Legune Land Pty Ltd v Northern Territory Land Corporation and Northern Territory of Australia [2012] NTSC 99

PARTIES:	LEGUNE LAND PTY LTD v NORTHERN TERRITORY LAND CORPORATION & NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 1 of 2011 (21103427)
DELIVERED:	11 December 2012
HEARING DATES:	15 to 22 August, 18 October & 23 November 2012
JUDGMENT OF:	KELLY J

CATCHWORDS:

COSTS – Assessment of mesne profits – both parties relied on the same valuation – commercial rent based on 5 year lease with 5 year option greater than the value for a 1 year lease – the plaintiff had been in possession of the land for 2 ¾ years – first defendant relied on figure based on the lost opportunity for leasing the land for 5 years with 5 year option – the plaintiff relied on the lesser figure based on a 1 year lease – two different approaches to the calculation of profits – the compensatory approach – the benefit to the defendant – the usual measure is the value of the commercial market rent for the premises unless exceptional circumstances – the reduced value of a lease for 1 year in the valuation was based upon a number of considerations that do not apply to the plaintiff – no reason to discount the value

CAVEAT – Application to remove caveat – principles applied on application to remove caveat are those applicable to application for interlocutory injunction – caveat too wide – no serious question to be tried re entitlement to prohibit dealings with the whole of the land – first defendant offered undertaking to give 10 days notice of adverse dealings – balance of convenience favours removal of caveat

Land Title Act

Bunnings Group Ltd v CHEP Australia Ltd [2011] NSWCA 342; *Re Burman's Caveat* [1994] 1 Qd R 123; *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198 applied

Jeramback Holdings Pty Ltd v Austral-Asean Pty Ltd [2005] NTSC 38 followed

Hampton v BHP Billiton (No 2) [2012] WASC 285; *Lamru Pty Ltd v Kation Pty Ltd* (1988) 44 NSWLR 432; *Ministry of Defence v Thompson* [1993] 2 E.G.L.R. 107 considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr Dunning SC with Mr Williams
First Defendant:	Mr Robinson SC
Second Defendant:	Mr Grant QC with Mr Bruxner

Solicitors:

Plaintiff:	Povey Stirk Lawyers & Notaries
First Defendant:	Clayton Utz
Second Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	KEL12027
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Legune Land Pty Ltd v Northern Territory Land Corporation & Northern Territory of Australia [2012] NTSC 99
No. 1 of 2011 (21103427)

BETWEEN:

LEGUNE LAND PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY LAND CORPORATION & NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: KELLY J

REASONS FOR ORDERS

(Delivered 11 December 2012)

[1] On 18 October 2012 I gave judgment for the defendants in this matter and left it to the parties to agree on the form of orders which should be made as a consequence. In the meantime, the plaintiff has lodged an appeal.

[2] The parties reached partial agreement and on 23 November 2012, by consent, I made an order that the plaintiff deliver possession of the land the subject of these proceedings ("the Land") to the first defendant, and an order staying execution of that order for possession of the Land on the plaintiff's undertaking to pay an occupation fee in an amount to be determined by the Court on the 10th day of each month, commencing on 10 December 2012,

and on the plaintiff's undertaking to vacate the Land entirely by 30 June 2013, or such other date as ordered by the Court.

[3] Two outstanding matters remained which were not subject to agreement. It was agreed that there should be an order that the plaintiff pay an amount to the first defendant by way of mesne profits for the period during which it has been held that the plaintiff was a trespasser on the Land, and that period was agreed to be 2¾ years. However, the parties did not agree on the assessment of the amount of mesne profits to be paid.

[4] Secondly, the first defendant seeks an order for the removal of a caveat which the plaintiff lodged over Spirit Hills Pastoral Lease of which the Land now forms part, and the plaintiff resists the removal of the caveat pending the hearing of its appeal.

Assessment of mesne profits

[5] The first defendant is seeking an order for mesne profits in the sum of $275,000 plus interest of $28,875 (calculated on an interest rate of 10.5% per annum). This claim is based on the valuation by Herron Todd White that the market rental for the Land based on a 5 year lease with a 5 year option would be $100,000 per annum. The same valuation states that the market rental based on a 1 year lease would be much less for reasons that are set out below. For a limited tenure of 1 year, the estimated rental value is $50,000 per annum. The plaintiff submits that the mesne profits (and interest) should be calculated using that figure.

[6] The valuation does not give intermediate values. The estimated rental for a 1 year lease assumed an artificial lowering of the full market rental value for such a short term.

[7] The valuation also stated that the value of the Land to the plaintiff would be more than its value to a third party because of its position in relation to the unexcised portion of Legune Station, and the significant production advantages the land offers the plaintiff as owner of the adjoining Legune Station.[1]

[8] The parties are agreed that the period during which the plaintiff was in possession of the Land as a trespasser, and hence the period over which the mesne profits should be calculated, is 2 ¾ years.

[9] The first defendant relied on evidence to the effect that during that period it was in the process of negotiating a sub-lease over the Land to a third party for 5 years with a 5 year option. Hence, its loss was the lost opportunity to sub-lease the Land at $100,000 per annum. It also relied on the added value of the Land to the plaintiff as supporting the higher assessment.

[10] The question is, whether mesne profits should be calculated on the basis of a rental of $100,000 per annum or a rental of $50,000 per annum. It was not suggested by either party that I should perform some kind of alternative valuation, and there was no evidence on which I would be able to do so.

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1 Herron Todd White valuation p 21

[11] In *Lamru Pty Ltd v Kation Pty Ltd* (1988) 44 NSWLR 432, Cohen J adopted as the measure of mesne profits a valuation which he considered to be "the most accurate assessment of the value of the property to the trespasser"[2]. He said:

> "Mesne profits are in effect damages for trespass. The authorities now seem to be clear that the usual measure is the value of the market rent for the premises which the trespasser should have paid for the period of its occupation. It will not depend on whether the plaintiff would have been able or willing to let the premises to someone else during the relevant period."[3] [emphasis added]
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> "The authorities are clear that the principle to be applied, except in exceptional circumstances, is that the mesne profits should be the amount which the second defendant should have paid as a market rent.
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> .....
>
> The assessment of damages as being the value to the trespasser and not the loss to the owner is itself restitutionary. If damages in the traditional way were being sought they would consist of what the lessor has lost, and this may be considerably less than what the trespasser should have paid."[4]

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2 at p 441

3 at p 439. In *Lamru* the plaintiff sought restitution, and submitted that the proper measure of mesne profits should be the amount the defendant saved by not moving to alternative accommodation. This included an amount for the cost of moving. That claim was rejected. However, the court adopted the value to the trespasser as the amount of mesne profits, which included a rental premium which it was determined the defendant would have been willing to pay because of the additional value of the property to the defendant including as a result of such saving in moving costs.

4 at p 440

[12] In *Hampton v BHP Billiton* (No 2)[5] Edelman J referred to the two different approaches to the calculation of mesne profits, the compensatory approach[6] and the approach involving a focus upon the benefit to the defendant[7], and said:

> "These two lines of authority are not in conflict. They are simply alternative measures of damages. One focuses upon compensation to the plaintiff. The other focuses upon the value of the benefit received by the defendant."[8]

> "When the claim for user damages is for compensation then the central question is the price which would be demanded by a reasonable person in the plaintiff's position. When the damages are sought on a restitutionary basis the question is upon the price which would be paid by a reasonable person in the defendant's position. In this case the counterclaimants put their claims in the alternative."[9]

[13] In *Ministry of Defence v Thompson*[10] Hoffman LJ, in summarising the applicable principles said:

> "First, an owner of land which is occupied without his consent may elect whether to claim damages for the loss which he has been caused or restitution of the benefit which the defendant has received.

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5 [2012] WASC 285. In *Hampton v BHP Billiton Minerals Pty Ltd (No 2)*, the Court held that the plaintiffs (the defendants by counterclaim) were not trespassers and that the defendant was not entitled to mesne profits. On the facts in that case, the defendant had offered a lease to the plaintiffs, but the plaintiffs had not accepted. The Court held that, if the plaintiffs had been trespassers, mesne profits should be assessed by reference to the amount of rental under that offer to lease.

6 at paras [337] to [339]

7 at para [340]

8 at para [341]

9 at para [345]

10 [1993] 2 E.G.L.R. 107 (referred to in *Trespass, Mesne Profits and Restitution*, Law Quarterly Review, July 1994, at p 425)

> Second, the fact that the owner, if he had obtained possession, would have let the premises at a concessionary rent, or even would not have let them at all is irrelevant to the calculation of the benefit for the purposes of a restitutionary claim. What matters is the benefit which the defendant has received.
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> Third, a benefit may be worth less to an involuntary recipient than to one who has a free choice as to whether to remain in occupation or to move elsewhere.
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> Fourth, the value of the right of occupation to a former licensee who has occupied at a concessionary rent and who has remained in possession only because she could not be rehoused by the local authority until a possession order has been made would ordinarily be the higher of the former concessionary rent and what she would have paid for local authority housing suitable for her needs, if she had been rehoused at the time when the notice expired."

[14] To the third principle may be added the corollary that the benefit may be worth more to a particular trespasser depending on the trespasser's particular circumstances.[11]

[15] Given these principles, it seems to me that the appropriate measure for the assessment of mesne profits is the fair market rent assuming the parties were free to negotiate a commercially appropriate term, for example 5 years with a 5 year option, and that is so whether the focus is on what the first defendant has lost, or on the value of the occupation to the plaintiff.

[16] The first defendant has lost the opportunity to enter into such a commercial leasing arrangement with a third party. It is not necessary to determine as a question of fact whether the first defendant would have entered into a lease for 5 years and, if so, from what date. "[I]f a property right has been

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11 *Lamru Pty Ltd v Kation* supra

invaded by wrongful user, the law should and does provide a remedy for the wrong, compensatory in character in the broad sense, focusing on the interference with the right in question."[12]

[17] Prima facie the value of the occupation to the plaintiff is also a commercial rental – ie $100,000 per annum. The reduction to $50,000 per annum in the valuation is based on the supposition that a discount of around 50% may have been required to attract a grazier to rent for just one year. The stated reason for that was as follows:

> "[A] very short term lease of just one year would be likely to attract a discount under the balanced market conditions prevailing at the date of valuation. We consider that it would be very difficult to find a tenant for a term of just one year given the large initial cost of trucking the herd to the land, a cost that would not be able to be amortized over a term of several years in such a scenario. Given the subject lands relatively isolated location where there are few potential lessees close by for whom trucking costs would not be such a burden, a potential lessee is likely to need to truck their stock a significant distance to the subject land. Therefore, the depth of the market for potential lessees in this location is limited. In any case, our market investigations have failed to yield any evidence of rental periods much less than 3 years which tends to support the apparent lack of demand for such a short term."[13]

[18] None of these considerations applies to the plaintiff. The plaintiff's cattle were already on the land at the beginning of the relevant period, and the

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12 *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 per Allsop P at [177]. See also *Lamru Pty Ltd v Kation Pty Ltd* at para [11] above

13 Herron Todd White Valuation p 31

plaintiff remained in occupation as a trespasser for 2 ¾ years.[14] I therefore see no reason why the value to the plaintiff of its occupation of the land should be discounted for the considerations referred to in the valuation for the special circumstances associated with a 1 year lease to a third party.

Removal of the caveat

[19] The first defendant seeks an order that the plaintiff take all reasonable steps to remove lapsing caveat No 738776 which the plaintiff has lodged over the whole of Spirit Hills Pastoral Lease of which the Land forms part. The first defendant points out that the caveat is in any case too wide as it forbids any dealings with the whole of the Spirit Hills Pastoral Lease; also that the existence of the caveat may impede negotiations with Western Australian parties relating to the extension of the Ord irrigations scheme. The first defendant has also offered an undertaking not to enter into any registrable transaction in relation to the land without giving 10 days notice to the plaintiff which, it contends, will adequately protect the plaintiff should the plaintiff succeed on appeal.

[20] The plaintiff says it is prepared to amend the caveat so that it applies only to the Land in question and says that it is desirable for the caveat to remain in place as a warning to anyone who might have dealings with the first

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[14] It seems the plaintiff intended to remain in occupation on a long term basis, perhaps indefinitely. Although it claimed a leasehold interest in the Land, no term for that lease was posited. It was suggested in submissions that the term might be "until the Land was required for the purposes of the Ord scheme", although it was not explained how such a term could be derived from a clause which purported to grant "a first right of refusal to lease the Licensed Areas from the Territory at a rental and upon and subject to such terms and conditions as the Territory may in its absolute discretion impose".

defendant of the existence of the plaintiff's interest. The plaintiff has not offered an undertaking as to damages should the caveat remain in place.

[21] The principles to be applied on an application for the removal of a caveat are those applicable on an application for an interlocutory injunction. There is an obligation on the caveator to establish that there is a serious question to be tried and that the balance of convenience favours the retention of the caveat.[15]

[22] Here, it seems to me that the plaintiff cannot show that there is a serious question to be tried regarding an entitlement to prohibit all dealings with the whole of Spirit Hills Pastoral Lease. Its claim to a constructive trust is for a leasehold interest over that part of Spirit Hills Pastoral Lease which consists of the two areas excised from Legune Station only. The caveat is simply too wide. I am not aware of any mechanism in the *Land Title Act* for amending a caveat. In any case, I am dealing with the existing caveat – that is caveat No 738776. The caveat should therefore be removed.

[23] If it were necessary to consider the balance of convenience, it seems to me that that too favours removal of the caveat.

[24] I do not think that the argument that the existence of the caveat may impede negotiations with Western Australian parties relating to the extension of the Ord irrigation scheme would, on its own, tip the balance of convenience in

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[15] *Jeramback Holdings Pty Ltd v Austral-Asean Pty Ltd* [2005] NTSC 38 at [14]; *Re Burman's Caveat* [1994] 1 Qd R 123 at 125; *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198 at 203

favour of removal of the caveat. If the plaintiff is successful on appeal then it is the existence of the plaintiff's leasehold interest in the Land that will (and should) affect what agreements the first defendant may enter into in relation to the Land. It is the purpose of the caveat to protect that interest (if any) until such time as the plaintiff's appeal is determined. It seems that this is likely to be some time in April, and it has not been suggested that negotiations are likely to have reached a crucial stage within that relatively short time frame.

[25] However, it seems to me that the first defendant's willingness to provide an undertaking not to enter into any registrable transaction in relation to the land without giving 10 days notice to the plaintiff would adequately protect the plaintiff should the plaintiff succeed on appeal. It would be sufficient to enable the plaintiff to apply to the court for an injunction restraining any dealing inconsistent with the plaintiff's claimed interest. Therefore, even if the plaintiff had shown a serious question to be tried, I would nevertheless have been of the view that the balance of convenience favours removal of the caveat.

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