SUPREME COURT OF QUEENSLAND

CITATION:	*English v Plath* [2003] QSC 222
PARTIES:	**DALE ENGLISH AND LINDA ENGLISH** (Plaintiffs) v **STEPHEN JOHN PLATH and MARTIN JOHN PLATH and EVELYN PLATH** (Defendants)
FILE NO:	S72/2001 (Mackay file)
DIVISION:	Trial Division
DELIVERED ON:	21 July 2003
DELIVERED AT:	Mackay
HEARING DATES:	2,3,4,5 June 2003
JUDGE:	Dutney J
ORDERS:	**Judgment for the plaintiffs against the defendants in the sum of One Hundred and Eighty-Six Thousand, One Hundred and Fifty-Six Dollars and Seventy-Five Cents ($186,156.75) together with interest to 21 July 2003 in the sum of Thirty-Six Thousand and Sixty Dollars and Sixty-Nine Cents ($36,060.69).**
CATCHWORDS:	CONTRACT – TERMS – where plaintiffs and defendants entered into a share-farming agreement - construction of document entitled "Letter of Understanding" CONTRACT – BREACH - TERMINATION – whether defendants entitled to terminate contact - whether fundamental terms of the agreement breached by plaintiffs – where defendant's conduct amounted to an election to affirm the contract *Associated Newspapers v Bancks* (1981) 83 CLR 322, followed *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, cited *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*(1978) 138 CLR 423, followed

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286, cited
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444, cited
Sargent v ASL Developments Ltd(1974) 131 CLR 634, followed
Sellars v Adelaide Petroleum NL (1992-1994) 179 CLR 332, cited
Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359, cited
Shevill v Builders' Licensing Board (1982) 149 CLR 620, cited
S*unbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, cited

COUNSEL: D McMeekin SC for the Plaintiffs
P Hack SC for the Defendants

SOLICITORS: Taylors for the Plaintiffs
Macrossan & Amiet for the Defendants

[1] This action concerns a share-farming agreement on land near Clermont in the Central Queensland Highlands. The defendants are the owners of a 32,000 acre property, "Dooruna" which they have held since 1981. Stephen Plath, the first named defendant, is the person with day to day control of "Dooruna". I have referred to him throughout rather than to the defendants collectively.

[2] Mr English, one of the plaintiffs, moved to the central highlands from Victoria in 1981. For 11 years he share-farmed a property, "Kyewong " near Dysart. In 1991 he purchased a property "Diamond Downs" about a half hour by road from "Duroona". This was in the Clermont district.

[3] In 1994 Mr Plath was looking for a share-farmer to clear and work some virgin or regrowth country forming part of areas known as Logan 3 and Logan 2. "Duroona" is a large holding of 32,000 acres. To have land cleared, stick raked and cultivated by a contractor is expensive. The figure of hundreds of dollars an acre was not demurred to by Mr Plath. The advantage to Mr Plath of the proposed share farming agreement was that he would have his land brought into production at no cost. He would get a share of the proceeds of the crop after the first three years without carrying any of the risk and he

would get grazing rights on the stubble throughout the arrangement. The share-farmer, of course, had the expectation of a profit out of the crops he was able to grow.

[4] Mr Plath raised the matter with Mr English. Just when the issue was first raised is unclear. Mr English thought it was about March 1994 while Mr Plath thought it was nearer August. In any event a document entitled "Letter of Understanding" was signed by them both in late August 1994 to signify they had reached agreement on the share-farming operation and as a memorandum of the principal terms. Since the major dispute in this action relates to the terms of the share-farming agreement I shall set out the terms of the Letter of Understanding in full.

[5] LETTER OF UNDERSTANDING

1. 5 year contract – 1st 3 years 100% on each block to Sharefarmer
   2 years 75% Sharefarmer
   25% Owner
2. Owner chains timber on to the ground. Sharefarmer to clean the timber up.
3. 3 months grazing rights – to finish on the 1st November or otherwise agreed.
4. All seed, weed control, plant, harvest and carting to be done by the Sharefarmer.
5. Endeavour to clear and plant 1500 acres 1st year and 1500 acres 2nd year. Total 3000 acres.
6. Choice of crop and other farming decisions to be made by the Sharefarmer.
7. Fences are the owners responsibility.
8. The said country to be farmed according to sound farming practice.
9. Shared grain to be marketed through Grainco unless otherwise agreed.

[6] At the outset I should say that I thought both Mr Plath and Mr English were doing their honest best to recollect events up to nine years ago. The differences between their recollections were relatively small. The dispute centred upon the meaning of their agreement.

[7] When the prospect of a share-farming agreement was first discussed Mr English made it clear he was interested in the proposition only if it was to be a long term arrangement. Clearing and cultivating new country is arduous work.

It requires expensive machinery. The land is less productive in the first years than it is in later years. The initial cost and effort required to bring the land into production is recognised by the share farmer taking all the proceeds in the first three years. Mr Plath was interested in the long term but wanted to fix an initial period of five years to see how it went first. Mr English agreed.

[8] The area to be farmed was ill-defined. It had few natural boundaries. Mr Plath and Mr English drove over it before the letter of understanding was signed and a rough idea gained as to the extent of it. Both parties thought the area was of the order of 3000 acres. Depending on whose version of the extent of the land to be farmed I accept the area may have been as little as 2300 acres. This was the area in fact farmed by Mr English and was verified by survey.

[9] Mr English recalled that on the drive the area to be farmed was identified by fences, existing cultivation and the Talkai Road. Some areas were identified as unsuitable. These included a quarry area and a watering point. A strip of timber was to be left along the Talkai Road. Coolibah trees were growing in a large central area which Mr Plath wanted to retain for fencing. The precise area would be defined by the area chained and pushed by Mr Plath.

[10] Mr Plath's recollection was slightly different. He recalled that he and Mr English first identified the country by using a grid over a map of the property to calculate three thousand acres. They then went for the drive through. Mr Plath said that as they drove up the fence line between what is described on the survey pan as Logan 2 and Block 3[1] he pointed out that the land on Logan 2 would be needed to make up the 3000 acres.

[11] The Central Highlands is dry land farming country. It has one cropping season each year depending on rainfall. The more profitable crop is sorghum which would be planted in January or February. Sorghum planted later is

[1] Exhibit 2, document 2.

disease prone. A summer sorghum crop would ordinarily be harvested in May or June. If the sorghum crop was missed because of unfavourable conditions the land would be held over for winter wheat planting. Wheat was usually planted about May and harvested in about September or October. Early wheat could be put in before May in suitable seasons.

[12] To prepare for a planting requires about two or three months preparation. The critical feature is soil moisture and the biggest enemy of soil moisture (apart from lack of rain) is weeds. It was important to cultivate to control weeds in order to retain soil moisture.

[13] Mr English said that these matters were discussed with Mr Plath in the context of clause 3 of the "Letter of Understanding". Mr English wanted to have access to the land no later than 1st November in the event of having planted wheat so as to prepare the country for sorghum in January. He gave evidence that the purpose of the clause was that the owner might not have the three months grazing rights in the event of a winter wheat crop. Mr Plath said that he took the clause to mean that he could graze up to 1st November in any year.

[14] It was clear to both men that the land could not be cleared and prepared for a crop in one year. Mr Plath wanted the land cleared in two years. Mr English doubted that he would be able to work at that rate. Clause 5 was thus inserted. As things transpired Mr English cleared and prepared in each year one of the "blocks" shown on the survey plan starting with Block 1 in the first year.

[15] Although on the pleadings there was some issue with clause 8 it was not ultimately pursued. There was no evidence Mr English did not employ sound farming practices. On the contrary, the evidence was that his farming practices were sound.

[16] At the time the agreement was entered into the shire was drought declared. Although Mr English cleared and cultivated Block 1 in preparation for the 1995 year no crop was able to be put in.

[17] In August 1995 Mr English approached Mr Plath with a view to changing the agreement to start a year later because of his inability to plant a crop in the first year. Mr Plath was sympathetic and agreed. A rough document to illustrate the effect of this change was drawn up. One copy of it is document 4 in exhibit 2. Another copy appears in Mr Plath's journal at page 24. In relation to Mr English's copy of the document the writing in blue biro was added later and is irrelevant. In the case of Mr Plath's journal the pencil writing was added later. It was submitted on behalf of Mr English that the words "he is going to clean up the rest off logan 3[2] this year" and the headings "1st 1000 ac", "1500 ac (the rest of logan 3)" and "500 ac logan 2" were also added later.

[18] The basis for Mr McMeekin SC's suspicion concerning these parts of the entry arise firstly from the fact that the line on which the first group of words quoted is set out contains 51 characters compared with a maximum in the lines above it of 28. The writing is compressed in a way inconsistent with the rest of Mr Plath's writing in the journal. It was submitted that this was indicative of being added later and compressed to fit the available space. Mr McMeekin also relies on the fact that Mr Plath agreed in cross-examination that Mr English had cleared about one third of the land in Logan 3 in the first year and believed at the time that was about 1000 acres. Thus it followed that in reality Mr Plath believed then, as did Mr English, that the land in Logan 3 made up the 3000 acres. Throughout the negotiations in 1999 the defendants believed the area actually farmed on Logan 3 was about 2700 acres[3]. It was not until the survey plan was prepared for this litigation that the parties realised the area was only 2300 acres. The figures in the headings do not correspond with what Mr Plath then believed were the areas cleared and to be cleared.

[19] Apart from the interpretation of the variation to which I will come later the importance of this entry in the journal is this. On 23 December, 1998 Mr Plath's solicitors wrote to Mr English terminating the share farming

[2] Blocks 1, 2 and 3 on the survey plan are all part of Logan3. Logan 3 and Logan 2 also continue across the Talkai Rd.
[3] This is the figure inserted in the draft share-farming agreement at page 38 of exhibit 3.

agreement. The "trigger" for this purported termination was the proceeds of a "ratoon" sorghum crop in late 1998. A "ratoon" is simply a regrowth from the stubble of an earlier harvest.

[20] By trial Mr Plath also relied as a basis for terminating the agreement on an alleged breach by Mr English being the failure to clear and cultivate the portion of Logan 2 Mr Plath alleges was included in the agreement. There was also some reliance placed on a dispute as to the time cattle could be grazed on the stubble but the evidence disclosed only the fact of disagreement and pressure by Mr English on Mr Plath to take the cattle off. This dispute was effectively settled by Mr Plath voluntary removing most, but not all, of the cattle before the end of the period for which Mr Plath claimed grazing rights.

[21] I shall come back to the narrative shortly. At this stage it is convenient to list the issues (apart from quantum) which were ultimately litigated.

[22] The issue were as follows:

1. Was the agreement in clause 1 for a 5 year term on each block or 5 years in total?
2. Did the agreement relate to calendar years or did it run from August to August?
3. When did the owner begin to receive a share of the proceeds?
4. Were the grazing rights 3 months from the when the land was made available or 3 months concluding on 1st November?
5. Was Logan 2 included in the agreement?
6. Was the failure to clear and cultivate Logan 2 a fundamental breach of the agreement?

[23] The variation of the agreement in August 1995 was recorded in Mr English's copy of the agreement (written by Mr Plath) as follows:

"	1		2		3
'96	100%	'96	100%		
'97	100%	'97	100%	'97	100%
'98	100%	'98	100%	'98	100%

’99	75%	’99	75%	’99	100%
’00	75%	’00	75%	’00	75%”

[24] The two issues that arose from this document were, firstly, whether “3” referred to “Block 3” or “Logan 2”. Secondly the issue was whether the agreement in relation to “3” terminated in 2000 or whether the document stopped there for convenience after showing the year in which the owner started sharing in the proceeds.

[25] In cross-examination Mr Plath acknowledged the importance to the share-farmer of a return on each part of the farmed land as follows[4]:

> *You knew too, that if you wanted to get a contractor in to clear your land as you proposed to have Mr English do it, it would have cost you a substantial amount of money? – Yes.*
>
> *Hundreds of dollars an acre? – I’m not sure on the exact cost, but it would have cost me a lot of money.*
>
> *And hundreds of dollars an acre would not be an underestimate? – No.*
>
> *So for you, the attraction of the arrangement was that you would get your land stick-raked and cleared and cultivated at no cost? – We forgo’d any profit off that country for three years.*
>
> *… The advantage to you of this arrangement was that you would get your land stick-raked and cleared and cultivated at no cost to yourself? – Yes.*
>
> *And even in the period where the share-farmer was to get the whole proceeds of the crop, you had the benefit of grazing rights on the stubble? – Yes.*
>
> *And that was an advantage to you? – Yes.*
>
> *And even when you get to the stage where you are splitting the proceeds, he bears the costs of getting the crop in the ground and getting it out? – That’s right.*
>
> *And the risks that are obviously associated with all that? – Yeah.*
>
> *Now, it was plain to you that no-one was going to clear your land for you unless you could put a deal to them that would show them at least a reasonable prospect of profit? – That’s right.*

[4] Transcript page 149, line 33 to page 150, line 30.

You knew that perfectly well when you were having these talks? – Yes.

And when you were discussing these things with Mr English, you were made perfectly aware by him by whatever form of words was used that he wanted to have the prospect of five years returns on every acre that he cleared? – Not the full price, not for five years, not the full …

Not a 100 per cent? – No

But he wanted a return – the prospect of a return for five years, we know the 100 per cent and the 75 comes in at some point? – Yeah.

But – granted that, that he wanted the prospect of a return for five years on every acre that he cleared? – Yes.

[26] The conversations preceding the variation of the term of the agreement were very general. I find that they involved no more than Mr English approaching Mr Plath on the basis that he had failed to get any crop in 1995 because of the drought and requesting that the term of the agreement run from what would otherwise have been the second year. I am satisfied that document 4 in exhibit 2 was prepared by Mr Plath to demonstrate when the 100% recovery by the share-farmer would cease in relation to each block. I am not satisfied that any greater significance can be placed on the failure of block 3 to extend beyond 2000.

[27] Mr Plath's recognition that the share-farmer wanted five year's returns from each acre is reflected in the wording of clause 1 of the Letter of Understanding where it refers to a return on each block. It was never contemplated that the whole of the land the subject of the agreement would be cleared and cultivated in one year. Clause 5 makes this plain. It was initially hoped that the area could be cleared and cultivated in two years but even that was uncertain as the wording of clause 5 makes plain. The only way effect can be given to the common expectation that there would be five year's return on each block is if the five years commenced in relation to each block cleared from the cropping period following clearing.

[28] Mr Plath agreed that for an agreement entered into in August 1994 the first year in which there could be the prospect of a return was 1995 having regard

to the cropping seasons and the time taken to clear and prepare the land.[5] In 1995 the prospect of return was limited to the land cleared and prepared in the previous year. For the land which it was not expected would be cleared until 1995 the earliest return would have been 1996. So much was common ground. In those circumstances it seems to me that the proper construction of the agreement recorded in clause 1 of the letter of understanding was that the five years in relation to block 1 would commence in 1995, in relation to block 2 in 1996 and, if it were necessary, in relation to block 3 in 1997.

[29] The effect of the variation in August 1995 was that the five years in relation to block 1 would commence in 1996 rather than 1995. Otherwise the agreement was unchanged. By August 1995 it was clear having regard to the rate of clearing in 1994 that Mr English would not get the land cleared and cultivated in 2 years but rather in 3. This explains the existence of the third block in document 4 of exhibit 2 and the commencement date of 1997. There is no evidence that any other variation of the agreement was discussed or agreed. There is no basis therefore for concluding that the absence of a 2001 year in relation to block 3 was intended to signify any reduction in the term of the agreement. The inclusion of a 2001 year might have led to confusion. When the agreement was negotiated Mr Plath was interested in the agreement continuing after the initial five year term if it had proved successful.[6] It therefore might not have been appropriate in 1995 when the relationship between Mr Plath and Mr English was still cordial to have shown no return from blocks 1 and 2 in 2001. To have shown the 75% which was then anticipated would have defeated the purpose of the initial trial period of five years by suggesting a commitment on Mr Plath's part to continue the agreement beyond the period he had in fact agreed to. The omission of 2001 is thus sensible and explicable. The change over in block 3 to a sharing arrangement in 2000 was noted but nothing that might be misinterpreted as an extension of the agreement beyond 5 years was shown.

---

[5] Transcript page 160, lines 1 to 21.
[6] Transcript page 150, lines 50 to 60.

[30] I am satisfied that by August 1995 it was apparent to both Mr Plath and Mr English that despite clause 5 of the agreement the land would not be cleared and planted in two years. No complaint was made about the speed or quality of Mr English's work. In 1994 Mr English succeeded in clearing and cultivating the area marked as Block 1 on the survey plan. Both men thought this was about 1000 acres. It fact it seems to have been nearer 800 acres. It was obvious that at the rate Mr English was clearing he could not do the balance in one year whether or not it included Logan 2. To achieve the rest of Logan 3 would have required him to work twice as fast as he had the previous year.

[31] There is no doubt that there were discussions concerning Logan 2. Mr English agreed that Mr Plath raised with him the possible farming of that land. Mr English would only take it on, however, if he were given a longer tenure. The fact that as early as 1995 Mr English had said he would not take on Logan 2 unless the agreement was extended is corroborated by Mr Plath's journal at page 75.

[32] The idea that Logan 2 was "extra" and not part of the original agreement as Mr English said is supported by a letter from Mr Plath's solicitor to Mr English's solicitor dated 18 March, 1999.[7] There at page 2 the following passage appears:

> "*Your client has not cleared the amount of country he was supposed to clear. He made a complaint to our clients that there was not 3000 acres and when our clients offered an extra paddock of at least an extra 500 acres, your client refused to take up this extra country, unless our clients were prepared to give your client even further years to share-farm, which our clients refused."*

[33] Mr Plath said in evidence that his solicitor wrote the above passage in error and it is inconsistent with page 24 of the journal if it is accepted that the disputed words were written when the entry was originally made.

[7] Exhibit 3 page 49.

[34] I prefer the evidence of Mr English as to what land was covered by the agreement. I accept that Logan 2 was additional land which was offered but not taken up. Firstly, there are the odd features of the entry at page 24 to which Mr McMeekin drew attention. Secondly, there is the recognised unlikelihood that Mr English could have cleared the balance of the country in Logan 3 in one year having regard to the fact that he had cleared only about a third of it in the previous year. Thirdly, there is document 4 in exhibit 2 which is said by Mr Plath's solicitor to be a copy of what was originally written in the journal.[8] What is on the copy given to Mr English was only a copy of what was in the diary if the description and areas of the paddocks were added later.

[35] In making the finding above I am not intending to suggest that I consider anything improper was done in relation to the journal. Obviously any additions were made before the solicitor's letter of 19 October 1998 because what appears in the letter is a copy of the current journal entry (without the pencil writing). I am not able to conclude when or why the original entry was altered but it seems most likely that it was done after the parties had begun to disagree and as an attempt by Mr Plath to reconstruct what he meant by the entry in the journal. After a number of years I accept that Mr Plath had forgotten having altered the original entry.

[36] In any event, for reasons to which I will come later I do not consider the inclusion or otherwise of Logan 2 in the agreement is material to the outcome.

[37] The last issue concerning the term of the agreement relates to its starting and finishing dates. The agreement was made in August 1994 and varied in August 1995. Nonetheless it does not seem to me to be sensible to treat it other than as an agreement for calendar years. There are several reasons for this. The "Duroona" area produces only one planting a year. It is either sorghum or wheat depending on rainfall. The crops overlap so that it is not

[8] Letter Macrossan & Amiet to John Crossan & Company 19 October, 1998 (exhibit 3 page 1).

possible to plant and harvest two crops in any calendar year. The usual planting time for sorghum is January and into February. It makes sense for the agreement to commence at the time of planting the first crop. If sorghum is not possible wheat is planted in May or thereabouts and harvested in September or October. It makes no sense to have a share-farming agreement which might mean that a crop planted within the term of the agreement is ready for harvest only after the agreement has expired. If there are not suitable summer rains in the fifth year of the agreement the share-farmer loses the chance of a winter crop in that year if the agreement is August to August. A commencing time of January also corresponds with when the first of the land was expected to be available for farming as opposed to being available to clear. If, as I have found, a "block" is an area cleared and cultivated, no "block" would exist until about January following the making of the agreement. Each year of the farming term would then run from January to December.

[38] The parties only ever spoke of the agreement in years. The idea of an agreement running from August one year to August the next seems to have originated with Mr Plath's solicitor, Jack Kidd. At page 19 of his journal Mr Plath records having spoken to Mr Kidd in July 1995 and asked him when the agreement would run from. Mr Kidd is recorded as saying "if the agreement was signed in August that is when it will begin". While ordinarily that might be so it depends on what the parties to the agreement intended. I am satisfied that a year earlier when the parties negotiated their agreement it was obvious to them both that if the cropping was done in calendar years the share-farming agreement would run in calendar years. This sits comfortably with the using of whole years in the note of the variation of August 1995. The first written reference to split years was when Mr Plath amended the note in his journal at page 24 by adding in pencil the references to split years. This was after disputes had arisen in 1998.

[39] The correspondence from Mr Plath's solicitor commencing at page 28 of exhibit 3 confirms the original agreement was from the beginning to the end of each year. On page 2 of the letter from Macrossan & Amiet of 1 February,

1999 referring to the assertion that the original agreement was for five years and was still current the author continues:

> "*In relation to the third last paragraph of your letter, our clients instruct quite simply that the letter of understanding was for a five year period, which five year period ended at the end of this year. They have only ever agreed to a one year extension which extends to the end of the year 2000. Our clients instruct however, as we have previously advised, that both the letter of understanding and any agreement subsequent to such have been breached by your client's default but in the spirit of compromise our clients are prepared to let your client stay on until August 2000, if all matters can be agreed upon and the share-farming agreement entered into without further delay."* (my underlining)

[40] It could not be made clearer that one of the objects of the negotiations following the purported termination of the agreement in December 1998 was to bring the end of the five year period back from December 2000 to August 2000 to correspond with what Mr Plath now asserts was the starting and finishing time. An agreement starting in August was never discussed between the parties when they were negotiating the agreement. Nonetheless the terms in which from time to time the parties chose to make notes of their agreement referred to it in the language of calendar years. It was assumed that the agreement would go until the end of the fifth cropping year. It was a matter so obvious for the reasons I have outlined that had its inclusion goes without saying.[9]

[41] The agreement that I find was entered into between the parties as evidenced by the Letter of Understanding and to the extent necessary implied from the background facts within the knowledge of both parties was as follows:

1. The agreement was for a term of five years in relation to each block cleared and cultivated.
2. The agreement would run for five calendar years originally commencing from the January following the making of the agreement but in relation to block 1 later varied to run from the following January.

[9] *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347.

3. The agreement was to run for calendar years so that the share-farmer had the opportunity in each operative year to plant and harvest either sorghum or wheat as the conditions dictated.
4. While it was hoped that the land could be confined to two blocks only it was always within the parties' contemplation that it might be more.
5. Income sharing would commence in the fourth year after the commencement of the term in relation to each block.
6. A block was the area of land actually cleared and cultivated in the period leading up to the January planting season.

[42] The income sharing arrangement in relation to blocks 1 and 2 was to commence under the terms of the agreement I have found in 1999. Anything earned from the growing of crops on the land prior to January 1999 was to belong wholly to Mr English.

[43] The issues that ultimately led to the end of the relationship are difficult to pinpoint on the evidence. There was disagreement about whether the grazing rights ran for three months from when the stubble became available or for the three months preceding 1st November. Although the dispute over this was resolved it seems to have led to some residual ill-feeling. The major issue seemed to concern the proceeds of the ratoon crop on blocks 1 and 2 in late 1998. Mr Plath asserted an entitlement to a share in the proceeds of this crop on the basis that the entitlement to 100% of proceeds ended in August 1998 or was confined to three harvests. There seemed to be more ill-feeling in the relationship than could be generated by these issues alone but that was not explored.

[44] On 23 December 1998 Mr Plath's solicitor wrote to Mr English terminating the agreement. The operative parts of the letter read as follows:

> *"As far as our clients are concerned, you have been and still are in breach of the Sharefarming Agreement. You have showed no willingness to have meaningful discussions to 'sort out' or make good your breaches and therefore, as far as our clients are concerned, they*

> *can do nothing else but treat the Sharefarming Agreement as at an end.*
>
> *You are therefore put on notice that should you come back on to our clients' property, you will be trespassing and will be treated as such and our clients will immediately call the police to have you removed from the property."*

[45] Whether a breach of an agreement entitles a party to rescind depends on whether the breach is a breach of an essential term.[10] The term may be essential because it goes to the root of the contract in the sense that breach of it substantially deprives the other party of the benefit of the agreement. It may also be essential because the parties expressly stipulate or the law regards the term breached as an essential term. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* [11]the principle was put this way:

> *"Whether a term of a contract is essential or not is a question of construction which is to be answered with due regard to the general nature of the contract considered as a whole and to its particular terms. See* Tramways Advertising Pty Ltd v Luna Park (NSW) Pty Ltd *(1938) 38 SR (NSW) 632 at 641-642, where Jordon CJ said: 'The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor:.. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight.'*
> *This statement of the law, which was approved in* Associated Newspapers v Bancks *(1951) 83 CLR 322, at p 337, emphasises that the quality of essentiality depends for its existence on a judgment which is made of the general nature of the contract and its particular provisions such judgment which takes close account of the importance which the parties have attached to the provision as evidenced by the contract itself as applied to the surrounding circumstances."*

[46] Since there is no express stipulation by the parties of any term being essential the essentiality of any term and the breach thereof has to be assessed against the principle just set out. The only specific matter relied on as a breach of the

---

[10] *Shevill v Builders' Licensing Board* (1982) 149 CLR 620 at 625 –627; *Associated Newspapers v Bancks* (1981) 83 CLR 322 at 337.

agreement in the letter of termination of 23rd December 1998 was the failure to pay or provide for payment of 25% of the proceeds of the ratoon crop to Mr Plath. Of course, if other breaches were available and would, if relied on, have entitled Mr Plath to rescind they remain available as breaches to support the termination unless previously rectified.[12]

[47] The breach relied on in the letter of termination, namely the failure to pay the 25% of proceeds, in my view, if proved, satisfies the test of essentiality. However, I am not satisfied that there was any such breach. I have found that the agreement between the parties, as varied, was that Mr English would take 100% of the proceeds of blocks 1 and 2 for the years 1996, 1997 and 1998. Since the ratoon crop was harvested in December 1998 Mr Plath had no entitlement to any part of the proceeds. I suspect, for what it is worth, that Mr Plath felt he was being cheated by the fact that the ratoon had been allowed to grow. He had never considered it to be financially viable to allow the crop to regrow after harvest and it was not something that he had considered at the time the agreement was made. Ratoons deplete soil moisture for the following season. He had expected Mr English to receive 100% of the first three harvests. This constituted a fourth which had already given rise to an argument and some compromise in relation to grazing rights. The fact that from Mr Plath's point of view it constituted a windfall for Mr English does not, however, make the retention of all the proceeds a breach of the agreement.

[48] The other breaches relied on at trial related to the grazing rights and the failure to clear and cultivate Logan 2. The grazing rights issue did not in my view amount to a breach of the agreement by Mr English. The problem commenced in about May 1988 when Mr English began to cultivate the sorghum stubble on blocks 1 and 2. Mr Plath asked him to stop because he had grazing rights. Mr English stopped and the land was made available to graze. Despite this Mr Plath did not put cattle on it until about October. Sorghum continues to grow until cultivated or sprayed. Mr English took the view that the grazing rights

---

[11] (1978) 138 CLR 423 at 430-431

[12] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377-8; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 262, 274-5.

commenced when the land was made available in May and finished in August/ September or thereabouts. Mr Plath on the other hand asserted that his grazing rights did not commence until he put cattle on the stubble provided he was off by 1st November. Because the sorghum had not been cultivated or sprayed it commenced to regrow. Hence the ratoon crop. Mr Plath was exercising his asserted grazing rights when he was asked to remove the cattle to allow the ratoon crop to mature. The arrangement ultimately entered into on 7th October 1998 is set out at page 75 of Mr Plath's journal. It records that Mr Plath would remove the cattle when he returned from "Whynot" and put "130 bigger fellows back out there until 23 or thereabouts." I accept that this arrangement was reached as a genuine attempt to compromise the competing claims about the meaning of the grazing rights and that in light of the compromise nothing done by Mr English amounted to a breach of the agreement.

[49] The failure to clear Logan 2 did not amount to a breach of the agreement. I have already found that the land in Logan 2 was additional to the contract. I am also satisfied that even if it were part of the agreement originally entered into the obligation to clear it was not essential to the agreement in the sense to which the authorities refer. The making of the land available for share-farming from Mr Plath's point of view was an alternative to paying a contractor to clear it as appears from the passage from the transcript I have already set out. Prior to the agreement the land was in a natural state. Mr Plath was not alienating in any sense land he might otherwise have been using. In the course of cross examination he was asked his attitude to the failure to clear Logan 2.

> *By late October of 1996, he hasn't cleared Logan 2 at all? – No.*
>
> *Never went on it, did he? – No*
>
> *If what you say is right about the agreement, wasn't it the position that this must have been in breach of what he said he was going to do? – Yeah it was.*
>
> *And you would be of the view that he had broken the agreement? – I wasn't pressing anything.*

> *It's – whatever view you take the terms of the agreement it was no great skin off your nose where he got to? – No I suppose not.*[13]

[50] In fact, Mr Plath pushed and pulled the land in Logan 2 in 1996 and then put in silk sorghum which apparently does not require clearing and cultivation.

[51] Notwithstanding this failure to clear Logan 2 and the indications from Mr English as early as 1995 as recorded at page 75 of the journal that he would not be clearing Logan 2 the agreement remained on foot with Mr English farming Logan 3 and Mr Plath using Logan 2 himself.

[52] Rather than regarding the clearing of Logan 2 as essential, it seems to me that Mr Plath regarded any area Mr English cleared as advantageous and was prepared to allow him five years use of it on the agreed basis as the price of not having to pay a contractor.

[53] Quite apart from this, the conduct of Mr Plath in allowing the agreement to continue when it was clear that Mr English was not going to clear Logan 2 in my view amounts to a clear election to affirm the contract. Mr Plath allowed Mr English access to the site for the purpose of clearing, cultivating, planting and harvesting and insisted on performance of the contract in relation to grazing rights. He also insisted on performance, erroneously as I have found, in relation to his claimed share of the ratoon crop in 1998. The well known passage from the judgment of Stephen J in *Sargent v ASL Developments Ltd*[14] is in applicable here:

> *"The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other: thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease … However, less unequivocal conduct , only providing some evidence of an election, may suffice if coupled with actual knowledge of the right of election … There need be no expressed intention to elect, nor will an express disclaimer of such an intention be of any avail in preserving one right*

[13] Transcript page 185, line 60 to page 186, line 13.
[14] (1974) 131 CLR 634 at 646

> *if in fact there be an exercise of another inconsistent right ... For an election there need be no actual, subjective intention to elect .... an election is the effect which the law attributes to conduct justifiable only if such an election had been made."*

[54] Leave was sought during addresses by senior counsel for the plaintiff to amend the pleadings to include a plea of waiver or election. Such an amendment was objected to by senior counsel for the defendant on the basis that he may have led further or different evidence had the pleading included the plea. No application was made by senior counsel for the defendant to reopen his client's case and Mr Plath was still present in the courtroom. More importantly, however, I consider the election was constituted by conduct which was uncontroversial and consistent only with a continuance of the agreement. In those circumstances I fail to see how any further evidence not inconsistent with the evidence actually given by Mr Plath could bear on the issue. Should it have been necessary I would have given leave to amend in the form of the Second Further Amended Reply and Answer filed on the 6th June 2003.

[55] For the reasons set out above I find that Mr Plath was not entitled to rescind the contract on 23rd December 1998 and in purporting to do so was himself repudiating the contract.

[56] Following the purported rescission of the contract the parties entered into negotiations with a view to putting in place a further agreement similar to but not identical with the repudiated agreement. Mr English was given limited access to the property to plant already cultivated ground and on the basis that it was in anticipation of a new share-farming agreement which as things transpired was never agreed. All concessions and negotiations from the point of view of Mr Plath were on the basis of and in anticipation of a new agreement being entered into.

[57] Ultimately, Mr English accepted the inevitable termination of his rights and commenced the current action seeking damages for breach.

[58] Mr Hack SC for the defendants submitted that even if I resolved the issues against his client I should conclude that the share-farming agreement had been mutually abandoned in the sense discussed in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd.*[15] The basis of the submission was that subsequent to the letter of 23 December 1998 by which the defendants repudiated the agreement and banned access to the land there were further negotiations and access was ultimately allowed to Mr English to plant part of blocks 1 and 2 in 1999 and to harvest in May what had been planted. Fresh arrangements were discussed and correspondence exchanged up until November 1999 after which negotiations ceased. The conclusion, so it was submitted, was that both parties had by then mutually abandoned the original agreement.

[59] In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*[16] Stephen, Mason and Jacobs JJ said:

> *"Thus the contract in the present case was still on foot on and after 25 July 1974. Neither party had effectively rescinded. But there can be no doubt that by 5th December 1974, when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract. The position is similar to that with which Isaacs J dealt in Summers v The Commonwealth. The plaintiff did not succeed in his action for damages for breach of contract, but on the other hand the defendant had not rescinded. Time passed during which neither party took any steps to perform the contract. It was held that the parties had so conducted themselves as mutually to abandon or abrogate the contract."*

[60] The critical feature of *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*[17] was that neither party was prepared to perform the contract in accordance with its proper construction. Hence mutual abandonment was the only sensible conclusion. That is not this case. Here on the construction I have given to the contract Mr English was performing in accordance with his obligations until prevented from doing so by the wrongful act of Mr Plath in excluding him

---

[15] supra
[16] ibid at 434
[17] ibid

from the land except to the limited extent to which I have referred. It does not seem to me to matter whether the contract was formally rescinded by Mr English thereafter or not. The remedy sought by him was damages for breach. That remedy is available whether or not the repudiation of the contract was accepted. Having done the work required to get the land into cultivation I accept that Mr English was always ready to go back to the original agreement. To the extent that he was deprived of the benefit of the agreement by Mr Plath's actions, however, he was entitled to damages.[18]

[61] The damages claimed by Mr English represent an estimated net proceeds to him of crops planted during the unexpired portion of the original agreement. They represent the value of the lost chance of deriving an income from the land.[19] Because the success or otherwise of any crop is dependent on the weather any calculation of the value of any particular crop has to be discounted. Likewise the discount to be applied is variable depending on whether the particular season, as appears from the actual evidence of rainfall and other factors was more or less favourable. It is thus necessary to deal with each crop separately.

[62] Two farm consultants gave evidence. Dr Wylie gave evidence for the plaintiffs. Mr Spackman gave evidence for the defendants. Both based their opinions as to the likely crop and yield on rainfall records taken at the Plath homestead adjacent to the subject land. Some criticism was made of the defendants' expert on the basis of his longstanding relationship with the Plaths. The relationship was based on their being clients of many years standing. I agree that it is difficult to categorise an expert with a longstanding relationship with one of the parties which the expert hopes will continue as independent. However, I accept that he was doing his best to be objective. As is the

[18] *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 300; *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 450.
[19] *Sellars v Adelaide Petroleum NL* (1992-1994) 179 CLR 332.

case with most experts the plaintiffs' expert tended to favour the plaintiff in borderline areas and the defendants' expert likewise favoured the defendants. The areas of disagreement were, however, relatively small and accountable in part by the discount applied for the uncertainty of farm returns. In effect the calculations done by the plaintiffs' expert are based on the rainfall actually received and the plaintiffs making all judgment calls favourably. The defendants' expert has based his calculations on the rainfall actually received and the plaintiffs being less astute in predicting the most favourable planting times and crops.

[63] The first claim for damages arises in relation to an area of 230 acres in Blocks 1 and 2 which was not planted in 1999. The balance of lots 1 and 2 was planted to sorghum and yielded 0.94 tonnes per acre. The 230 acres was excluded because of the refusal of Mr Plath to allow Mr English access to the land for the purpose of cultivation to remove weeds. Both agronomists accept that weed control was important for the 1999 sorghum season. It was a period with good rain in January and February. Mr Spackman observed a heavy burden of weeds (particularly parthenium weed) on the land. I accept that had Mr English been given access to this land for the purpose of weed eradication it could and would have been planted with the balance of the blocks and produced a similar yield. Mr Wylie's assessment of the net loss is $14,405. Mr Spackman estimates $11,851. The difference apart from a slight difference in yield (0.9 tonnes as opposed to 0.94 tonnes) which Mr Spackman now concedes in Mr English's favour is the cost of spraying and chemicals not allowed for by Mr Wylie. Mr English said that he would not have had to spray if he had been allowed to cultivate the land with the rest of blocks 1 and 2. He believed the whole of blocks 1 and 2 had been sprayed with a residual chemical, previously and additional spraying was unnecessary if they had been cultivated with the balance of Lots 1 and 2. I accept the logic of this. Allowing a slight discount for what was in my view a near certain return on this land in 1999 I allow damages at $14,000.

[64] The second claim is in relation to block 3 which Mr English claims would have been planted to wheat in 1999. The last worthwhile summer rain in 1999

was on 7th and 8th March. Access to the property after the rain would have been in the following week. There was some further rain on 17th May and no further rain until November. The second week in March when access to the land would have been available was too late to plant sorghum. It was very early to plant wheat although it was possible. Few farmers were able to grow wheat in 1999 because of the poor rainfall. To succeed they had to anticipate the poor season and plant two months earlier than they would normally have planted. Mr Plath successfully grew wheat on nearby paddocks using a technique known as "zero tillage" which did not involve cultivation and hence had better soil moisture retention.

[65] Because this was the land on which the ratoon crop had been grown in 1998 there had been a short fallow period since that harvest in December and in Mr Spackman's opinion little time to build up the soil moisture necessary for planting. Because of the reasonable early rain early in 1999, Mr Spackman believed that there was a high likelihood of weed and stubble growth following the December ratoon harvest which would have required an extra working. Dr Wylie estimated the net value of the lost opportunity to grow wheat at $58,627. Mr Spackman did not believe Mr English would have planted a wheat crop at all and suffered no loss. It is unlikely he would have planted as early as March and not having done so would not have had another opportunity. If wheat had been planted in the poor conditions Mr Spackman opined that the yield would have been of the order of 0.3 tonnes per acre rather than the 0.5 tonnes on which Mr Wylie's figures are based and also believed an extra cultivation would have been required to control weeds. In the result even if wheat had been planted he estimates the net loss at $27,456.

[66] In my view the opportunity to plant wheat was lost as the result of the breach of the agreement by the defendants. Nonetheless I consider the probability of it actually being planted was relatively low for the reasons given by Mr Spackman. I also consider that the yield suggested by Mr Wylie was optimistic. I assess the value of the lost opportunity of growing wheat on block 3 in 1999 at $14,656.75 representing a 25% chance of making the most optimistic return as assessed by Mr Wylie.

[67] The claim in relation to the 2000 season is for being prevented from growing sorghum on block 3 and wheat on blocks 1 and 2.

[68] For block 3 in 2000 Mr Spackman considered wheat a more likely crop than sorghum. This was based on the fact that Mr Plath in fact grew wheat on this block in that year despite the relatively long fallow period since the termination of the share-farming agreement after the ratoon crop in 1998. This was said to be mainly due to the dry soil profile and the excessive weed growth which was a significant contributor to the poor soil moisture. Of course, had the agreement not been terminated Mr English would on his evidence have planted wheat on this block in 1999. In any event it is likely it would have been cultivated and weeds controlled even if the wheat crop had not gone in. The prospects of planting sorghum were, therefore, in my view greater in the hypothetical situation with which we are dealing than in the situation that actually transpired. The rainfall on the back of which sorghum could have been planted in 2000 was not until 22nd to 27th February. Sorghum could not have been planted until a few days later. Late February or early March is a very late planting for sorghum. Planted so late in the season it has a greater propensity to suffer disease. Mr Plath , himself, had on at least one occasion successfully planted sorghum well into March. Mr Spackman considered, however, that it was more likely that rather than take a chance on the late sorghum the farmer would wait for the wheat season and hope for more rain which in this season did fall in late April.

[69] I accept that the chances of planting sorghum on block 3 in 2000 were no more than 50%. If sorghum had not been planted I accept that wheat would have been. Dr Wylie's optimistic net return from a sorghum crop was $43,492. Mr Spackman's conservative net return from a wheat crop was $19,453. For wheat Mr Spackman used a yield of 0.5 tonnes per acre. This is on the basis that on one part of block 3 for which paddock records are available (Power Line) a yield of 0.5 tonnes per acre was achieved. On the other side of Talkai Rd, however, and still on Logan 3 Mr Plath on Coconut Grove achieved 1.5 tonnes per acre. Dr Wylie considers that a higher yield of 0.8 tonnes per acre

was readily achievable with the consistent rainfall near to the planting time. In assessing the value of the lost opportunity I have considered the 50% chance of a sorghum crop against the near certainty of a wheat crop in the alternative and the possibility of a higher yield than assessed by Mr Spackman. If a 25% higher yield were obtained than the 0.5 tonnes estimated by Mr Spackman (ie to 0.625 tonnes as compared with the 0.8 estimated by Dr Wylie for blocks 1 and 2) it would increase the net return after apportionment between Mr Plath and Mr English to Mr English by $12,758. The difference would be between Dr Wylie's net return of $43,492 for sorghum and Mr Spackman's $32,031 ($19,453 plus $12,578). I assess the value of the lost opportunity in these circumstances at $36,000.

[70] The claim for the loss on blocks 1 and 2 is on the basis of a wheat crop. The main area of disagreement is between 0.8 tonnes per acre yield in Dr Wylie's figures and 0.5 tonnes per acre by Mr Spackman. The only other material difference is between two workings plus planting and three workings plus planting. In this regard I accept the evidence of Mr English that he would in fact only have worked the land twice in addition to the planting. The cost of the additional working is estimated at $3,750.

[71] I can see little difference on the evidence between a wheat crop on blocks 1 and 2 and a wheat crop on block 3. The comments in relation to block 3 therefore apply equally here. The best result for Mr English is the $101,268 assessed by Dr Wylie. This is the gross value of the opportunity lost. In assessing the chance of achieving this outcome. Mr Spackman has used a price per tonne of $169.91 which is the figure as at November 2000 taken from exhibit 5 less $15 freight. Dr Wylie has used $178 as I understand it on the basis of Mr English's evidence of deducting $13.50 per tonne rail freight and adding an additional protein bonus which Mr Spackman has ignored but which on the evidence seems likely. Mr Spackman's assessed loss of $63,383 does not seem to me to in fact take into account Mr Plath's 25% although on its face it purports to do so.[20] In this case the lost chance of achieving Dr Wylie's

[20] Multiplying $169.91 by 750 tonnes gives a gross figure of $127,433 which represents 100%. 75% is $95,575. Mr Spackman's net result if that is right should be $31,843.

best result is reflected by applying a discount of one-third to a rounded 67,500. This is close to the result achieved by using the same yield as in relation to block 3 and deducting one working. I accept Dr Wylie's rate per tonne on the basis of the evidence of Mr English.

[72] The final claim is in relation to block 3 in 2001. Here the claim is in relation to sorghum. There is little difference between the expectations of Dr Wylie and Mr Spackman who respectively calculate $54,852 and $54,033. The difference relates to the research levy which Mr Spackman applies to sorghum and Dr Wylie doesn't. Accepting the general agreement as to crop and returns for 2001 I regard the chance of achieving this result as virtually certain and apply a nominal discount to round off the figure at $54,000.

[73] The damages thus calculated are as follows:

230 acres of blocks 1 and 2 in 1999	14,000.00
Block 3 in 1999	14,656.75
Blocks 1 and 2 in 2000	67,500.00
Block 3 in 2000	36,000.00
Block 3 in 2001	54,000.00
TOTAL	**186,156.75**

[74] Each loss should bear interest from the end of the year in which it was incurred at the rate of 8%. Interest is thus calculated to the 21st July, 2003 in the sum of $36,060.69.

[75] It was submitted I should discount the damages because Mr English did not have to work the land in 1999, 2000 and 2001. No authority was cited in support of such a proposition. There was no pleading of failure to mitigate. In fact, the evidence suggested that the greater part of the effort and cost involved in deriving the income was in relation to the clearing which had already been expended. There was no evidence that Mr English was able to undertake other remunerative work because he was freed from the obligation of farming this land.

[76] I give judgement for the plaintiffs against the defendants in the sum of **ONE HUNDRED AND EIGHTY-SIX THOUSAND, ONE HUNDRED AND FIFTY-SIX DOLLARS AND SEVENTY-FIVE CENTS ($186,156.75)**, together with the sum of THIRTY-SIX THOUSAND AND SIXTY DOLLARS AND SIXTY-NINE CENTS ($36,060.69) for interest to 21st July, 2003.