IN THE SUPREME COURT OF QUEENSLAND No. 60 of 1985

BETWEEN:

MEYERS & OSWALD INVESTMENTS PTY. LTD. Plaintiff

AND:

BRAMBLES HOLDINGS LIMITED Defendant

JUDGMENT - MACROSSAN J.

Delivered the day of , 1985.

By specially indorsed Writ issued on the 10th January, 1985, the plaintiff company claimed against the defendant recovery of possession of leased industrial premises situated at Nerang. The premises had been let by the plaintiff to the defendant for a term of three years from 12th December, 1981, and, by the time of the issue of the writ, the term had expired. The question at issue between the parties was whether the defendant was, nevertheless, entitled to remain in possession for a new term of years.

The lease under which possession had been given to the defendant was in writing and was dated 28th February, 1983, (Exhibit 1). By Clause 3(c), it was provided that in the case of a holding over at the expiry of the term there should come into existence a weekly tenancy. If this constituted the defendant's claim to retain possession at the relevant time, it would not have assisted it, since the plaintiff, who after the original term expired on 11th December, 1984, contended that the defendant had no more than a weekly tenancy, had caused a Notice to Quit to be served on the defendant on 24th December, 1984, to terminate any right to possession on 1st January, 1985.

The lease did provide for a right of renewal, at the tenant's option. Clause 5(a) allowed a further term of years to the tenant, should it wish it, but if it was to have this right it was obliged to give "not less than six

months previous notice in writing". On the hearing of the action it was not contended that any such written Notice had been given within the prescribed time.

A number of issues were raised on the pleadings. The defendant, who counter-claimed for a declaration that it had exercised its option to renew and alternatively for specific performance of an agreement for lease for a term of three years from 12th December, 1984, made a number of alternative allegations as the basis for the relief claimed by it. In its defence and counter-claim, the defendant contended that it had exercised its right to renewal for a further term of three years as provided under the lease or, if its purported renewal did not conform with the requirements of Clause 5, it claimed that the plaintiff waived any non-compliance; in the further alternative, that the plaintiff was estopped from asserting that the defendant had not validly exercised its right of renewal and, in the final alternative, the defendant claimed that by oral agreement between the agents of the two parties, on or about 30th October, 1984, the plaintiff had agreed to lease the premises to the defendant for a term of three years from 12th December, 1984, "at a rental of $4,300-00 per calendar month for the first year of the said term and otherwise upon the terms and conditions of the lease". In respect of its last allegation, the defendant further pleaded that the agreement referred to had been partly performed. The plaintiff did not plead the Statute and, in view of what Counsel submitted in the course of address, it seems that this was deliberate because of the provisions of Section 12(2) of the Property Law Act, 1974.

As the case proceeded, it became quite clear that the defendant had not exercised any right to renew in writing at the relevant time and since it also appeared that all relevant acts of the parties could be regarded as wholly referable to negotiations between the parties over a possible new lease, there was really no basis for the allegations of waiver or estoppel against the plaintiff. The one real issue in the action became whether the parties

had, in the period commencing in September, 1984, reached a concluded agreement for a new lease for a term of years and this itself depended upon whether they had reached final agreement upon an appropriate rent since, at the critical time, both parties were agreeable to a further lease and the only live issue between them was the rent to be paid. If a concluded agreement upon the rent had not been arrived at, then there was no new lease and, on expiry of the old term and the termination of the subsequent weekly tenancy by Notice to Quit, the plaintiff would have shown its right to possession. On the other hand, if it was to be held that the parties had reached a concluded agreement upon the rent for a new term then, in view of the way in which the matter was debated, it was equally obvious that the defendant was entitled to an order for specific performance of the agreement for a fresh lease.

The negotiations between the parties in September and October, 1984, became all important in the determination of the matter and, in particular, it was those negotiations which took place on 4th October, 18th October and 26th October between Meyers, acting on behalf of the plaintiff, and Warburton and Eales, acting on behalf of the defendant, which were the vital ones. There were telexes exchanged between the parties at the end of September but these merely demonstrated the willingness of the parties to enter into a new lease if satisfactory terms could be agreed upon. There was a lack of agreement about what references may have been made to the topic of an appropriate rent prior to the important meeting of 4th October but, whatever references may have been made in those early meetings, no real advance towards agreement was achieved.

Even with the advantage of seeing and hearing the witnesses who gave evidence, I did not find that the resolution of the important issues of credit was an easy matter. There was sharp conflict between Meyers, on the one hand, and Eales and Warburton on the other, as to what was said on the three important occasions and this was particularly the case in respect of the meeting which took

place at Nerang on 18th October. The reference in the defence to an oral agreement being entered into between Meyers, acting on behalf of the plaintiff and Warburton, acting on behalf of the defendant on or about 30th October, 1984, was shown to be an intended reference to a certain phone call between those two gentlemen which undoubtedly did take place and is probably more accurately described as having occurred on 26th October. This was the third important contact between the parties.

On 4th October, a meeting took place between the three persons mentioned at the defendant's office at Hendra and the matter of the rental for a further term was discussed. Meyers, on the plaintiff's behalf, wanted a large increase and indicated that this was based upon the need for a fair return upon the value of the premises which was supported by a valuation which he had obtained. He wanted a 10% return which would have meant a rental of $60,000-00 per annum. Warburton, whose position made him the senior as between himself and Eales in the defendant company's chain of command, expressed the view that Meyer's request was exorbitant and that not only was a lesser figure called for but something amounting to a reduction, even, of the current level of rent. As the parties bargained, and expressed their respective points of view, it is clear that Meyers made reference to a figure in some way as being his minimum and this was a 10% increase upon the current rent. In cross-examination he appeared to concede that Warburton made a calculation at this meeting of 4th October which showed that $4,300-00 per month was, in broad terms, the figure which would be produced by a 10% increase upon the current rent. Taking into account the whole of the evidence given by Meyers, I am satisfied that at this meeting he indicated either that he would accept a rent of $4,300-00 per month or that he was likely to accept it if an offer at that level were made to him. Neither side contended that final agreement was reached at that meeting.

Meyers then met with both Eales and Warburton at Nerang on 18th October when he called in at the Nerang

premises, without prior warning, to discuss a number of matters of business which had to be dealt with between the parties. He met and spoke with Eales first and then, shortly afterwards, Warburton arrived and he spoke with both of them. Each side gave a completely different account of what happened at this meeting. Meyers said that he enquired of Eales whether the defendant had reached a decision about the rent which it would pay for a new lease and was told that it had not and he said that he later spoke with Warburton who was also non-committal and said merely that the defendant was looking around at other properties and rentals before making a decision. Meyers said that no specific figures were discussed at this meeting. Both Eales and Warburton gave an entirely different account and in considerable detail described the way in which, as they say, various figures were mentioned and agreement was finally reached, subject only to the need, on the defendant's part, for authorization to be official from someone of higher authority. Eales and Warburton, and especially the former, showed a tendency to contend for the proposition that final agreement had been reached and repeated that with a curious degree of emphasis and, at the same time, each qualified this attitude by a reference to the way in which the defendant reserved its own position by mentioning the need for ratification by a senior officer. I am not disposed to accept that the specific version given by Eales and Warburton of the 18th October is accurate. I decline to find that Meyers specifically indicated that he would definitely agree to a rent of $4,300-00 per month at this meeting. Meyers impressed me as having a more accurate recollection of the course of events at this meeting and I am largely disposed to accept it. I do, however, find that nothing said at this meeting took from the general willingness which he had displayed at the earlier meeting, to accept $4,300-00 and, indeed, I find that a continuation of this general willingness or likely willingness would have been deduced by the defendant's officers from his attitude at the meeting of 18th October, even though no specific figures may have been mentioned. I determine the principal issue

raised between the parties on Meyer's own account of what was said in the telephone call between himself and Warburton on 26th October.

Meyers said that on 26th October Warburton telephoned him and said that the defendant was "willing to accept" a rent of $4,300-00 per month, or was willing or prepared to pay that figure and that he responded to Warburton by saying "All right, I will ring my Solicitor in Sydney and advise him" or "All right. I will advise my Solicitor". I do not accept that he added, as Warburton claims, that he would have the Solicitor send the documents which would have to be signed.

Counsel for the defendant contended that Meyer's words, in the telephone call of 26th October, amounted to a definite acceptance of the rent offered and, hence, a concluded agreement for a new lease. Counsel for the plaintiff urged that the words used by Meyers should not be construed as an acceptance, but only as an indication that Meyers would think about the matter, so that the negotiations were left open. In their submissions to me, both sides were agreed that the question whether Meyers' words amounted to an acceptance should be judged on an objective basis, by deciding how a reasonable man would have construed his words in context, if aware of the previous negotiations which had taken place between the parties. I apply this approach and I conclude that the matter calls to be resolved in this way as a matter of construction. I do not find the subsequent conduct of the parties to be of assistance. The defendant's later conduct appears to be equally consistent with a belief that on the one hand, a final agreement had definitely been concluded, or on the other, that a stage had been reached where the defendant could regard itself as assured a final agreement. The plaintiff's conduct thereafter is consistent with its holding the view that, although it had displayed a willingness to accept the rental figure mentioned it was, for some reason or other, not yet finally bound, so that it was free to open negotiations with a third party who came

into the picture shortly afterwards. In any event, having made a finding upon the words that were used in the course of the conversation on 26th October and in the previous negotiations, if I am to apply the objective test upon which both parties were agreed, it seems that the subsequent conduct of the parties does not have particular significance. I will, however, briefly deal with some of those subsequent matters.

It seems that Meyers decided, at about mid or late November, that he would not deal further with the defendant and he did not, in fact, communicate with them until he served a Notice to Quit upon Eales on 24th December. Obviously, the reason for his changed attitude was that he had opened negotiations with a third party who was interested in buying another business from the plaintiff, one at Mackay, but would do so only if it could obtain a lease of the premises at Nerang as well. Meyers admitted that in the course of negotiations with this third party, on 16th October, he told one of its officers that he had offered a lease of the Nerang premises to the defendant at a rent of $4,300-00 per month. About this time, he appears to have considered that he had reached or would reach a bargain with the third party both to sell the plaintiff's Mackay business and to lease the Nerang premises, although the agreement with the third party was not finally signed until 16th December. Meyers would have a motive for wishing to keep the defendant “in reserve” until this agreement with the third party was signed and this would explain why he kept out of the way and did not communicate further with the defendant until the agreement was signed. Although they heard no more from Meyers, the defendant's officers appeared to be confident that they either had a final agreement or could comfortably act upon the basis that they would have one and they made no attempt to contact Meyers. At the same time, they made no move to vacate the Nerang premises.

When the time was reached for the payment of the rent for the month of December, then currently fixed at $3,914-

63 per month, a telephone conversation occurred between another agent of the plaintiff, Oswald, and an employee of the defendant company Miss Murphy. These two officers had duties to discharge which included accounting for rental payments between the two parties. I did not find the evidence of the telephone conversation between these two was of particular assistance even though it appeared that Oswalo may have made the telephone call on the instruction of Meyers. The respective impressions which Oswald and Miss Murphy displayed in the course of that conversation, that the rent of the premises was changed or was to be changed, does not particularly assist, because I was not persuaded as to the source of their respective impressions of the change that was made or was imminent and as to the date at which they may have derived their impressions. I was not persuaded, either, of the accuracy of their respective recollections of the content of this conversation, although both appeared to be doing their best to present their current recollections. I consider that it is likely that at the time this telephone call was made in December, Meyers would have been anxious to investigate the attitude of the defendant to its right to possession and he would have wished to know the degree of resistance he was likely to encounter to his own contention that no new lease had been agreed upon.

When the complicating attitudes of the parties to the right to a new lease became revealed, the defendant's Solicitors in December, 1984, wrote a letter to the plaintiff's Solicitors, (Exhibit 7), which, while it amounts only to an abridged version of the defendant's contentions and was, no doubt, produced in something of a hurry, does not claim that any agreement was entered into at the Nerang meeting on 18th October, not even one subject to ratification by a senior officer of the defendant. I have taken the content of this letter into account in the findings which I have reached as to what was said in that particular discussion.

In December, the defendant's officers, now alerted to the existence of the dispute between the parties, belatedly sent a cheque for an additional amount of rent, to make up a total of ?4,300-00 per month and, subsequently, they have sent rental cheques for this amount each month, but the plaintiff, for its part, has held these cheques without banking them. When Meyers served the Notice to Quit upon Eales on 24th December, Eales, in the agitated discussion which ensued, stated his belief that the parties had reached a final agreement and Meyers seems to have stated his contention that they had not. There then ensued discussions about when the defendant might vacate in response to the requirements of the Notice to Quit and indeed whether it would vacate at all. I do not find any of these matters assist much in the determination of the central issue and I now return to this matter.

The essential aspect of the background to the conversation of 26th October between Warburton and Meyers was that the defendant had been made aware by the plaintiff of the plaintiff's current state of willingness to grant a new lease at a rental of $4,300-00 per month and that the plaintiff was waiting upon the defendant's answer and an indication of its willingness or otherwise. I have set out above the words which I find were used and these are, essentially, the words which Meyers said were exchanged. In this context, I do not consider that the words “All right” can be construed as other than words appropriate, to convey assent or agreement and I think that the further indication which Meyers gave that he would advise his solicitor strengthen this impression, since a solicitor's usual function is to attend to conveyancing requirements after agreement has been reached. I do not consider that anything was said to make the matter of agreement subject to final contract, or that anything was said which would indicate that Meyers was merely taking the matter under consideration and would provide his definite answer at a later time. I consider that a final agreement was reached at this point and, subject to the inaccuracy about date which paragraph 7 of the defence and counter-claim

contains, I find that the contentions in that paragraph have been made out. Accordingly, in terms of paragraph 2 of the relief clause in the counter-claim, I order that the plaintiff's action be dismissed, that there be judgment on the counter-claim for the defendant and that the plaintiff do specifically perform the agreement for lease entered into between the plaintiff and the defendant orally on 26th October, 1984 for a term of three years commencing on and from 12th December, 1984 at a rental of $4,300-00 per calendar month for the first year of the term and otherwise upon the terms and conditions of the lease. I further order that the plaintiff join with the defendant in executing a lease in registerable form between the plaintiff as lessor and the defendant as lessee and that that plaintiff register a lease pursuant to the provisions of the Real Property Act 1861-1981. I reserve to each party liberty to apply in respect of the terms of this order so far as it relates to the terms of the lease to be executed or any further consequential orders to be made. This liberty is to be availed of, if at all, within seven days of the date of delivery of judgment; otherwise, the order set out above will stand as the order of the Court. The plaintiff is to pay the defendant's costs of and incidental to the action and counter-claim to be taxed.