

GUMLAND PROPERTY HOLDINGS PTY LTD v. DUFFY BROS FRUIT MARKET (CAMPBELLTOWN) PTY LTD & ORS (S395/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 14 February 2007

Date of grant of special leave: 3 August 2007

This appeal concerns the construction of a Lease and subsequent Deed of Variation, and the question of whether a breach arose giving rise to a right to the lessor to terminate and seek damages for loss of bargain.

In 1993 the first respondent became lessee of a substantial area in the Marketfair Campbelltown Shopping Centre for a term of 15 years. In 1999 the Deed of Variation was executed and as a consequence part of the area was sub-let to Woolworths. In September 2001 Gumland became the lessor.

By this time trading at the Centre had deteriorated and Duffy Bros were seeking to negotiate an exit. The sub-lessee Woolworths declined to renew its lease, tried to negotiate directly with Gumland, and remained in occupation at a unilaterally reduced rental. Gumland demanded that Duffy Bros make up the shortfall, but Duffy Bros denied they were liable as a result of the Deed of Variation. Gumland purported to terminate Duffy Bros' lease and the latter claimed the lease was terminated by Gumland's conduct.

The trial judge (Macready AJ) held, inter alia, that Duffy Bros was obliged to pay for the shortfall in Woolworth's payments pursuant to the 1999 Deed and that failure to do so was a breach of a fundamental clause in the original lease which entitled Gumland to terminate and seek damages for loss of bargain.

The Court of Appeal (Giles, Santow and Tobias JJA) held that on a proper construction of the documents the failure to make up the shortfall was a breach of the 1999 Deed, but not of an essential covenant of the original lease and did not give rise to a right to terminate and seek damages for loss of bargain.

The respondents cross-appeal, subject to the grant of special leave, from the whole of the judgment of the Court of Appeal. In the event that the cross-appeal is unsuccessful they contend that the decision of the Court below should be affirmed but on the ground that the court below erroneously decided or failed to decide some matter of fact or law.

The grounds of appeal are:

- The judgment of the Court below is wrong because it found that a Lessee (the first respondent) who failed to pay agreed rent to the Lessor (the appellant) did not breach a term which the parties had agreed was essential so as to entitle the Lessor to terminate the Lease and recover loss of bargain damages and costs of reletting (which had been awarded by the trial judge in the amount of \$1,743,282), notwithstanding that the Lease and a Deed varying the rent payable under the Lease both declared that time for payment of rent was essential.

- The Court below erred by failing to find that:
 - The first respondent breached essential terms of the lease, entitling the appellant to terminate the lease;
 - The appellant was entitled to recover loss of bargain damages and costs of reletting from the first respondent, by virtue inter alia of the provisions of section 117 of the *Conveyancing Act 1919* (NSW) and/or sections 51 and 52 of the *Real Property Act 1900* (NSW); and
 - The appellant was entitled to recover loss of bargain damages and costs of reletting from the second and third respondents under the terms of the guarantees they had given.