



HIGH COURT OF AUSTRALIA

Public Information Officer

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GUMLAND PROPERTY HOLDINGS PTY LTD v DUFFY BROS FRUIT MARKET
(CAMPBELLTOWN) PTY LTD, FERDINANDO PISCIUNERI AND NATALE PISCIUNERI

A commercial lease was validly terminated on account of the lessee's failure to pay rent and the lessor was entitled to damages as well as unpaid rent and outgoings, the High Court of Australia held today.

In 1993, Duffy Bros leased almost 20 per cent of the Marketfair Campbelltown shopping centre for 15 years from Transit Management Pty Ltd to operate a fruit, vegetable and meat market. The base rent was \$245,343 per annum, subject to Consumer Price Index increases and five-yearly reviews, plus almost 20 per cent of Transit's outgoings. In 1994, the Pisciueneris entered into a guarantee to pay all costs for occupation of the premises or arising out of any breach of the lease agreement. By 1999, Duffy Bros was experiencing difficult trading conditions and had fallen into arrears with rent and outgoings. Duffy Bros and Transit entered a deed which reduced the rent to \$156,000 per annum and allowed the creation of a sub-lease over part of the premises. Duffy Bros sub-leased the portion of the premises to Austie Nominees Pty Ltd which in 2001 transferred its interest to Woolworths Ltd. Transit sold the shopping centre to Gumland Property Holdings in 2001 and transferred all its rights under the lease and the 1999 deed to Gumland.

The sub-lease expired in 2002 and Woolworths told Duffy Bros that it did not wish to renew. However it remained in occupation while opting unilaterally to pay only half the rent. This put Duffy Bros into breach of the deed since it did not pay the shortfall itself. Gumland served notice on Duffy Bros stating that the shortfall in rent was a breach entitling it to terminate the lease. It demanded payment of \$57,893.55. Duffy Bros did not pay and on 1 August 2003 Gumland gave notice terminating the lease. In 2004, Gumland began proceedings seeking arrears of rent up to the date of termination, loss of bargain damages for the rest of the 15-year term, expiring on 29 March 2008, and reinstatement damages (the costs of reletting the premises). It also sued the Pisciueneris as guarantors of Duffy Bros' obligations under the lease.

In the NSW Supreme Court, Associate Justice Richard Macready held that the lease was validly terminated due to the failure to pay rent. The failure to make up the shortfall in Woolworths' rent gave rise to a right to loss of bargain damages as well as rent arrears. Associate Justice Macready gave judgment for Gumland of \$2,096,514, including interest, made up of the Woolworths' shortfall (\$78,635); arrears of rent and outgoings (\$283,597); loss of bargain damages – the difference between rent and outgoings payable between 1 August 2003 and 29 March 2008 and that paid by new tenants (\$1,624,737); and reinstatement damages (\$109,545). The Court of Appeal held that Gumland was not entitled to terminate the lease because Duffy Bros' failure to pay the shortfall was only a breach of the deed, not a breach of an essential term in the lease. Therefore Gumland was not entitled to loss of bargain damages or reinstatement damages, reducing the judgment to \$362,232. Gumland appealed to the High Court.

The High Court unanimously allowed the appeal and restored the judgment sum awarded by Associate Justice Macready. It held that Duffy Bros had breached the deed and that Gumland had a clear right of action under the deed against Duffy Bros for rent not paid by Woolworths. Once part of the store was sub-leased, Duffy Bros was liable for the rent and outgoings under any sub-lease. The deed was not a side agreement to the lease or a suspension of the lease, but a variation of it. Hence the failure to pay these amounts was a failure to comply with the lease covenant to pay all rent and outgoings. The lease covenant was an essential term and breach of an essential term entitled Gumland to terminate the lease and obtain an award of loss of bargain damages.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*