SUPREME COURT OF QUEENSLAND Appeal No 83 of 1988

FULL COURT

THOMAS J

RYAN J

MACKENZIE J

ALAN KINGSFORD STREETER (Plaintiff) Appellant

and

SHIRLEY CLARICE McCAMLEY and TARTRUS CATTLE COMPANY PTY LTD (Defendants) Respondents

BRISBANE

.. DATE 17/10/91

JUDGMENT

MR JUSTICE THOMAS: I shall ask my brother Ryan to propose the order.

MR JUSTICE RYAN: I would dismiss the appeal, and order the appellant to pay the costs of the respondents to be taxed. I publish my reasons.

MR JUSTICE MACKENZIE: I agree with the order. I agree that the appeal should be dismissed and I agree with the reasons of my brother Ryan.

MR JUSTICE THOMAS: I agree with the reasons and order proposed by my brother Ryan and the order of the Court will be appeal dismissed. Order the appellant to pay the respondents' costs to be taxed.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 83 of 1988

FULL COURT

BETWEEN:

ALAN KINGSFORD STREETER (Plaintiff) Appellant

AND:

SHIRLEY CLARICE McCAMLEY and TARTRUS CATTLE COMPANY PTY. LTD. (Defendant) Respondent

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THOMAS J

RYAN J

MACKENZIE J

Reasons for judgment delivered by Ryan J on the 17th October, 1991. Thomas and Mackenzie JJ agreeing with those reasons and with the orders proposed.

“APPEAL DISMISSED. ORDER THE APPELLANT TO PAY THE RESPONDENT'S COSTS TO BE TAXED.”

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 83 of 1988

FULL COURT

Before the Full Court

Mr Justice Thomas

Mr Justice Ryan

Mr Justice Mackenzie

BETWEEN:

ALAN KINGSFORD STREETER (Plaintiff) Appellant

AND:

SHIRLEY CLARICE McCAMLEY and TARTRUS CATTLE COMPANY PTY. LTD. (Defendants) Respondent

JUDGMENT - RYAN, J

Delivered the Seventeenth day of October, 1991

Counsel: Mr. A.K. Streeter appearing for himself
Mr. A.M. Daubney for Respondent
Solicitors: McCullough Robertson Solicitors for Respondents
Mr. A.K. Streeter for himself
Hearing Date: 17 September, 1991.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 83 of 1988

FULL COURT

BETWEEN:

ALAN KINGSFORD STREETER (Plaintiff) Appellant

AND:

SHIRLEY CLARICE McCAMLEY and TARTRUS CATTLE COMPANY PTY. LTD. (Defendants) Respondent

JUDGMENT - RYAN J.

Delivered the Seventeenth day of October, 1991.

The essential question in this case was, as the learned trial Judge said, whether the plaintiff and the defendants entered into a contract to extend a five year sharefarming agreement by one year. His Honour was not satisfied that the plaintiff had proved an agreement which the defendants had breached, and he dismissed the action with costs.

The appellant plaintiff was represented by counsel at the trial, but he appeared for himself at the appeal. He sought to adduce extensive further evidence before this Court. Order 70 r. 1 of the Rules of the Supreme Court gives the Court full discretionary power to receive further evidence upon questions of fact. Such further evidence may be given without special leave except upon appeals from final judgment, and in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon an appeal from a judgment after the trial or hearing of a cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, is not to be admitted except on special grounds.

This is an appeal from a judgment after the trial of a cause on its merits, and the further evidence it was sought to adduce (with one irrelevant exception) related to matters which had occurred before the date of the decision. The further evidence could therefore not be admitted except on special grounds. In Langdale v. Danby [1982] 3 All E.R. 129 at pp. 137-8, Lord Bridge said:

> "The classic statement of what amounts to 'special grounds' within the meaning of O. 59 r. 10(2) [which corresponds to Queensland O. 70 r. 10] comes from the judgment of Denning L.J. in Ladd v. Marshall [1954] 3 All E.R. 745 at 748, [1954] 1 W.L.R. 1489 at 1491, and was

> expressly approved by your Lordship's House in Skone v. Skone [1971] 2 All E.R. 582 at 586, [1971] 1 W.L.R. 812 at 815 in the speech of Lord Hodson with which all the other members of the Appellate Committee agreed. The statement reads:
>
> 'In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible'."

The need for such grounds was recognised by the High Court in Fredericks v. Hay (1973) 47 A.L.J.R. 362, 368, 369.

In the present case, the appellant failed to satisfy the first of these conditions. His case was, not that the material which he sought to place before the Court could not have been obtained with reasonable diligence for use at the trial, but that the testimony given by witnesses called by the defendants caught his counsel completely off guard, and he was unable to call witnesses to contradict that evidence at the trial. If that was the position, it does not appear from the record that the plaintiff's counsel sought an adjournment or leave to recall any witnesses. In the circumstances I consider that the so-called fresh evidence could not be admitted.

The appellant submitted that he did not receive a fair trial as his counsel and the respondent's counsel had chambers which shared a common reception staff. This submission is untenable. An examination of the record shows that the appellant was properly represented.

The litigation in this case relates to a sharefarming agreement, which was made between the plaintiff (the sharefarmer) and the defendants (the owner) on 18 December

1978. It was for a term of five years. Clause 25 is in these terms:

> "Should the sharefarmer be desirous of seeking an extension of this agreement beyond the said term of five years then he shall approach the owner at least 12 months before the expiration of the term and if no satisfactory agreement has been entered into prior to the expiration of the fourth year of the term then this agreement shall expire at the end of the fifth year and the sharefarmer will immediately vacate the said land. The sharefarmer undertakes and agrees that if no such agreement in writing is entered into he will not plant any new crops on the said land during the last three months of the term."

The plaintiff claimed that in early December 1982 and before 18 December 1982, he orally agreed with one Russell McCamley on behalf of the defendants that they would grant a twelve month extension or renewal of the sharefarming agreement to the plaintiff; that the plaintiff would sharefarm the land for a further twelve months from 18 December 1983 upon the same terms and conditions contained in the agreement with one new agreed condition namely that the plaintiff would introduce a docket system for drivers of grain carrying trucks; and that Russell McCamley would have a document reflecting this agreement prepared. He alleged that in reliance upon this agreement he did not enter into other sharefarming arrangements for the material period then offering to him.

The plaintiff claimed that if the agreement for the extension or renewal was required to be in writing, the defendants offered a new agreement on the above terms subject only to a further condition that the plaintiff sharefarm only the defendants' land. He alleged that he verbally communicated his acceptance of this offer, and consequently a concluded agreement was reached on or before 4 February 1983.

He alleged further that if either agreement was required to be in writing, the defendants were estopped

from relying on the absence of writing. He claimed that the defendants knew or should have known that the plaintiff in reliance on the agreement would act to his detriment in not making alternative arrangements for the period after 18 December 1983 if the agreement was not extended or renewed, and that he did so act to his detriment in reliance upon the agreement. He claimed that as a consequence of the defendants' breach of agreement the plaintiff had suffered loss and damage in that he lost the opportunity to plant a summer crop of sunflower seed and had been forced to sell farm machinery at a loss.

The plaintiff gave evidence at the trial that he was approached by Mr. Graham McCamley to farm a property. He had done so for approximately three years before a formal agreement was entered into for a five year period. During the period of the agreement he was sharefarming on another property owned by Mr. Hill; but he said that this did not interfere with his ability to attend to his obligation under the five year agreement. He said that towards the end of October 1982 he spoke to Mr. Graham McCamley regarding an extension of the five year agreement, and was told that Mr. Russell McCamley was handling all the sharefarming agreements and that he should see him. He requested an extension from Mr. Russell McCamley, and was told that he would let him have a decision before 18 December. In mid-November, Mr. Russell McCamley told him that he agreed to extend the agreement for 12 months provided that he introduced a docket system throughout the grain trucks. He told Mr. McCamley that he had thought of bringing in a docket system himself. Later on that day, he asked Mr. Russell McCamley: “Is this definite regarding the one year extension”, and he replied: “Yes, I am in the process of getting the paperwork prepared”.

On 26 January 1983, the plaintiff received a letter from the defendants' solicitors. It stated:

> “At the time the original sharefarming agreement was entered into, our client wished you to sharefarm only its land. Our client informed you that if the agreement was

> to be renewed our client would require that you conform with its policy and sharefarm only its land.
>
> Our client wishes to insert this provision in the extension of the sharefarming agreement which is presently being negotiated. Obviously if you are to comply with our client's policy it will be necessary for you to cease sharefarming on land other than that owned by our client.
>
> As the time within which the extended sharefarming agreement should have been negotiated has expired, our clients are anxious to clarify this matter.
>
> Could you kindly contact either Mr. Laurie Creighton of Messrs. James Bubb & Co. or the writer with your response."

The plaintiff said that he saw Mr. Creighton, and told him that he was bound by a sharefarming agreement until the end of July 1983 with Mr. Hill, that he had no intention of renewing that sharefarming agreement, and that he was prepared to accept the insertion of the condition in the agreement. He gave the same information to the secretary of the writer of the letter.

According to the plaintiff, he was approached by Mr. Hill about sharefarming on his property before 18 December. He told Mr. Hill that if the extension of his agreement with the defendants was granted, he would not farm his property. After he received the indication from Mr. R. McCamley that the extension was granted, he told Mr. Hill early in December that he would not be proceeding with his offer.

On 31 March 1983, the plaintiff received a letter from the defendants' solicitor which stated that they had decided not to extend the sharefarming agreement, and directing him to vacate the land at the time set out in the agreement. He consulted his solicitors, and some "without prejudice" discussions took place to try to resolve the problem. He received a draft agreement for signature in May 1983, but refused to sign it.

The plaintiff said that in May 1983 he had planted a crop of wheat on the land, and he had intended to plant a crop of sunflower about the end of January 1984. He vacated the land on or about 18 December 1983 as he had been required to do. He claimed that he would have had the opportunity of obtaining a bumper crop of sunflower if the extension had been granted.

On 11 November 1983, the plaintiff's solicitors wrote to the defendants' solicitors stating that “under normal circumstances our client would be preparing (and would by now have partly prepared) the sharefarming area for the planting of a summer crop. On our advice, in view of your client's attitude, Mr. Streeter has not and will not prepare the area for planting unless your clients are prepared to allow him to remain on the property, if not until 18 December 1984, then at least until he is able to harvest a summer crop”. They sought advice whether the defendants would be prepared to permit Mr. Streeter to remain in possession. However, four days later they wrote that “Mr. Streeter now instructs us that it would be impossible for him to prepare for a summer crop at this late stage of the season. Accordingly then Mr. Streeter has already lost the value of the summer crop he would have been able to prepare and harvest had he been permitted to continue sharefarming by your clients”. At the trial, the plaintiff claimed that this statement was wrong, and said that there had been a misinterpretation.

The plaintiff's son, Shane Streeter, gave evidence that he heard a conversation between his father and Russell McCamley in which his father asked McCamley “if it was definite that our agreement was going to be extended”, and McCamley replied, “Yes, I am in the process of having the paperwork done”.

Russell McCamley said that in late 1982 Mr. Streeter asked him whether he could go on. He told Mr. Streeter he would have to get back to him. On a later occasion, Mr. Streeter asked him again could he go on, and he replied

that he could but there would be some alterations or changes. He told Mr. Streeter about a docket system, and about a year by year at a time extension. He said he was “pretty sure” Mr. Streeter asked whether there were other changes in mind, and he replied that the others would be in the contract. He said that Mr. Streeter indicated that he was not happy with the docket system and a year by year extension, which did not give him enough planning time ahead. Mr. McCamley said that he saw his solicitor and “initiated” action by him. He said that Shane Streeter was not present at this meeting.

Mr. Ashton, a local farmer gave evidence that there was “no chance” of anyone planting a sunflower crop in the area until January or February. Contrary evidence was given by an agronomist. An agricultural scientist said that he considered January too early to plant in that area, and he would have preferred planting in mid-February or early March.

Mr. Hill a grazier gave evidence that the plaintiff was sharefarming 500 acres of his property in 1982 and 1983. Another 1,500 acres were sharefarmed by a Mr. Morton and then by a Mr. Holt. Mr. Morton left the property on 24 June 1982. Prior to 16 August 1982 he made an offer to Mr. Streeter of the 1,500 acres. He said that in August 1982 he offered Mr. Streeter 1,500 acres in addition to the 500 acres he was legally entitled to farm. Mr. Streeter replied that he was or would be trying to get an extension from the McCamleys, and if he did he would not take up any further land. On 16 August 1982, Mr. Holt moved onto the 1,500 acres.

The learned trial Judge accepted Mr. Russell McCamley's version of the conversation. He stated that he was satisfied that, while terms were discussed between Mr. Streeter and Russell McCamley, any agreement was to be expressed fully in writing.

His Honour accepted also the evidence of Mr. Hill that the 1,500 acres on his property which had been sharefarmed

by Morton was being sharefarmed by Holt in August 1982. Accordingly, the plaintiff did not give up any interest in sharefarming this area on Hill's property because of any understanding he had with the defendants in December, 1982.

On the issue of damages, His Honour accepted the accuracy of the statement in the letter written by the plaintiff's solicitors on 15 November 1983 that “it would be impossible for Mr. Streeter to prepare for a summer crop at this late stage of the season”. This was supported by the evidence of Mr. Ashton.

These findings were clearly open on the evidence, and they are fatal to the plaintiff's claim. The appellant made a number of criticisms of the evidence of the witnesses who were accepted by the learned trial Judge as reliable, but nothing in my opinion indicated that he failed to apprehend or else misapprehended any matter, or the cogency of any matter, bearing in some significant respect upon the credibility of the witnesses. In those circumstances, this Court could not be satisfied that the trial Judge reached a wrong decision about the credibility of witnesses. See Savonoff v. Re-Car Pty. Ltd. (1983) 2 Qd.R. 219 at p. 227. In Steele v. Tardiani [1947] St.R.Q. 1 at pp. 18-19, Dixon J. (as he then was), in holding that findings by the primary judge as to the terms of a contract should not be disturbed, pointed out that they rested on his acceptance of oral testimony and on his approval of the true meaning and reliability of the evidence. He quoted with approval this passage from the judgment of Lord Sumner in S.S. Hontestroom [1927] A.C. 37 at p. 47:

> “Not to have seen the witnesses puts the appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shown that he has failed to use or has palpably misused his advantage the higher court ought not to take the responsibility of reversing conclusions so arrived out, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.”

Such views are consistent with those of the High Court in Warren v. Coomes (1979) 142 C.L.R. 531, 537-538.

The effect of accepting Mr. Russell McCamley's evidence was that the intention of the parties was that there would be no extension of the sharefarming agreement unless and until a written agreement was made. It was a case of the third kind referred to in Masters v. Cameron (1954) 91 C.L.R. 353 at p. 360. It was in relation to this class of case that in Masters v. Cameron at p. 361 the Court cited the observations by Lord O'Hagan in Rossiter v. Miller (1878) 3 App. Cas. 1124 at p. 1151 which were quoted by the learned trial judge.

In addition, no new agreement was made, whether orally or in writing. It is impossible to conclude that the plaintiff had accepted an offer contained in the letter of 26 January 1983, from the defendants' solicitors, since it made no offer. No question of estoppel can arise in view of the acceptance of the evidence of Mr. Hill.

This makes it unnecessary to consider whether the learned trial Judge was correct in holding that any extension of the sharefarming agreement was required by Clause 25 to be in writing, but as that issue was central to his Honour's reasoning and it was challenged by the appellant it is appropriate to comment upon it. Clause 25 of the sharefarming agreement does two things. First, it provides that the agreement will expire at the end of the fifth year unless the sharefarmer approaches the owner at least 12 months before the expiration of the term and a satisfactory agreement is entered into prior to the expiration of the fourth year of the term. Secondly, it provides an undertaking by the sharefarmer that if no such agreement in writing is entered into, he will not plant any new crops on the land during the last three months of the term. The two matters are distinct, but they are also related. In my opinion, the second limb refers back to the first limb, which itself refers to a “satisfactory agreement”, and the sharefarmer gives an undertaking for

the situation where “no such agreement in writing is entered into”. That indicates strongly that the “satisfactory agreement” in the first limb must be an agreement in writing. In my opinion, it is wrong to read Clause 25 as permitting an oral agreement for extension of the term of the agreement, but as requiring the sharefarmer not to plant new crops during the last three months of the term though an oral agreement for extension had been made 9 months earlier, unless the agreement was in writing.

I would dismiss the appeal, and order the appellant to pay the costs of the respondents to be taxed.