IN THE HIGH COURT OF AUSTRALIA

WALKER

V.

WALKER

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY 17th OCTOBER 1955

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

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ORDER

Appeal allowed. Order of the Supreme Court of Western Australia made on the 20th April 1955 varied by substituting for the sum of £6561 therein appearing the sum of £5865. Respondent to pay the appellant's costs of the appeal.

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JUDGMENT

FULLAGAR J.
KITTO J.
TAYLOR J.

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JUDGMENT

FULLAGAR J.
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TAYLOR J.

The appellant in this matter is the wife of the respondent who in August 1954 instituted proceedings against her to recover damages for breaches of an agreement for the lease of a farming property in the vicinity of Tardun in the State of Western Australia. The respondent was successful in the suit and recovered judgment for a total sum of £4816 but being dissatisfied with the amount of damages as assessed he appealed to the Full Court. Upon appeal the judgment was varied by increasing the amount thereof to the sum of £6561 and it is from the order of the Full Court that the appellant brings this appeal.

The facts show that the parties lived together on the property until the end of 1946 when the respondent leased it to a third party. From 1946 to 1948 the parties resided in Melbourne but in April of the latter year they returned to Perth where for a further period they continued to live together. In August of the same year there was a brief separation and in the following month the final break came, the appellant informing her husband that she was desirous of returning to the property and that she had entered into some form of share-farming agreement with the lessee. From that time the parties did not live together again.

The events of the next two years are of no consequence as far as this appeal is concerned but on 1st January 1951 the appellant became the lessee of the property. By an agreement of that date the respondent agreed to lease the property to the appellant for a period of one year expiring on 31st December 1951 at a total rental of £700 and upon specified terms. On 17th April 1952 a further agreement in much the same terms was executed with respect to the succeeding year and on 16th March 1953 the parties executed a further agreement for a lease for a period of a year expiring on 31st December 1953. It was for breaches of provisions of this agreement that the respondent sought to recover damages and some further reference should be made to this instrument. By Clause 4 the appellant was to be "entitled to reside on the said lands and enjoy the full use of all stock, machines and facilities necessary for the carrying on of lawful farming operations" and by Clause 6 she agreed "to maintain all fences, gates, buildings and machines in good repair and to supply all necessary parts to keep same in working and usable order and similar condition as at the granting of the lease, to the reasonable satisfaction of the lessor". Clause 7 imposed upon the appellant an obligation to keep all cleared land free from suckers and noxious weeds to the reasonable satisfaction of the lessor and by Clause 8 she undertook "At the termination of this agreement, viz. 31.12.53 .... to leave on the property 700 sheep plus natural increase of lambs, 27 horses, 11 cattle and 250 boxes of graded seed wheat and 50 tons of hay in stack and 20 bags of seed itself". She further undertook, by Clause 9, "to leave not less than 500 acres of fallowed land" on the termination of the agreement. The total rent reserved by this agreement was the sum of £600.

The amount for which judgment was recovered in the first instance included a number of individual amounts for separate breaches of a number of provisions of the agreement but only three items, two of which were so included, were in question in the Full Court and these are the only matters which call for individual consideration in this Court. The first of these related to a breach of Clause 8 of the agreement. The respondent's statement of claim alleged that in breach of this clause the appellant did not leave any livestock on the property and the breach as alleged was expressly admitted on the pleadings. Accordingly the only issue with respect to this claim was damages and upon the hearing of the suit the learned trial judge assessed damages, in so far as the breach related to the appellant's failure to leave any sheep on the property, at £2015. This amount was increased by the Full Court to £3064. The second matter in dispute was concerned with plant and machinery to the use of which the agreement entitled the appellant. The statement of claim alleged that the appellant had, in breach of the agreement, removed a number of items of plant and machinery from the property and had failed to yield them up to the respondent. Again the breach was expressly admitted and the only issue was damages. Under this head the trial judge awarded the sum of £504 but this amount was increased by the Full Court to £600. The difference between these two sums is in dispute between the parties on this appeal. The third item now in dispute is one in respect of which the learned trial judge refused to make any award. The relevant claim was made by paragraph 12 of the statement of claim and it alleges that by reason of the many breaches previously alleged in the statement of claim the property in question had been depreciated in value and had been rendered unfit for habitation and for leasing for farm purposes. By reason of the state of repair and the absence of livestock

and plant and machinery, it was alleged, the plaintiff had been unable to lease the property during 1954 and it was further alleged that he would be unable to do so until March 1955. Under this heading the respondent claimed the equivalent of one year's rent and in respect of this claim the Full Court allowed the sum of £600. This sum, together with the additional amounts allowed by the Full Court in respect of the other two items referred to, accounts for the difference between the amount initially awarded - £4816 - and that awarded by the Full Court - £6561.

At the expiration of the term specified by the lastmentioned agreement the appellant remained in possession of the property for some time. According to the evidence there were negotiations between the parties for a further lease for the year 1954 and these negotiations, apparently, continued for some time into that year. The appellant, however, decided not to continue in possession and, by a letter bearing date 31st May 1954, she informed the respondent's solicitor to that effect. This letter was said to have been received on 21st June 1954 and at the end of July the respondent returned to the farm. When he returned he found that there was no livestock there and that the appellant had disposed of the plant and machinery. The farm, he said, had been hopelessly neglected, the house was in a ruinous condition, the fencing was down and some of the outbuildings had been pulled down. In contradistinction to the picture of desolation painted by the respondent's evidence he said that cleaning up the house had cost £10, restoring the harness room £11 and that it had cost £32 to replace the harness. He did, however, produce a written estimate showing that it would require the expenditure of some £584, being £182 for materials and £402 for labour, to restore the farm buildings and appurtenances and fences

to a state of good order and repair and to clear suckered land. Of this amount the sum of £90 was allowed by the learned trial judge to cover the cost of cleaning and repair to the dwelling house, camp huts and shearing sheds and £350 was allowed for repairs to fences and gates. Nothing was allowed for repair to or restoration of the stables, chaff shed and harness room which the trial judge thought, upon the evidence had outlived their usefulness. The abovementioned items were not in dispute in the Full Court nor were they on this appeal, but in view of the contentions raised with respect to the claim for the equivalent of one year's rent it is necessary that some reference should be made to them. It is also necessary that a brief reference should be made to claims in respect of breaches of Clauses 7 and 9 of the agreement by which the appellant undertook to keep all cleared land free from suckers and noxious weeds and to leave not less than 500 acres of fallowed land on the termination of the agreement. In respect of these claims the learned trial judge allowed amounts of £135 and £375 respectively. The total of the various sums allowed as mentioned in this paragraph, viz. £950, was included in the judgment which the respondent initially obtained.

It is convenient to deal first of all with the basis upon which damages should be assessed with respect to the admitted breach by the appellant of the provisions of Clause 8 of the agreement in failing to leave any sheep, with their natural increase, on the property. There was no precise evidence as to the cost of restocking the property with the appropriate number of sheep at the expiration of the lease or, indeed, at any other particular time. There was evidence, however, which showed that the sheep and lambs which had been depastured on the property were sold by the appellant and which established the amount realised upon sale. There were, in fact, three

sales in all and these took place on 17th November 1953 and 11th and 14th May 1954 respectively. Included in the first sale were 395 sheep, the wethers being sold at 58/- and 64/- per head and the ewes at 73/- and 36/- per head. The lambs, 314 in number, were sold at prices ranging from 42/- to 54/- per head. On 11th May 1954 228 sheep were sold at prices ranging from 60/- per head for 6 stags to 81/- per head for 28 wethers. Lambs were sold at 31/- and weaners at 54/-. On 14th May 1954 92 ewes were sold at 34/6d and 43 lambs at 17/6d per head. The average price obtained for sheep overall was approximately 58/- per head and for lambs and weaners approximately 44/-. In dealing with the situation created by the evidence the learned trial judge observed "that the appellant could have fulfilled her obligation by leaving the lower priced stock on the farm" and he thereupon proceeded to assess the respondent's loss by reference to the lowest price obtained for sheep in November 1953, viz. 36/- per head and by adding a sum, ascertained by reference to the amounts obtained upon sale, in respect of the lambs. The Full Court thought that this view was wrong and adopted as the measure of the respondent's loss the actual amount realised for the sheep and lambs upon sale, viz. £3124, subject to a deduction therefrom of the sum of £60 as an allowance for numbers in excess of those which the agreement required the appellant to leave on the property. In all the appellant had sold 715 sheep and it is reasonable to conclude that among the lambs sold in May 1954 there was a small number, approximately 40 to 50, of the natural increase of 1954. In the opinion of the Full Court the learned trial judge had erred in adopting the lowest price obtained in November 1953 as a basis for assessing damages and with this view we agree. Of the 395 sheep then sold only 90 were sold at 36/- per head whilst, of the remaining sheep, 72 were sold at 58/- per

head, 94 at 64/- per head and 139 at 73/- per head. There is nothing to indicate that the sheep were not an average batch or that the appellant, if she had desired to restock the property with other sheep, or that the respondent, if circumstances had required him to restock the property, oould have purchased the requisite number of sheep at 36/- per head. In either case it is reasonable to assume that average lots only would have been available for purchase and we see no reason why damages should not be assessed on that basis. Accordingly, if the correct view is that the respondent's loss should be assessed as for a breach on 31st December 1953, we see no reason why the average price obtained for sheep in November - approximately £3 per head - should not be taken as a guide. This view would, of course, take no account of the somewhat different prices obtained in May 1954 when the sheep would be bearing more wool and when higher prices might generally be expected for sheep in good condition. In the circumstances of this case it might properly be said that the time for the performance of the appellant's promise was delayed at her request and as her obligation thereafter remained unfulfilled we see no reason why damages should not be assessed by reference to the prices obtained at the later stage (cf. Ogle v. Earl Vane, L.R. 3 Q.B. 272, and Blackburn Bobbin Co. v. T.W. Allen & Sons, (1918) 1 K.B. 540 at p. 554). But on either basis the damages which the respondent was entitled to recover in respect of this particular breach were at least equal to the amount which the Full Court thought fit to award. The appellant's submissions on this aspect of the matter therefore fail.

The second item in dispute was concerned with the value of the plant and machinery which was also disposed of by the appellant. In respect of these items the respondent originally claimed £2016. The learned

trial judge considered that the amount should be assessed at £504, but this amount was increased by the Full Court to £600. Evidence had been given to the effect that the replacement value of the machinery and plant was £2988 and at the trial the respondent conceded that this figure should be depreciated by 33⅓%. But the trial judge considered that the depreciation "should be more like 80%". In assessing the damage under this heading the Full Court expressed the view that the trial judge had fallen into the error of deducting depreciation at the rate of 80% from a figure which had already been depreciated by 33⅓%. Accordingly, they allowed damages at £600, or approximately 20% of £2988. It is clear, however, that the learned trial judge did not fall into this error. Apparently what he did was to adopt the figure originally claimed by the respondent in his particulars, viz. £2016, as being a more reliable estimate of the replacement value of the items in dispute and then to depreciate that figure by 75%. The resultant amount, viz. £504, he then allowed as damages. We see no reason why this assessment should be disturbed.

The final item in dispute is the claim for the equivalent of one year's rent which was allowed by the Full Court on the basis that, by reason of the appellant's breaches already referred to, the respondent "was precluded from getting the fruits of his investment for one year." In his evidence the respondent said that he intended to relet the farm but that because of its condition he was unable to do so when he returned in July 1954. In these circumstances he decided to sell it and thereafter he sold it for £7500. He further says that if the property had been in good order he would have been able to obtain £10,000 for it. The fact is, however, that the appellant, with the respondent's consent, remained in possession of the property until the middle of 1954 and that, until about the time when he resumed possession in July of that

year, he was not in a position to relet the property. No claim was made against the appellant for use and occupation or for mesne profits and until that point of time any loss to the respondent arising from his inability to relet it did not flow in any way from the condition of the property. It was the direct and immediate result of the continued occupation of the property by the appellant. There is nothing in the evidence to suggest that thereafter he suffered any loss over and above the amounts already assessed for the appellant's breaches and although the task of repairing and restocking, if it had been carried out, might have occupied some time - though not any substantial period of time - there is nothing to show that any loss of profits or any additional capital loss accrued to the respondent. On the whole we are of the opinion that the respondent did not make out any case for damages under this head.

In the result the appellant is entitled to have the amount assessed by the Full Court reduced by the sum of £696 and to this extent the appeal succeeds.