the premises may have actually been used for

from time to time. The lease defines the "Lessee's business" as "the farming and livestock enterprise carried on by the Lessee on the Property."

Clause 8.1 of the lease provides that the "Lessee must at its own cost use the Property solely for the Permitted Use." The "Permitted Use" is defined by clause 1.1 to have the meaning given in item 7, which in turn states:

> Farming property for the growing, harvesting and packing of crops as a commercial concern as well as operating a livestock enterprise. Accommodation of staff for training, farming and packing operations.

[38] I see no reason why a livestock enterprise or farming/cropping enterprise is not a "business" in the ordinary sense of the word. In my opinion the lease is a business lease, having regard to the purposes for which the lease was granted. That being so, a notice to quit, to be valid, must comply with the provisions of the BTFDA.

Did the alleged termination email notice comply with the BTFDA?

[39] I consider that the notice given was invalid because it did not comply with the following legislative requirements:

a. The email at 1.07 pm on 23 June was not signed by the landlord or the landlord's agent. (s 125)

b. As the lease did not provide for a period for the giving of notice, the Act required one month's notice (the regular intervals during which the lease rent was paid). (s 130(3)).

c. It was not personally served on a director of the defendant company or served or sent by post to the defendant company's registered office but sent to Mr Flory. (s 135).

[40] Section 129 of the BTFDA provides that a notice to quit which does not comply with the provisions of Division 2 does not operate to terminate the tenancy.

[41] In any event, the termination of the lease would not operate so as to discharge the defendant to pay any outstanding rent, or to pay damages or mesne profits if the defendant remained in possession of the leased premises. I will deal with this further, below.

[42] I am unable to conclude that the BFTDA provided a code which determined the only way in which a lease may be terminated. Again, the relevant provisions do not state that a lease may be determined only if a notice to quit is given. There are many ways in which a lease may be determined otherwise than upon a notice to quit: for example, by expiry; by notice if the contract provides for termination; by notice without there being any breach of its terms; by surrender; by merger; by becoming a satisfied term; by enlargement; and by disclaimer. Section 130(2) merely imposes a restriction on termination by a notice to quit in the circumstances envisaged by the section. If a notice to quit is not required to terminate the lease, s 130(2) does not apply. However, even though the lease has been terminated, the lessor cannot re-enter the land whether peaceably or otherwise, except by an

order of a court: see s 124.[14] It seems to me that in these circumstances the correct view is that the dictum of Meagher AJ in *Marshall v The Council of Snowy River* cited above, in so far as the contract provides for termination by notice in the event of a breach of an essential term, is applicable. There is nothing in the BTFDA to the contrary.[15]

Did the defendant act in such a way as to repudiate the lease, thus entitling the plaintiff to terminate the lease?

[43] As noted previously in [13] above, by the time that the alleged termination email was sent on 23 June 2016, two months' rent as well as the rent for April, had fallen due and was unpaid. This was a breach of an essential term of the lease: see [16] above. Clause 15.3 of the lease entitled the plaintiff to terminate the lease by notice. Did this amount to a repudiation of the lease entitling the plaintiff to either accept the repudiation of the lease or hold the defendant to its terms? I do not think it did. The mere fact that the rent had fallen behind is not in itself sufficient to show that the defendant had repudiated the lease. What the defendant was seeking at this stage was time in order to bring the rent up to date. As was observed by Mason J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*:[16]

> What needs to be established in order to constitute a repudiation is that the party evinces an intention no longer to be bound by the contract or that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way (Shevill, at

14 A possible exception to this is where the tenant abandons the lease: see s 71(5) of the *Land Title Act 2000.*

15 For example, there is no provision providing that the parties may not contract out of the need for giving a notice to quit in order to determine a business lease, as opposed to s 9(1) of the BTFDA which specifically prevents contracting out in the case of retail shop leases.

16 [1985] HCA 14 at para [38]; (1985) 157 CLR 17 at p 33.

> pp 625-627). Likewise, the primary judge's finding does not amount to a finding that there was a fundamental breach of contract in the sense that the party at fault, though wishing to perform the contract, was guilty of such default in performance that the breach went so much to the root of the contract that it made commercial performance of it impossible. Whether fundamental breach is but another illustration of repudiation.

[44] However, the right to terminate for breach of an essential term is a separate right which the contract expressly provides for. The only question is whether the plaintiff terminated the contract by the alleged termination email. Looking at the wording of the email, I think it is clear that the notice given provided that unless the rent was paid within seven days the lease would be terminated. In my opinion the notice given was sufficient to terminate the lease on 30 June 2016, it being common ground that the rent was not brought up to date by then. However, the defendant remained in possession of the property for a considerable period afterwards. Even though the lease was terminated, (as was the option to purchase), this did not entitle the plaintiff to possession. Section 124 of the BFTDA required a court order; the plaintiff could not even obtain peaceable possession.

The roles of Mr Astill, Mr Flory and Mr Troy Dann

[45] Mr Astill states in his affidavit sworn on 8 June 2018, that apart from signing the lease and the option to purchase, neither he nor the defendant had anything to do with the premises or any business to be carried on therewith. His only other role was to cause the defendant to resign as the trustee. In his mind, the premises were under the control of Troy Dann. His understanding was that the documents were signed for the benefit of

Troy Dann and his family. He never had any contact with the plaintiffs. The defendant did not provide any funds for the trust and neither he nor the defendant was a unit holder in the trust. It is asserted that all the units in the trust were held ultimately for the benefit of Troy Dann and his family. In June 2015, the defendant's only relationship with Troy Dann and the Dann family was as the purchaser of the Dann family's cattle station known as Aileron Station. He had no memory of signing the guarantee. The lease and the guarantee are contained in the one document which Mr Astill in fact signed. He says that Troy Dann told him that through Mr Dann's father's network, he would effect a sale and a transfer of the premises within 90 days so that the lease and guarantee would be terminated within a short period of time. He also states that Mr Flory was the defendant's general counsel at the time. In his affidavit sworn on 8 February 2019, he asserts that he had nothing to do with the trust other than to permit the defendant to act as trustee. He asserts that Troy Dann personally took possession of the property and occupied it solely for his own benefit, which is contrary to the admitted pleadings. The defendant received no payment or other benefit for acting as the trustee. This state of affairs beggars belief. The plaintiff had solicitors acting for him and the same firm of solicitors acted for the defendant, albeit different members of the firm were involved. In addition, Mr Flory, as the defendant's general counsel, was aware of the terms of the lease before the lease was executed. It is unbelievable that the defendant would expose itself to a lease for such a large rental and obtain an option to

purchase the property if there was nothing in it for the defendant. It is incredible to think that the solicitors acting on Mr Astill's behalf would not have advised him strongly against assuming such a significant liability for no apparent benefit. However, I make no finding about that one way or the other, as Mr Astill was not cross-examined on his affidavit.

[46] Mr Flory has acted as solicitor for the defendant and has apparently also acted for the trust. According to Mr Astill, Mr Flory instructed the firm of HWL Ebsworth, solicitors, to prepare the lease and the guarantee, and they appear to have arranged for the lease to be registered. They also prepared the deed of trust. According to the unit trust certificates the unit holders in the trust were TNT Agriculture Pty Ltd which held 100 units and RJR Legal & Consulting Pty Ltd in its capacity of a trustee (the beneficiary is not named) held 900 units. Mr Troy Dann is referred to as the "Associated Person" in the certificate in favour of TNT Agriculture Pty Ltd and Mr Flory is the "Associated Person" in relation to the units held by RJR Legal & Consulting Pty Ltd. The deed does not specifically throw any light on what rights or obligations if any are vested in Associated Persons. Mr Flory claimed that the units held by TNT Agriculture Pty Ltd were held on trust for Troy Dann and that the units held by RJR Legal & Consulting Pty Ltd were held in trust for Troy Dann and his family. No documents have been produced proving the existence of either of these trusts. During the time that Mr Flory was emailing the plaintiff seeking more time to pay the rent, it is unclear from the correspondence who he was acting for in relation to the

proposed sale of the property. Mr Flory, in his evidence maintained that he was at this stage acting for Mr Troy Dann. I found Mr Flory to be an unsatisfactory witness, but I make no finding about that either.

[47] According to the affidavit of Troy Dann, the underlying arrangement between he and Mr Astill was quite different. In short, he claims that the arrangement was supposed to be that Waite River Holdings Pty Ltd, a company "associated with" his parents, owned Aileron Station. The plan was to acquire the station as well as the property the subject of the lease in these proceedings and other neighbouring pastoral leases to supply produce "from paddock to plate". His role was to find suitable properties and oversee the pastoral and agricultural activities. He was to hold a 20% interest in the group and the other 80% would be held by the "Caason Group" of which Craig Astill was the managing director. This led to the sale of the Aileron property to Aileron Pastoral Holdings Pty Ltd, "an entity set up by Craig and Richard" [Flory]. He was engaged to manage Aileron Station after that and paid a monthly fee of $10,000 and reported to Mr Astill. He claims that he did not receive the 20% stake in Aileron Pastoral Holdings Pty Ltd which he complained about to Astill and Flory, but instead was promised a "reasonable stake no less than 20%" in the acquisition of the "grape farm" (the property the subject of these proceedings). He said that Flory handled the whole of the legal side of acquiring the grape farm. He said he did not know what a unit trust was and that there was never any agreement that Flory would hold any interest in the trust for him or his family. He says that

after the lease was in place, he became responsible for managing it and still reported to Astill. He states that he regularly had telephone discussions with both Astill and Flory about money he spent out of his own pocket for some improvements on the leased property, that he was told many times that funds were coming, that Flory and Astill were responsible for sourcing the funds, and that he eventually walked off the property when the funds did not materialise in about October 2017. He denies that any of the units were held in trust for him or members of his family. Clearly there is a major factual dispute between Mr Dann, Mr Flory and Mr Astill.

[48] According to the affidavit of Mr O'Donnell, in around June 2015, the plaintiff engaged in discussion with Troy and Gary Dann who had expressed an interest in leasing or purchasing the property. A proposal was received from the Danns on 17 July 2015 that the Danns' family company, Waite River Holdings Pty Ltd, would lease the property for two years at a rental of $33,333 per month and take an option to purchase for $4.5m at the end of the lease. That proposal was not accepted by the plaintiff. Subsequently Troy Dann introduced O'Donnell to the Caason Group (Mr Astill's companies) through its general counsel, Mr Flory. Ultimately this led to the execution of the lease and option agreement. There is nothing in Mr O'Donnell's affidavit to suggest that he was aware of the precise relationship between the Danns and Mr Astill or his companies.

[49] Nevertheless it seems to me that regardless of who is telling the truth about this, Mr Dann, when he collected the keys and took over the running of the

lease, did so as an agent and not as a principal for his own benefit. On Mr Astill's account, he clearly left everything to do with the running of the property to Mr Flory. Mr Flory was well aware, as was Mr Astill, that Mr Dann was in occupation on the property. No objection was taken to this course. I find that in taking possession he acted as an agent for the defendant, and that he remained as the agent for the defendant until he left the property. Certainly from the plaintiff's point of view that was the perception of its officers. No-one had returned the keys to them. So far as they knew, Mr Dann was still on the property. They were not to know anything about the internal arrangements between Mr Flory, Mr Dann and Mr Astill and their respective business interests.

The events after 23 June 2016

[50] On 28 June 2016, further emails passed between Mr Flory and Peter O'Donnell, a director of the plaintiff. The email chain began with an email from Mr O'Donnell to Mr Flory drawing his attention to an ABC News report concerning "big expansion plans for desert hay farm", sent at 3.06 pm on 28 June 2016. Mr Flory replied by email on the same day at 22.43 hours in which Mr Flory stated that it looks like "we have sorted out the lease payments" and asking for him to ring tomorrow "because I need just a small bit of slack." The following morning further emails passed between Mr O'Donnell and Mr Flory. At 13.11 Mr Flory sent an email to Mr O'Donnell:

> I have already got the 3 months covered and will send you a letter of support confirming that ongoing funding is in place from our funder to keep this going even to August as we are confident of getting in equity investors as part of the purchase from the vendor…
>
> I am confident will have the May payment by the 7th and the June payment on or before the 15th July and the July payment by the 30th July.
>
> We will also have an indicative offer to finalise the contract by the end of July as well that is why we will be exercising the nominee clause in the contract.
>
> Please give the Trust a chance to show its commitment and pay the funds as I will go through the detail with you over a beer…"

[51] It is interesting to note that Mr Flory referred to "giving the Trust a chance" when according to Mr Astill, the plaintiff had already resigned from the trust and yet, there is no mention of this until Mr Flory's email to Mr O'Donnell at 18.11 on 30 June 2016. In this later email he proposes wholesale changes to the contractual arrangements between the parties including a "change of Trustee arrangement." This is followed up by another email from Mr Flory to Mr O'Donnell and to "Vin" (who is presumably Vincent Lange, a director of the plaintiff) on July 4 at 6.40 pm in which he foreshadows that a personal guarantee "is now available" (although nothing in writing to that effect is produced) from "the Danns for 6 months which will be obtained [from] moneys owed to them from their settlement with APH which will cover the lease and will also allow the property to be sold to investors we are working with which will give you the comfort that you will get the sale price within the next 180 days." This is followed up by two further emails from Mr Flory on July 11 to "sort this out" by Wednesday [13 July] and to ask for him to be given time to attend to this. The following

day, Mr Flory sent another email to "Vin", Mr Walker and Mr O'Donnell asking for a copy of the June invoice "so I can get then (sic) to load it into the system." Mr Walker responded on 13 July at 8.48 enclosing the June invoice which was made out to Aileron Pastoral Holdings Pty (sic). On Wednesday 20 July, Mr Flory sent an email enclosing a copy of a payment receipt into the Westpac Bank account of the plaintiff for $36,666.66 made on 14 July. This brought the rent up to date as at the end of May 2016, but the June payment was still outstanding.

[52] On 17 August 2016, Mr Flory sent an email to "Vin", Mr Walker and Mr O'Donnell again asking for more time, and indicating that there were potential equity partners/potential buyers inspecting the property, and indicating that he was expecting funding to pay the rent in the near future. This was followed up by another email on August 18 seeking forbearance until the end of August for a "review" and asking for more time to the end of September, presumably, for the option to be exercised. The next email is dated 16 September from Mr Flory in which he refers to Mr Dann's illness and encloses an email from a firm of solicitors who are apparently acting for a Mr Graeme Watters on behalf of the proposed investors seeking more time until the end of September. There are no emails in reply and no evidence that the plaintiff's servants or agents spoke to Mr Flory in the meantime. The inference I draw from the objective facts is that the plaintiff, notwithstanding that it had terminated both the lease and the option agreement, was hoping that the defendant would in the end bring the rent up

to date, and exercise the option once the funds came in from the prospective buyer or buyers. Although this is inconsistent with the legal position which governed the rights of the parties, I infer that the plaintiff considered that the lease and the option must have been still on foot, or that at the least, they were prepared to waive noncompliance. However, as noted in the next paragraph a notice to quit was eventually given which was only necessary if the lease had not been terminated already. In any event, the proposed funding to pay for the arrears of rent never came through. Emails from Mr Flory consistently asking for more time and trying to sound positive continued until 24 October 2016. On 26 October 2016 the plaintiff's solicitors prepared a formal notice to quit which was served on the defendant the same day. This is admitted by the defendant in its Defence and Counterclaim (para 8.)

The notice to quit dated 26 October 2016

[53] The notice to quit stated that the reason for giving the notice was because of non-payment of arrears of rent. The notice purportedly operated to determine the tenancy in one month, namely on 26 November 2016. It also demanded payment of the arrears of rent and for outstanding legal fees, totalling $188,222.80. Neither the plaintiff nor the defendant has pleaded that the lease was terminated at that time. Ordinarily, a lease is determined

once the time fixed by a valid notice to quit has expired.[17] However, as I have found already, the lease had been terminated as at 30 June 2016.

Recovery of possession of the premises

[54] There is no specific evidence as to when the plaintiff recovered possession of the premises, other than Mr Walker's statement, in paragraph 10 of his affidavit sworn on 30 November 2017, that his solicitors informed him on 14 February 2017 that Mr Flory had informed them that "he considered that the defendant was not in possession of the property".[18] The plaintiff filed a request to register a re-entry on 27 February 2017 on the ground that the "tenant abandoned or voluntarily given up (sic) possession of the leased premises on 14 February 2017."

[55] There is some evidence that the property had at least one habitable building on the premises and that the keys to the premises were given to Mr Dann. There is some evidence that the premises were occupied by a manager; this may have been Mr Dann. There is no evidence that the keys were ever returned to the plaintiff. A re-entry of business premises without a court order is forbidden by s 124 of the BTFDA, where the tenant is still in possession.

[56] The premises were sold by the plaintiff in 2017 for the sum of $4,500,000 exclusive of GST, completion having taken place on 19 July 2017.

---

17 *Woodfall*, Landlord and Tenant, 28th Edition, para 1-1970.

18 See ext P3, an email from Flory to the plaintiff's solicitors dated 14 February 2017.

The commencement of these proceedings

[57] The writ in this matter was filed on 13 December 2016. It sought a warrant for possession of the premises[19] and an order that the defendant pay outstanding rent. As the plaintiff has recovered possession it is not necessary to consider the claim for the warrant for possession. The Amended Statement of Claim no longer seeks arrears of rent but damages for breach of the lease. A substantial part of the loss and damages particularized in the Amended Statement of Claim is for the unpaid rent.

Consequences of the lease being terminated

[58] It is a basic principle of contract law that when a contract is lawfully terminated by a party for breach of an essential term, the termination does not release the other party from non-performance of its obligations which arose before the date of termination. The ordinary principles of contract law apply to leases.[20] Termination of the lease in those circumstances releases both parties from any future obligations, but not past obligations. As Dixon J observed in *McDonald v Dennys Lascelles Ltd*[21] "rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected." Furthermore, the lessor can recover damages for loss of bargain (or *mesne*

---

19 Despite the fact that actions for ejectment from business premises are required to be brought in the Local Court: see BTFDA, s 131(1); but see s 124 which provides that re-entry for the purposes of obtaining possession may be made "in accordance with an order of a court." It is not necessary to reconcile these provisions in this case.

20 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 259 [58].

21 (1933) 48 CLR 457 at 477.

profits) in respect of the period of the balance of the lease,[22] subject to the lessor's obligation to mitigate its loss.[23] In the Northern Territory, a tenant who holds over is also liable to pay double rent during the period that possession of the premises is retained.[24] Counsel for the plaintiff, upon my asking him, specifically abandoned any claim for double rent.

Arbitration Clause

[59] The lease contains a provision, clause 19, providing for determination of disputes by an expert. The clause is enforceable even though the lease has been determined, and even though there is no provision in the contract providing for survival of the relevant clauses in the contract after termination, as in this case.[25] However, the right of a party to insist on arbitration does not prevent a court from determining the issues if the party wishing to exercise the right to arbitration does not ask the court to refer the matter to arbitration not later than its first pleading.[26] Not only did this not happen,[27] but the issue was first raised in its Further Amended Defence and Counterclaim filed on 19 December 2017. Counsel for the defendant faintly sought a stay of the action until the matter had been concluded by

---

22 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609 at 619 per Mason J; at 625 per Brennan J; per Deane J at 636; *Gumland Property Holdings Pty Ltd v Duff Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 259.

23 BTFDA, s 134.

24 *Law of Property Act 2000*, s 152.

25 *Heyman v Darwins Ltd* [1942] AC 356; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wale*s (1982) 149 CLR 337at 365.

26 *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), s 8(1).

27 The Defence and Counterclaim in its original form was filed on 3 May 2017.

arbitration, which I refused. Nevertheless the defendant argued that the plaintiff failed to mitigate its loss by taking advantage of clause 19.

Failure to Mitigate Loss

[60] The defendant pleads that the plaintiff failed to mitigate its loss by retaking possession after the expiration of the alleged termination email on 23 June 2016. This is despite the overwhelming evidence that the plaintiff took no action because it was constantly promised that the rent would be paid soon by Mr Flory. The plaintiff did not attempt to mitigate its loss, by finding, if it could, another tenant. Instead, the plaintiff decided to sell the premises. On the plaintiff's case this occurred in February 2017. By this time the plaintiff had already placed the property in the hands of Elders for sale. The property was sold promptly and settled on 19 July 2017. There is no evidence that this was an unreasonably long time to sell the property, or that the property was tenantable to someone else in the meantime. The burden of proof being on the defendant[28] that the plaintiff failed to mitigate its loss, I am left with such arguments as were presented at trial.

[61] The first argument was that the plaintiff should have sought to have the matter determined by an independent expert in accordance with clause 19 of the contract. It was put that if this had happened, the defendant would not have defended the matter, because it had no defence. The defendant previously claimed in its earlier defences that it was relieved from the lease

---

28 *Roper & Anor v Johnson* (1873) LR 8 CP 167; *Criss v Alexander (No 2)* (1928) 28 SR (NSW) 587 at 595-596 per Street CJ; *Metal Fabrications (Vic.) Pty Ltd v Kelcey* [1986] VR 507.

because it had resigned as trustee for the trust. But that argument was first raised after the proceedings had commenced. It was never raised by Mr Flory in his correspondence with the plaintiff. It was never suggested by Mr Flory during his negotiations with the plaintiff that he was no longer acting for the defendant and was solely acting for Mr Troy Dann. If, as Mr Astill claims, he had no interest in the lease or presumably the option, it may well have been the case that the defendant would not have contested the matter. But I am not satisfied that this was the case for the reasons I have already expressed, and in addition I would have expected Mr Flory to have advised the defendant that its interests and those of the trust and Mr Dann were in conflict and to have advised them all to seek independent legal advice. I note also that Mr Flory claimed to have paid the rent out of his own pocket which makes it even more difficult to understand why he continued to act in the matter. However, I make no adverse finding against him. In any event, from the plaintiff's point of view, the consistent promises made by Mr Flory that there was a buyer in the wind and that the rent would be paid and brought up to date when the option was exercised is only consistent with the view that the defendant was holding onto the lease. The fact that the plaintiff did nothing until it served a notice to quit on the defendant is consistent with it having decided to wait and hope that the sale would go through according to the promises made by Mr Flory. Having regard to the nature of the property and its location, it is unlikely that a new tenant could have been found, particularly as the plaintiff wanted to sell the

property. It was not argued that the plaintiff ought to have found a new tenant.

[62] The second argument that was put was that the plaintiff delayed too long in putting the property in the hands of Elders. On the facts of this case, the defendant remained in possession of the premises after the lease was terminated. The defendant did nothing to return the premises to the plaintiff, such as returning the keys to the premises to the plaintiff and in fact until Mr Dann left the premises in October 2016, still actually occupied them. So far as the plaintiff knew, the defendant remained in possession of the premises at the time the writ was issued, as the plaintiff's endorsement on the writ originally sought possession of the premises as well as damages. It was not until February 2017 that the plaintiff was advised by Mr Flory that the premises had been abandoned. I do not think it was incumbent upon the plaintiff to have acted more promptly than it did. Mr Flory's continued assertions that there were buyers about to complete the purchase by the exercise of the option, that a short delay would result in a "win win situation" etc, although in hindsight may be thought to be about as reliable as the spruiking of a snake-oil salesman, left the plaintiff in the position of a chance of recovering not only the rent but the full $5,000,000 on the sale of the property, compared with the uncertain outcome of having to start all over again to find a new buyer, with no rental income in the meantime. The evidence is that the plaintiff put the property in the hands of Elders to find a buyer in January 2017, before the plaintiff even realised that the property

had been abandoned. There is no evidence the Elders took too long to sell the property or that the settlement was unreasonably delayed, let alone due to the fault of the plaintiff.

[63] I do not consider that the defendant has established that the plaintiff failed to mitigate its loss.

Counterclaim

[64] The defendant pleads that the lease is capable of being set aside, presumably because the defendant claims that at all times the plaintiff was dealing with Troy Dann in his own capacity and not with the defendant as the real lessee. It is not clear to me on what basis it can be said that the lease is voidable. There is no evidence to show that the lease is voidable. This was not pressed at trial. This ground of the counterclaim must be dismissed.

[65] The other relief sought in the counterclaim is: first, a declaration that the plaintiff has no standing to bring this action because of the failure to comply with the arbitration clause. I have already rejected that argument. Secondly, the defendant seeks damages for breach of the condition to arbitrate. There is no merit in this claim. Thirdly the defendant seeks a declaration that the guarantee is of no force and effect. As the guarantee has no independent existence for the reasons already explained above the defendant is entitled to this declaration for what it is worth.

Conclusions and Orders

[66] The plaintiff is entitled to recover the non-paid rent due on 1 June 2016, amounting to $33,333.33.[29] Thereafter the plaintiff is entitled to damages at the rate of $33,333.33 per month until the sale of the property settled on 19 July 2017. This equates to 12 months' rent which equals $400,000. In relation to the rent due on 1 July 2017, as the sale took place on the 19th, the plaintiff is entitled to damages calculated in accordance with clause 4.3 of the lease, which provides for instalments of rent of less than a month to be that proportion of the annual rent as the number of days in the period bears to the number of days in the year. This totals a further $20,821.92 making a total of $420,821.92 making a grand total of $454,155.25.

[67] Interest is claimed on the outstanding rental payments at the rate of 8% compound interest calculated daily: see clause 7.6 of the lease and the definition of "Default Interest Rate" in clause 1.1. The contract does not provide for interest on damages.[30] I am not sure that the original calculations delivered to the court by the plaintiff's counsel correctly calculated this on the basis of the correct monthly figure: see fn 29 below. I am not able to calculate this amount. I will hear further submissions from the parties as to the correct sum.

---

29 The plaintiff's submissions assert that the monthly rental was $36,666.66 per month. This is a miscalculation based on the assumption that the payment made of $36,666.66 in July 2016 represented a month's rent. In fact it represented the rent for April and May 2016 excluding GST. However, the rental was $400,000 pa plus GST or $440,000 pa. This actually amounts to $37,000.00 per month. Apparently the parties have decided to ignore the GST. If the rent is $400,000 excluding GST a month's rent is $33,333.33.

30 Interest is payable at such rate as the Court thinks fit on damages pursuant to s 84(1) of the *Supreme Court Act*. However interest on interest is not permissible under s 84(2)(a).

[68] There is a claim also for outstanding legal fees of $4,889.50, which I understand to be the plaintiff's legal costs in relation to the preparation of the lease and the option to purchase. The lease agreement makes no mention of the defendant being required to pay these costs. This was abandoned by counsel for the plaintiff at trial.

[69] There is also a claim for unspecified outgoings in relation to the premises. This was also abandoned at trial.

[70] Accordingly there will be judgment for the plaintiff for the sum of $454,155.25 plus interest to be determined.

[71] There will be a declaration on the counterclaim that the guarantee is of no force and effect but otherwise the counterclaim is dismissed.

[72] I will hear the parties as to costs.
