RIGHT TO HARVEST THE CROP AFTER THE EXPIRATION OF THE TERM: WHO GETS THE CROP?

In Hohn & Anor v Mailler [2003] NSWCA 122, the New South Wales Court of Appeal determined whether a clause in a fixed term agricultural lease altered a landlord's right to harvest sorghum planted by the tenants approximately one month before the expiration of the Lease term.

The tenant appellants entered into a lease of a property near Boggabilla for three years, expiring on 10 November 1999. The sorghum crop was sowed shortly before, in late October, and could not be harvested until long after the expiration of the Lease.

The tenants paid the rent of $30,000 per annum in one lump sum of $90,000 at the commencement of the Lease.

The provisions of the Lease contained all the normal lessee covenants standard in an agricultural lease, such as provisions relating to the continuous eradication and keeping down of noxious weeds and other growths and the use of approved methods of farming. The Lease also contained a clause in these terms:

> *"**14. Re-entry for Harvest***
>
> *If the Lessee shall duly and punctually pay the rent reserved by this Lease at the times herein appointed for payment thereof and shall duly observe and perform the covenants and agreements by and on the part of the Lessee contained in this Lease up to the expiration of the term hereof the Lessee shall have the right if necessary to enter the land after the date of expiration of the term to harvest and remove any growing crops provided that the Lessee conducts such work expeditiously and without undue inconvenience to the Lessor."*

A dispute arose between the parties as to who should get the benefit of the crop (worth $177,982.00), harvested by the Landlord in February 2000, and the matter came before the Equity Division of the Supreme Court of New South Wales. The tenants claimed, in reliance on clause 14, that although the Lease had expired, they had the right to enter the land and harvest and remove the sorghum crop.

Findings at Trial

Burchett AJ found in favour of the Landlord. His Honour's reasoning started with the proposition that the common law rule applicable to an agricultural tenancy for a fixed term was that, subject to any statutory provision, a lessor might become entitled to emblements, being such crops as might be growing and not yet severed when the term expired. His Honour reasoned that, given the specific provisions of the lease for keeping down weeds and employing proper husbandry, the parties *"cannot have intended that no-one, over the period of months required for the growing of a crop (i.e. between 10 November and the harvest in February), would attend to the essential practices of proper farming and that, in effect, good husbandry would be abandoned for this time"* (because the lessee had no right to remain on the property to look after the crop, his rights following expiration of the lease term were restricted only to harvesting and removal of the crop).

Further, His Honour considered that, as the Lease provided for a substantial annual rent for the use of the land, the parties could not have intended that the tenants could receive the benefit of the land for a crop, at no rent, between 10 November and the following February with the Landlord being excluded from the use of the land during that time.

Burchett AJ found that clause 14 was only intended to confer on the tenants a limited extension to come onto the land after expiration of the term to harvest a crop which could have been expected to have been ready for harvest within the lease term but which, for some reason such as bad weather, was not then ready for harvest.

On this basis, His Honour found in favour of the landlord who had harvested the crop in February and who had claimed the sale proceeds.

Findings on Appeal

The Lessee successfully appealed to the New South Wales Court of Appeal. Sheller JA delivered the decision, with whom Mason P and Beazley JA agreed.

The Court found that where the words in the document are unambiguous, the Court must give effect to them. Clause 14 meant what it said. Sheller JA stated:

> *"Standing alone cl 14 means that subject to the lessees' meeting the introductory condition up to the expiration of the term they are entitled thereafter, that is to say after the date of expiration, to enter the land, to harvest and remove any growing crops. There is a proviso that the lessees conduct "such work", which must mean the work of harvesting and removing the growing crop, expeditiously and without undue inconvenience to the lessor."*

The landlord argued (unsuccessfully) that the effect of the clause was more limited, in particular, the lessees had no obligation to cultivate the land or harvest the crop. The Court of Appeal, although noting the difficulty in delineating the circumstances in which clause could potentially operate, disagreed with the trial judge's construction of the clause, holding that the clause was plain in its terms; the words were unambiguous and made clear that the responsibility for maintaining the land after the expiration of the term rested with the landlord.

On this basis, the Court of Appeal held that the tenants were entitled to enter the land after expiration of the Lease term to harvest and remove any growing crop, notwithstanding the fact that they had planted the crop only a matter of weeks before the expiration of the Lease term.

A Vaccari
2 June 2010