

# Supreme Court of Victoria

Before HERRING, C.J.

October 6, 7, 27, 1948.

MAJALA PTY. LTD. v. ELLAS.

*National security — Landlord and tenant—Recovery of possession—Conviction for offences arising out of the use of the premises for illegal purpose—Acceptance of rent after knowledge of conviction—No waiver of statutory ground—Hardship—National Security (Landlord and Tenant) Regulations, reg. 58 (5) (e).*

A complaint for the recovery of possession of premises was based upon a notice to quit in which a ground stated was "that the lessee or a person or persons other than the lessee have been convicted during the currency of the lease of an offence or offences arising out of the use of the premises for an illegal purpose or purposes," and particulars of convictions were given. Rent had been accepted by the lessor after knowledge of the convictions.—

*Held.*—1. For the purposes of sub-regulation 58 (5) (e) of the National Security (Landlord and Tenant) Regulations the offence must be really incidental to the use of the premises, and it is not sufficient that the premises are merely the scene of the offence.

2. In order to amount to waiver, the lessor must have knowledge of the facts which give rise to his election whether to determine the lease or not, and the acceptance of rent while he is deciding his course is an equivocal act not to be regarded as a waiver of his statutory right under the regulation.

## ORDER TO REVIEW.

A. W. H. McEwan, as agent for Majala Pty. Ltd., laid a complaint against Peter Ellas for the recovery of possession of premises in Exhibition Street, Melbourne. The application was based upon a notice to quit, in which the ground stated (*inter alia*) was, "that the lessee or a person or persons other than the lessee have been convicted during the currency of the lease of an offence or offences arising out of the use of the premises for an illegal purpose or purposes." The particulars under this ground listed eight convictions under sec. 44 of the Licensing Act 1928 for drinking liquor on unlicensed premises during prohibited hours, and one conviction, that of Steve Pedro, under sec. 161 of the said Act for selling liquor without a licence. All the offences were committed on Ellas' premises. Pedro was convicted on 23rd March, 1948, and this was known to the lessor towards the end of March, 1948. Rent was accepted by the lessor up till 28th June, 1948, when the notice to quit expired.

The Magistrate held that all the convictions came within reg. 58 (5) (e), thus establishing the ground, and that there was no waiver of the right to take ejectment proceedings, and, in considering hardship, stated—"It has not been shown to me that the lessee would suffer any hardship by his being evicted," and accordingly made an order for the recovery of possession.

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The defendant obtained an order *nisi* to review on the following grounds (*inter alia*):—

1. That the Magistrate should not have held that the lessee or any other person had been convicted during the currency of the lease of any offence arising out of the use of the premises for an illegal purpose.

2. That on the uncontradicted evidence the Magistrate should have held that any right which the lessor had to terminate the tenancy by reason of the conviction of Steve Pedro was waived by the acceptance of rent after knowledge of such conviction.

3. That the Magistrate was wrong in holding that the defendant would suffer no hardship by the making by the Magistrate of the order for the recovery of possession of the said premises.

*Fazio* for the defendant to move the order absolute.—Though the offences occurred on the premises, they did not arise out of the use of the premises for an illegal purpose. The use of the premises must be an element in the offence and that should appear from the charge itself. Selling liquor without a licence is an offence wherever it is sold. Regulation 58 (5) (e) contemplates a conviction for using premises, such as using the premises as a brothel. There must be a continuous user of premises for an illegal purpose, not just isolated convictions. "Other person" in reg. 58 (5) (e) must mean a servant or agent authorised or permitted to commit the offence. The mere acceptance of rent is a waiver of a breach of covenant. Rent was received after knowledge of the offence. This is a statutory tenancy, and, owing to the Regulations, a notice to quit can only be given on certain grounds, and these conditions are imposed in addition to the obligations of landlord and tenant—*Morrison v. Jacobs*, [1945] 2 All E.R. 430; *Brewer v. Jacobs*, [1923] 1 K.B. 528; *Hyman v. Rose*, [1912] A.C. 623. The receipt of rent waives the statutory condition in the ground. The Magistrate did not properly consider hardship—*Fenton v. Adams*, [1948] V.L.R. 12, [1948] A.L.R. 53.

*Gunson* for the complainant to show cause.—The words "arising out of the use of the premises" should not be restricted, and the object is to prevent people being on or using premises and conducting illegalities there. Drinking on unlicensed premises is using premises for an illegal purpose—*Schneiders and Sons Ltd. v. Abrahams*, [1925] 1 K.B. 301; *Waller and Son v. Thomas*, [1921] 1 K.B. 541; *Folan v. Lee*, [1926] Ir. R. 87. Mere acceptance of rent does not operate as a waiver. The draftsman had the subject of waiver in mind—reg. 58 (5) (b). All the circumstances must be looked at, and it was always made clear that proceedings would be taken. This is a statutory matter, and only an estoppel could stop the statutory right, not waiver—*Egerton v. Esplanade Hotels London Ltd.*, [1947] 2 All E.R. 88; *Hoffman v. Fineberg*, [1948] 1 All E.R. 592; *Chandler v. Strevett*, (1946) 63 T.L.R. 84. The Magistrate has considered hardship and there is evidence to support his conclusion—*Aldom v. Dunn*, [1917] V.L.R. 70, 23 A.L.R. 3.

*Cur. adv. vult.*

HERRING, C.J., read the following judgment:—This is an order to review an order made on the 18th August, 1948, by a Stipendiary Magistrate on the complaint of Majala Pty. Ltd., which is the owner of certain premises in Exhibition Street, Melbourne. Ellas is tenant from week to week of the first floor of the said premises, which are known as the Balkan Club. He carries on there the business of a cafe proprietor, which he took over in June, 1947, from one Markou, to whom he paid £550 for the tenancy. The premises are unlicensed and are used chiefly at night and are frequented by people from the Balkan States and others, who meet there for social and other purposes. The order complained of was for the recovery of possession of the premises.

The proceedings were based on a notice to quit, dated the 4th June, 1948. In this notice four grounds were taken, but the only one that is

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relevant to the present inquiry is the first, which was based on the first part of sub-reg. 58 (5) (e) of the Landlord and Tenant (National Security) Regulations, namely, that the lessee or any other person has been convicted, during the currency of the lease, of any offence arising out of the use of the premises for any illegal purpose. The particulars under this ground contained in the notice to quit particularised nine convictions. Eight of them were convictions under sec. 44 of the Licensing Act 1928 for drinking liquor on unlicensed premises during prohibited hours, and the ninth was under sec. 161 for selling liquor without a licence. All the offences were committed on Ellas' premises. The offences under sec. 44 were committed by eight different persons, one on the 21st January, 1948, two on 28th January, 1948, four on 30th January, 1948, and one on 21st February, 1948. Two of the convictions were dated 2nd March, 1948, and the rest 23rd March, 1948. The offence under sec. 161 was committed by one Steve Pedro, an employee of Ellas, on 21st February, 1948, and the conviction took place on 23rd March, 1948. An appeal to General Sessions was lodged against this conviction and this appeal was dismissed on 10th June, 1948. On 30th January, 1948, twenty-three bottles of beer and twenty-two half-flagons of wine were found on the premises, and on 16th March, 1948, an order of forfeiture was made in respect thereof.

The Magistrate held that all these convictions particularised came within reg. 58 (5) (e) and that consequently the first ground of the notice to quit was made out. The first ground of the order *nisi* challenged his finding on this matter. It was said that, in order to come within the sub-regulation, a conviction must be for an offence the gist of which is the user of the premises for an illegal purpose; that is to say, that the offence must be one an essential element in which is the user of the premises. And offences such as using premises as a common gaming house were referred to as typical instances of the type of offence that the regulation-maker had in mind.

This contention would seem to place too narrow a view upon the sub-regulation, and cannot, I think, be justified upon the language used. The offences specified are offences "arising out of the use of the premises for any illegal purposes," so that it is sufficient to bring an offence within it to show that there has been a use of the premises for an illegal purpose and that the offence arises out of that use. Where, moreover, a court has found that the premises have, during the currency of the lease, been used for some illegal purpose, the second part of the sub-regulation operates and there is no need to call in aid the first part.

On the other hand, it is not sufficient to show that the offence was one with which the premises had nothing to do beyond being the scene of its commission. The Magistrate, according to his reasons for judgment, would seem to have erred in this direction, as he placed great stress on the fact that the offences particularised in the present case all took place on the premises. He realised that some limitation must be placed on the operation of the first part of the sub-regulation, as it includes not only a conviction of the lessee but of "any other person," and he sought to limit its operation by reading down the words "any other person" and treating them as referring to "a servant or agent of the lessee or a person on the premises with the permission of the lessee or his employees." In this way he sought to restrict its operation to cases where blame could be attributed to the lessee. That there should be some such restriction is, I think, clear. The sub-regulation takes its place after three others all of which envisage

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misconduct on the part of a lessee. One would hesitate to attribute to the regulation-maker the intention of introducing in this context a ground for ejectment proceedings that might be made out by proving the conviction of some person with whose wrongdoing the lessee had nothing whatever to do. The restriction on the operation of the first part of the sub-regulation, however, is not, in my opinion, to be found by giving to the words "any other person" a restricted meaning; those words must, I think, as a matter of construction be read as meaning what they say. The restriction is rather to be found in the fact that the sub-regulation is only concerned with convictions for offences arising out of the use of the premises for an illegal purpose.

The words "arising out of" impose one limitation upon the operation of the first part of the sub-regulation. An offence cannot be said to arise out of the use of the premises unless it is connected with that use in the sense that it is really incidental thereto. Suppose, for example, the premises are used for a common gaming house, persons found on the premises may be convicted of being found in a common gaming house without lawful excuse. Persons so convicted are guilty of an offence incidental to the use to which the premises are, on the assumption made, being put. But there is no such connection between such use and the offence committed by one patron of the premises who assaults another thereon.

The second limitation is to be found in the requirement that it must be established as a matter of fact that the premises are being used for an illegal purpose. And, as was pointed out by Lord Hobhouse in *Powell v. Kempton Park Racecourse Company*, [1899] A.C. 143 at p. 172,

the phrase "use-for-a-purpose" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand.

There is thus involved, in cases coming within the sub-regulation, a use of the premises for an illegal purpose that is deliberate and designed on the part of some person, and that person will in the normal course of events be the person in control of the premises who by reason of such control can determine the purpose to which they are to be put. The use for an illegal purpose contemplated by the sub-regulation is thus one for which the lessee is responsible whether he himself makes use of the premises for such purpose or allows someone else to do so. He can control the use of the premises if he wants to. He cannot evade his responsibility by leaving control in the hands of his servants or shutting his eyes to what is going on.

Whether premises are used for an illegal purpose is, of course, a question of fact, and it will be a matter for the court that tries the issue to determine whether the evidence adduced is or is not sufficient to establish the type of user alleged. In the present case the Magistrate did not expressly advert to this question in his reasons for judgment. He referred to Pedro's conviction as one of sly grog selling, and he may well have been satisfied in his own mind, in view of the other convictions and the finding of liquor on the premises, that the premises were used by Pedro as a sly grog shop, that is to say, for an illegal purpose. He does advert to the fact that Pedro was Ellas' servant and that Ellas through Pedro retained control of the premises and was responsible for what was done there during his absence. There being no definite finding, however, upon the issue of whether the premises were used during the currency of the lease for an illegal purpose, the question does arise whether this aspect of the case should be referred back to the Magistrate. After due

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consideration I think no good purpose would be served by my taking this course. The evidence is all one way and there is only one inference that I think can properly be drawn in the circumstances when all the evidence is considered, and that is that the premises were used for the illegal purpose of a sly grog shop and that they were so used by Pedro, the servant of Ellas, who had been left by him in control. The various convictions under sec. 44 were spread over a period of weeks, and suggest such a user during that time, and when they are considered along with Pedro's conviction under sec. 161 and the finding of a large quantity of liquor on the premises, the inference drawn becomes irresistible. Offences under secs. 44 and 161 are offences which are incidental to the use of the premises as a sly grog shop, and may therefore be said to arise out of that use. The convictions particularised under the first ground of the notice to quit are consequently convictions that the lessor could properly rely upon under sub-reg. 58 (5) (e). In deciding as he did that this ground was established, the Magistrate thus came to a correct decision.

What I have said disposes of the first ground of the order *nisi* and also the second and third grounds. The fourth ground raises a different matter altogether. It is in the following terms:—

that on the uncontradicted evidence the Magistrate should have held that any right which the lessor had to terminate the tenancy by reason of the conviction of Steve Pedro was waived by the acceptance of rent after knowledge of such conviction.

The facts were that the conviction was recorded on the 23rd March, 1948, and it became known to the lessor towards the end of March, when the police interviewed the lessor's secretary, McEwan. Thereafter, in March, McEwan saw Ellas and told him of the conviction and that the lessor proposed to take action to get rid of him and close the club. Knowledge of the other convictions came to the lessor about the middle of April. About the 23rd April, 1948, the lessor's solicitor obtained a certificate of Steve Pedro's conviction and found that he had appealed against it. He interviewed an officer of the Clerk of Peace's office, but was unable to find out what the position of the appeal was or when it was coming on. He was told it had not been set down on the list of appeals. Actually it was dismissed on the 10th June, 1948, but some six days before the notice to quit had been issued. Actually no definite knowledge that the appeal had been dismissed was acquired by the lessor until the lessor's solicitor again visited the office of the Clerk of the Peace on or about the 20th July, 1948. The rent book, which was put in evidence, shows that rent was paid weekly in advance and accepted by the lessor up till the 28th June, 1948, when the notice to quit expired. It was this payment of rent after knowledge of Pedro's conviction that was relied upon as a waiver by the lessor of its right to terminate the tenancy by reason of such conviction.

The Magistrate held that there was no waiver, and in expressing his reasons for so doing he said—

the fact that rent was accepted after knowledge of the conviction does not in itself amount to a waiver of the owner's right to take ejectment proceedings. One must look further in order to ascertain what was the owner's intention.

He then proceeded to consider how the delay in issuing proceedings was explained.

In *Croft v. Lumley*, (1858) 6 H.L.C. 672, Baron Bramwell, as one of the Judges consulted by the House of Lords, said (at p. 705)—

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The common expression "waiving a forfeiture," though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not to avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the Statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, or does an act inconsistent with its continuance as bringing ejectment, he elects to avoid it. In strictness, therefore, the question is in such cases, has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election?

This statement explains most lucidly what is the position in cases where the lessor has a right of re-entry for breach of covenant. Similar considerations apply in the present case. The sub-regulation in question gives a lessor a statutory ground on which he can base a notice to quit that will by force of reg. 62 in appropriate circumstances put an end to the lease at the expiration of the notice to quit. He can thus, whenever the facts are such as to bring the ground into operation, elect either to bring the lease to an end or, if he chooses to take no action, allow it to continue. He may determine his election in either way, but once determined it shall, as stated in Comyns' *Digest Election* C.1, be determined for ever. He must, of course, have knowledge of the facts which give rise to his election, because until he has such knowledge he is not aware that there are open to him two alternative courses of action. Without such knowledge he cannot waive his right to take advantage of the statutory ground. Here again the position is much the same as it is in the cases where a right of re-entry arises for breach of covenant. With regard to such cases the law was clearly stated by Parker, J., in *Matthews v. Smallwood*, [1910] 1 Ch. 777 at p. 786, and his remarks were cited with approval by the Privy Council in *Fuller's Theatre and Vaudeville Company v. Rofo*, [1923] A.C. 435 at p. 443. Parker, J., said—

Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of re-entry arose.

Upon one other point the headnote states the pith of Parker, J.'s judgment thus—

The question whether there has been a waiver in such a case is one of law, and the onus is on the lessee to adduce some evidence of the lessor's knowledge, and proof of an act showing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor.

Once then it is established that the lessor has knowledge of the existence of a cause of forfeiture and of his consequent right to re-entry, he has an election, and the doing of an unequivocal act in either direction determines that election for ever. And in the re-entry cases, acceptance of rent in respect of a period after the right of re-entry has arisen is such an unequivocal act, it is inconsistent with the prior determination of the lease and is taken, as was stated by Lord Sumner in *P. Samuel and Co. v. Dumas*, [1924] A.C. 431 at pp. 477, as a conclusive waiver without inquiry into the lessor's actual state of mind. See too *Rex v. Paulson*, [1921] A.C. 271. On the other hand, the issue and service of a writ in ejectment is in such cases such a final election by the lessor in the opposite direction that a subsequent receipt of rent is no waiver of the forfeiture—*Civil Service Co-operative Society Ltd. v. McGrigor's Trustee*, [1923] 2 Ch. p. 347.

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So long, however, as the lessor has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party acquires an interest in the lease, or if in consequence of his delay the position of the lessee is affected, he may be precluded from exercising his right to determine the lease. And lapse of time without determining it will furnish evidence that he has elected to affirm the lease and waive the forfeiture, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so elected—*Clough v. London and North West Railway Company*, (1871) L.R. 7 Exch. 26 at p. 35.

Lapse of time may thus be a very relevant consideration, if a lessor deliberates too long and does not make up his mind to determine his election one way or the other within a reasonable time. But in view of what I have said, time does not run until it is made to appear that the lessor has knowledge of the facts upon which his election arises. And the onus of establishing such knowledge is upon the lessee. Thus, in the present case it is not enough to show, in order to put the lessor to its election, that it knew that Pedro had been convicted of an offence under sec. 161 of the Licensing Act 1928. It must be shown that it also knew that the premises were being put to an illegal use and that that offence was one arising out of such use. True it is that the lessor made it clear to the lessee at the end of March that it proposed to turn him out, but at the time could it be said that the lessor knew all it had to know in order to be put to its election? All it then knew was of Pedro's conviction, and his offence might well have been one with which the premises had nothing to do beyond being the scene of its commission. As soon as the lessor learnt of the convictions under sec. 44 a very different situation arose. It should then have known, no doubt, all that it was necessary for it to know. But almost as soon as this knowledge came to it, about the middle of April, it also learnt that Pedro had appealed to General Sessions. And so it became uncertain whether his conviction was one upon which it could ultimately rely under the sub-regulation. For under sec. 136 (7) of the Justices Act 1928 the Court of General Sessions on appeal from the Court of Petty Sessions had power to reverse the decisions of that Court. And in the event of reversal in Pedro's case his conviction would have been avoided *ab initio*—*Commissioner of Railways, New South Wales, v. Cavanough*, 53 C.L.R. 220, [1935] A.L.R. 304. The lessor was therefore entitled, so far as this conviction was concerned, to await the outcome of the appeal, and was not bound to determine its election in respect thereof until then. Until then it could not be said to have the necessary knowledge. Actually, however, in pursuance of its expressed desire to put the tenant out, it took a chance on the satisfactory outcome of the appeal from its point of view, and determined its election before the appeal was finally dealt with by issuing a notice to quit. Under reg. 58 this was the appropriate step to take for the purpose of taking advantage of the statutory right conferred by the sub-regulation, and so bringing the lease to an end.

This I think disposes of ground 4 of the order *nisi*. But I think there is another aspect of the matter to which I should refer. As I pointed out above, in the cases of re-entry for breaches of covenant, the acceptance of rent in respect of a period after breach is an unequivocal act which, whatever the actual state of the lessor's mind, operates as a conclusive waiver of the right of re-entry. By accepting the rent in such circumstances the lessor recognises the continued existence of the lease, and is so taken to have determined his election not to avoid it. His act is inconsistent with an election in the opposite direction, because any such election would bring the lease to an end by relation back to the very time when the cause of forfeiture arose. But in cases under the sub-regulation the position is very different. The right conferred thereunder to bring the

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lease to an end is not to bring it to an end then and there upon the conviction relied upon taking place, but it is a right to bring it to an end by a process which involves the continuance of the lease until the expiration of a notice to quit based on such a conviction. And rent will, of course, continue payable so long as the lease endures. This being so, in cases under the sub-regulation an acceptance of rent in respect of a period after the conviction relied upon is not necessarily inconsistent with an election to determine the lease thereunder. The lease is bound to continue for some time at any rate, whichever way the lessor determines his election. Whilst the lessor is deliberating and making up his mind what course he will pursue, his acceptance of rent from week to week, as in the present case, is therefore an equivocal act, and cannot be regarded as a waiver by him of the statutory right conferred by the regulation.

There remains for consideration ground 5 of the order *nisi*. That ground is as follows:—

that the Magistrate was wrong in holding that the defendant would suffer no hardship by the making by the said Magistrate of the order for the recovery of possession of the said premises.

With regard to this matter the Magistrate said on the day of the hearing, 30th July, 1948—

I am convinced that greater hardship would be imposed on the landlord in refusing an order of ejectment in the circumstances of this case than would be inflicted upon the lessee in making an order.

On this day he reserved his decision on the question of waiver, and, in giving judgment on the 18th August, 1948, he dealt with this and other matters, and then went on—

It has not been shown to me that the lessee would suffer any hardship by his being evicted. He was lessee of these premises on a prior occasion and presumably has followed other occupations whilst away from these premises. The club does not appear to be a *bonâ fide* one in the sense that it is not an association of persons for the purpose of conducting a club under rules prescribed by those persons, but is in effect a business conducted by the respondent for his own profit, the premises of which his own countrymen and others frequent for social and other purposes. He can if necessary continue his occupation as a cafe proprietor in other premises.

I think that I must treat this statement, made after consideration, as expressing the reasons that actuated the Magistrate in coming to the conclusion that he did with regard to hardship. From this statement it would appear that the Magistrate took the view that from the fact that the lessee was carrying on on the premises a business for profit, he should draw the inference that the lessee would not, as a result of being evicted therefrom, suffer any hardship that was cognisable under reg. 63. As, however, the premises were business premises and the uncontradicted evidence was that the lessee had paid £550 for the ingoing in June, 1947, it would seem that he must necessarily suffer some financial loss if he is evicted from the premises. I think, moreover, that this case is one of those envisaged by the Full Court in *Fenton v. Adams*, [1948] V.L.R. 12, [1948] A.L.R. 53, where financial loss should be considered an element, and an important element, in determining hardship. This being so, the Magistrate has, I think, misdirected himself, as he has not taken into consideration one of the matters that it was his duty to consider under reg. 63. I therefore propose to remit the case to him to be dealt with in accordance with law.

The order *nisi* will be made absolute, the order below set aside, and the case remitted to the Magistrate to be dealt with by him in accordance with law.

*Case remitted.*

[Solicitors—For the complainant, M. Mornane; for the defendant, McInerney, Williams and Curtain.]  
B. F. McN.