

ASHMORE DEVELOPMENTS PTY LTD v. EATON & ORS
(Unreported Full Court of Queensland Appeal No. 62 of 1990)

by

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Does clause 16 of the Standard 1990 REIQ contract achieve its objective of reserving to a vendor the right to sue for arrears of rent accrued prior to sale of premises?

(a) Material Facts

Ashmore Developments Pty Ltd (re respondent) the registered proprietor of land leased part of a building erected thereon to Axlong Pty Ltd.

The lease was assigned to Eaton (the appellants). Subsequently the respondent entered into a contract for the sale of the land. Clause 14 of the 1982 REIQ form contract of sale, being indistinguishable from the present 16.1(a) of the 1990 version, provided (inter alia):

“(a)all unpaid rents and profits in respect of any period terminating on or prior to the date of possession shall not be apportioned between the parties on completion but shall be receivable by the vendor who shall have the right to recover payment thereof . . .”

After completion of the sale the respondent instituted proceedings against the appellants claiming the sum of \$49,969.41 representing arrears for the period April 1987 to February 1988.

The respondent was successful at first instance. The issue on appeal was whether section 117 of the *Property Law Act 1974* deprived the respondent of the right to recover the arrears.

(b) Full Court Appeal

The Full Court by majority allowed the appeal (Macrossan CJ, Ryan J; Byrne J dissenting).

Ryan J delivering the main judgment for the majority, examined the effect of section 117(1) of the *Property Law Act 1974*, which provided (inter alia):

Rent reserved by a lease, and the benefit of every covenant, obligation, or provision therein contained, touching and concerning the land, and on the lessee's part to be observed or performed . . . and other condition therein contained, shall be annexed and incidental to and shall go with the reversionary estate in the land, or in any part thereof . . .

After considering similar provisions in other jurisdictions¹ His Honour concluded:

. . . that an assignee of reversion acquires the right to sue for breaches of covenant committed before the assignment and the assignor loses that right . . .²

In effect section 117 of the *Property Law Act 1974* transfers the right to sue for prior breaches from the vendor, to the purchaser. It should be noted that the judges in the majority did not expressly consider the point, whether the section could be varied or waived by agreement between the parties.

The majority viewed clause 14 merely as an incomplete attempt to assign the right to sue for the arrears back to the respondent. Their Honours stated that for a valid assignment of

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1. *Re King* [1963] Ch.555 & *London and Country Ltd v. Wilfred Sportsman Ltd* [1971] 1 Ch.764.

2. Page 6 of the judgment.

this right, notice of it must be given to the lessee. As this was not done the assignment was deficient, the right remained with the purchaser, and the claim of the respondent failed. Byrne J. in dissent reached the same conclusion as the majority on the effect of section 117 of the *Property Law Act* 1974. The divergence of opinion was on whether the effect of section may be varied or waived by the parties.

After appraising authorities from other jurisdictions³ he concluded that a purchaser may waive his statutory entitlement. The basis for this position taken by His Honour may be summarised in the maxim *quilibet potest renunciare juri pro se* [everyman is entitled to renounce a right introduced in his favour].

After considering the terms of clause 14, His Honour concluded that it had the effect of waiving the purchaser's right to sue for the arrears of rent given by section 117 of the *Property Law Act* 1974. On this line of reasoning the right always remained with the respondent, and an assignment back was unnecessary.

(c) Appeal to the High Court

On the 27th of June 1991 special leave to appeal to the High Court was refused.

(d) Comments

While unanimous on the effect of section 117, the judgments differ on the issue whether its effect may be varied or waived by agreement between the parties. The judges in the majority appear to proceed on the basis that it cannot. As a result an assignment of the right back is required before a vendor could maintain an action for arrears of rent prior to the assignment of a lease. This approach leaves a vendor with few options to ensure that he is able to sue for arrears of rent after an assignment of the lease.

The most feasible option is to effect a valid assignment. Section 199 of the *Property Law Act* 1974 provides for the assignment of debt and other legal choses in action.

It is clear from the case that clause 16 would have effected a valid assignment if notice of such had been given to the lessee. The giving of such notice would not be a burden to a vendor. Section 257 of the *Property Law Act* 1974 expressly provides for the methods by which such notices may be severed, if not already provided for by the parties.

The majority did not expressly reject the concept that the effect of section 117 of the *Property Law Act* 1974 may be varied or waived by the parties. If this approach is ultimately adopted by the courts a vendor is in a more favourable position. Then merely by expressly concluding the operation of section 117 of the *Property Law Act* he will be able to retain the right to sue. As leave to appeal to the High Court has been refused it is doubtful that this will occur.

In addition there are several reasons which may be advanced in support of the first conclusion, amongst which are:

- (1) To waive the benefit of a covenant it must be for the sole benefit of the party seeking a waiver⁴. It is submitted that section 117 of the *Property Law Act* 1974 is also for the benefit of the lessee providing certainty as to whom the rent is to be paid⁵.
- (2) Preceding sections provide that their effect may be varied by agreement. As a matter of statutory construction a reference in one section and its exclusion in another may demonstrate that the legislature did not intend for it to apply in the latter.

3. *Re King supra* n.1; *Dalegrove Pty Ltd v. Isles Parking Station Pty Ltd* (1988) 12 N.S.W.L.R. 546.

4. *Nyhius v. Anton* [1980] QdR 34.

5. Note that this argument was considered by the High Court in the application for special leave to appeal.

Conclusion

In answer to the question in the introduction clause 16 does *not* reserve a vendor the right to sue for arrears of rent accrued prior to the sale of the premises. In order to do this the vendor must effect an assignment of this right back from the purchaser. Section 199 of the *Property Law Act 1974* should be complied with and notice in accordance with the section given to the lessee.

