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RELIEF AGAINST FOREFEITURE OF A LEASE, INCLUDING RELIEF AGAINST FAILURE TO EXERCISE AN OPTION TO RENEW A LEASE

Introduction

1. An option to renew a lease is a right to call for a fresh lease with fresh covenants: *Gerraty v McGavin* (1914) 18 CLR 152 at 163. The option to renew thus creates an equitable interest to a new term. Where a new lease is not in fact executed after the proper exercise of an option to renew, then the parties are regarded as having an enforceable agreement for lease between them: *Re Eastdoro Pty Ltd* [1989] 2 Qd R 182 at 184.
2. Registration of a lease, where the relevant land is under the Torrens legislation, would appear to make the equitable interest to call for a new lease, absolute and indefeasible upon registration: *Mercantile Credits Ltd v The Shell Co. of Australia Ltd* (1976) 136 CLR 326.

As Duncan says in the third edition of *Commercial Leases in Australia* at p.242, “the net result of this decision must be that the right to exercise a specifically enforceable covenant for renewal in a registered lease will take priority over all subsequently registered estates. If the covenant is not specifically enforceable, and, thus, invalid for some reason, registration will not give the covenant that protection.”

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3. The learned author’s statement serves to focus one’s mind on the important question of whether the land one is dealing with is under the Torrens system and if so, whether equitable rights to call for a fresh lease have crystallised into indefeasible rights upon registration.

4. Thankfully, that debate is outside of the scope of this lecture but nevertheless provides the setting for what follows.

Options generally must be exercised strictly in accordance with their terms

5. Brereton J summarised the principles recently in *Mineaplenty Pty Ltd v Trek 31 Pty Ltd* [\[2006\] NSWSC 1203](#)

“36 Trek 31 contends that the first (31 July) notice was not a valid exercise of the option, because it was a personal letter from Mr Taylor to Mr Prendergast and not a notice by Mineaplenty to Trek 31, is expressed to be an exercise of an option in a lease between Mr Taylor and Mr Prendergast, and is expressed to be signed by Mr Taylor personally and not for or on behalf of Mineaplenty.

37 The issue is whether the purported exercise communicated a clear and unequivocal intention to exercise the option.....This is resolved according to what a reasonable recipient of the notice, familiar with the terms of the lease and the surrounding circumstances – including the dealings between the parties – would have understoodSo long as the notice conveys an unequivocal intent, it is not fatal that it does not use terminology precisely conforming to the terms of the option grantedor even misstates its terms

38 Notice of exercise of an option may be given by and to the duly authorised agents of the lessee and the lessorWhether an alleged agent had authority to give or receive such a notice is to be judged having regard to the whole of the circumstances of the case, including the terms of the lease, and the role of the agent in the relationship between the parties

39 Here, the terms of the lease refer explicitly to the servants and agents of the lessors and lessee as being within the definition of the terms “the lessor” and “the lessee”, where applicable. There is nothing to suggest that that extended definition is not applicable to the option of renewal. In this respect, the case is *a fortiori Young v Lamb*, in which the definition of “lessor” did not include a reference to the lessor’s agent, yet was held not to preclude acceptance by the lessor’s agent [*Young v Lamb*, [32]-[36]].....”

HH then referred to the relationship between the two directors and their course of dealing and how they corresponded in their personal names and then continued

“41 The words of the 31 July letter plainly convey an intention “to take up the option”.

42 In that context, no reasonable recipient familiar with the terms of the

lease and the course of dealing between the parties could mistake the letter – given as it was during the period less than six months but more than three months before the expiry of the term – for anything other than an intended exercise of the option on the part of Mineaplenty. Indeed, Mr Prendergast himself was under no misapprehension about that.”

Waiver by lessor of time stipulation: irrevocable offer or conditional agreement for lessor’s benefit ?

6. As the discussion below shows, there are a number of legal theories vying for acceptance as to the juridical nature of an option; with consequences as to whether it can be said that a time stipulation can be waived.

One line of authority, associated with the *McCaul* case, says an option is an irrevocable offer, although conditional. On this theory, there can be no waiver.

Another line of cases, associated with *Traywinds*, says an option is a conditional contract, for the benefit of the lessor, and thus can be waived.

Yet a third line has emerged, associated with *Jiwunda* (where the parties were not represented in the lease renewal negotiations), which says that in this day and age, one must seek to give effect to what commercial people mutually intend, without undue technicality, because it is often artificial to seek to fit facts into the paradigm of offer and acceptance, and one must look to the substance of the matter.

7. Moreover, many of the cases below proceeded without all relevant authorities being brought to the attention of the court.
8. It would appear that the matter has never been properly argued, and the matter is ripe for appellate consideration.
9. The New South Wales Full Court in *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122 at 123 held in a joint judgment that an option for renewal is no more than an offer to make a contract which if under seal or if given for consideration is irrevocable and which prescribed the time and manner for acceptance. On this logic, the Full Court went on to say as follows at 123-124:

“Only by performing the conditions prescribed could it be accepted and result in an agreement for a lease. A purported acceptance without performance of the prescribed conditions would not and could not be an acceptance of the offer. It would in reality be a counter offer by the original offeree requiring acceptance by the original offeror if an agreement were to result.

If a conditional offer is made and the offeree without performing the condition purports to accept it, that is to say makes a counter offer and that counter offer is accepted, it is a loose although not uncommon use of language to say that the original offeror has waived performance of the condition which was prescribed by his offer as being the manner of accepting it. In contemplation of law the original offeror has done no such thing. What he has done is to accept a counter-offer and in the result an agreement is made but it is not an agreement consisting of the original offer and an acceptance of that offer.”

10. The Full Court of the Supreme Court of Queensland came to a different view in *Traywinds Pty Ltd v Cooper* (1988) 1 Qd. R 222, at 226-227.
11. The Queensland Full Court held that if the true categorisation of an option is that it is a conditional agreement to grant a lease for a further term then the stipulation regarding the time within which notice must be given by the lessee to trigger the option, is in truth, a stipulation for the benefit of the lessor and hence, in accordance with general contractual principles, can be waived. The key passage is at page 226, lines 44-54.
12. In *Traywinds*, there was conduct by the lessee which induced the lessor to believe that a lease existed, although irregularly created. Its conduct was sharp. The lessees had hardly ever paid rental on time (such prompt payment being a condition to the exercise of the option). However, the lessee that they wished to exercise the option and the lessor advised that was in order and the parties were going down that track when the lessee in effect abandoned the premises, leaving the lessor with no effective alternative but to rent them out at a lower rental.
13. On these facts, it is unsurprising that the Full Court held the lessor, induced by the lessee, had waived the stipulation as to time, thus leading to an irregularly created but nevertheless enforceable agreement to lease, the breach of which sounded in damages. Indeed, the Full Court categorised the approach of the trial judge (in upholding the lessor’s claim) as “robust” (page 227, line 45).
14. In *Robert William Whitton Trustee of the Bankrupt Estate of John Emmanuel Rose v Batson Holdings Pty Ltd (No. 2)* [2006] NSW ADT 325, the Member referred only to the *Traywinds* case without adverting to the *McCaul* line of authority. This may simply be because of the way the matter was argued.
15. *Smoothseas Pty Ltd v Law Loan Mortgages Pty Ltd* (2007) QSC 82, held that an option to purchase commercial land had not been properly exercised and was not specifically enforceable. The option clause had strict requirements as to how it could be exercised, but was not

complied with.

Again *Traywinds* was referred to and again *McCaul* was not.

Moreover, in *Smoothseas*, Mackenzie J., referring to the High Court's decision in *Alphapharm* [2004] HCA 52; (2004) 219 CLR 165 observed at para [18] that an option must be construed objectively as a commercial document and continued:

"[19] Where an option is concerned, one issue, and the critical one in this case, is whether there is provision that it must be exercised in a particular way or whether any communication in a clear and unqualified way that it is being exercised is within the intention of the parties, objectively determined, as a sufficient means of exercising it (*Ballas v Theophilos (No 2)* [1958] VR 576; *Traywinds Pty Ltd v Cooper* [1989] 1 Qd R 222). As previously foreshadowed, the defendant contends for the former and the plaintiff for the latter."

The decision was upheld on appeal: [2007] QCA 445, argued by senior counsel on both sides, and again *McCaul* was not referred to.

16. The reasoning of Mackenzie J. namely that an option must be construed as a commercial document, would appear to be more consistent with the reasoning in *Traywinds* than in the *McCaul* case.
17. The Supreme Court of Victoria followed *McCaul*, which it described as "entirely convincing" in *BS Stillwell v Budget Rent-a-Car System Pty Ltd* [1990] VR 589 at 603, line 34. However, Gray J., with whom Crockett J. agreed, also observed that "*its correctness has not been questioned in any authority to which the Court was referred.*"
18. What is clear is that the Court was not referred to the *Traywinds* case.
19. *Gilbert v McCaul* seems to have come in for some polite reading down in *Jiwunda v Trustees of the Travel Compensation Fund* [2006] NSWSC 741, where Palmer J. held as follows:

"The effect of the 12 March letter

50 ...Counsel, who appears for TCF, says that the 12 March letter was ineffective to exercise the option for renewal contained in the then current lease because the terms upon which that offer could have been exercised had not been complied with so that the irrevocable offer constituted by grant of the option had lapsed: if a new lease was to come about it could only be as the result of a new offer and acceptance resulting in a binding contract: see e.g. *Gilbert*

J. McCaul (Aust) Pty Ltd v Pitt Club Ltd (1957) 59 SR(NSW) 122, at 123-124.

- 51 I accept Ms Preston's analysis thus far as correct.
- 52 Ms Preston then submits that the 12 March letter, although ineffective to exercise the option in the lease, constituted a new offer by TCF to the Plaintiffs to enter into a lease upon the same terms as would have obtained had the option been duly exercised. However, Ms Preston submits, there is no evidence that that new offer of TCF was ever accepted by the Plaintiffs and that the Plaintiffs communicated that acceptance to TCF. For that reason, the 12 March letter could not have brought about the formation of the agreement for lease for which the Plaintiffs contend. It is at this point that I part company with Ms Preston's submission.
- 53 TCF's submission insists on the classical formula of offer and acceptance as the sole criterion for ascertaining the formation of a contract and upon the notion that an offer and its acceptance must always be unequivocally recognisable as such.
- 54 However, the law recognises that while offer and acceptance analysis is a useful tool in most circumstances, there will be some cases in which the formation of a contract may be inferred from the acts and conduct of the parties, viewed in the light of surrounding circumstances:
....
- 55 This recognition is necessary, and perhaps long overdue, because it is impossible to fit many situations in which a contract is undoubtedly made into the paradigm of offer and acceptance without giving to people's conduct a legal character and consequence which they never contemplated in fact. ...Such curiosities of legal reasoning are no longer necessary or appropriate...
- 56 In the present case, neither Mr Kong nor Mr Brattoni is a lawyer. I have no reason to think that they went to their meeting on 12 March 2001 cognisant of the law of options: rather, they wanted to achieve a commercial result ...
- 57 On the version of the discussion on 12 March 2001 which I accept, ...Mr Kong said that if TCF wanted a new lease, the Plaintiffs would waive the option notice period: as a matter of commercial practicality, this meant that the Plaintiffs were willing to grant a new lease to TCF on exactly the same terms as would have obtained had TCF duly exercised the option. I am satisfied that Mr Kong and Mr Brattoni had a common understanding and intention that if TCF wanted a new lease on the same terms as if the option had been exercised, then it could have one: TCF simply had to give a written notice "*exercising the option*" and the Plaintiffs would grant a lease on the same terms as if the option had been validly exercised. Why should this common intention to bring about an agreement, if TCF wanted one, be foiled by

choosing to call Mr Brattoni's letter an "offer", so that the want of a response from the Plaintiffs results in there being no contract...? In the light of an objectively manifested common intention of the parties to create a contractual relationship, I do not think that the modern law of contract readily embraces such arbitrariness.

- 58 If one were compelled to analyse the discussion between Mr Kong and Mr Brattoni according to the paradigm of offer and acceptance, I would hold that Mr Kong, on behalf of the Plaintiffs, made an oral offer to Mr Brattoni on behalf of TCF to grant a new lease to TCF in the same terms as would have applied had the option been duly exercised, and he stipulated that acceptance of that offer had to be in writing.
- 59 The terms of the 12 March letter clearly indicated that TCF wanted a new lease of the Premises on the same terms as would have obtained had the option been duly exercised. I hold, therefore, that the letter amounted to an acceptance of the offer made by Mr Kong on the Plaintiffs' behalf at the 12 March meeting."

20.

21. In *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd.R 101, the Court considered a scenario where a lessee purported to exercise an option to renew a lease out of time, when the option had completely lapsed; but the letter purporting to exercise the option, signed as it was by both parties, should be construed as an agreement to give and take a fresh lease. In other words, it was a sufficient memorandum of the agreement, referring as it did to the original lease, and identifying the parties, the land and the terms of the lease, to satisfy the relevant statute of frauds.
22. McMurdo J. in the recent case of *Elderslie Property Investments No. 2 Pty Ltd v Dunn* [2007] QSC 372 has stated at para [67] that the better view now seems to be that an option is an irrevocable offer, a view associated with Gibbs J. in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, especially at paras [71]-[76].
23. As has been seen from the analysis above, there are a number of theories as to the nature of an option, which impact on whether it can be said that a time stipulation has been waived.
24. Until recently, in light of *McCaul's* case, there would have been a large obstacle to running a "waiver of time stipulation" argument in New South Wales. However, *Jiwunda's* case means that all bets are off; but how it is treated at appellate level, and on different facts eg where both parties are represented by lawyer, in light of the long reign of *MCCaul*, remains to be seen.

25. However, what is clear is this: where a lessee purports to exercise an option but does not validly do so because, for example, some condition relating to the prompt payment of rental has not been met, or it is exercised out of time, or by way of an inappropriate form, then is, the lessor, is nevertheless happy to proceed, courts variously categorise this as waiver, counter-offer, the common intention of the parties or perhaps even a new contract.
26. The larger point to make is that irrespective of the juridical categorisation, courts are willing, in appropriate cases, to find a binding renewal, especially where the conduct of one party deviates from that standard of commercial integrity that the court's think appropriate.

General equitable principles on relief against forfeiture of leases

Mistake, surprise or accident; lessor's unconscionable conduct

27. Relief against forfeiture of leases can be on two bases: statutory or under general equitable principles.
28. But first-what is "forfeiture"? In the context of leases, "[u]pon the lessor becoming entitled to terminate, there is a "forfeiture", against which, in appropriate circumstances, relief will be granted in equity." : *Mineaplenty Pty Ltd v Trek 31 Pty Ltd* [2006] NSWSC 1203 para [66].
29. A wider and a narrower basis for relieving against forfeiture have been expressed by differently constituted High Courts. The seminal modern decision is *Legione v Hateley* (1983) 152 CLR 406, which has laid the groundwork for these two views. The High Court appeared to have endorsed the wider view articulated by Lord Wilberforce (with whom Viscount Dilhorne, Lords Pearson, Simon and Kilbrandon agreed) in *Shiloh Spinners Ltd v Harding* [1973] AC 691; [1973] 2 WLR 28; [1973] 1 All ER 90 at 722-723 (AC) explained that there are three situations where equity relieves:
1. where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money;
 2. where there has been fraud, accident, mistake or surprise;
 3. where the primary object of the bargain is to secure a stated result which can effectively be obtained when the matter comes before the court and where the forfeiture provision is security for the production of that result.
30. The party contending for "surprise" would have to show that the surprise was caused by conduct of the other party; although exceptional circumstances need not, on the wider view, be

demonstrated. *Tanwar Enterprises v Cauchi* [2003] HCA 57; 217 CLR 315 paras [58] to [59].

31. A narrower view associated with *Stern v Macarthur* (1988) 165 CLR 489 at page 503 holds that the absence of a requirement for exceptional circumstances would “eviscerate unconscionability of its meaning”.

Both the above cases do not of course deal with options to renew a lease and are thus only of course of general guidance. See further in this regard *The Essence of Punctuality: Termination of Contracts for the Sale of Land for Late Performance and Relief in Equity*, by Assoc Prof Rossiter [2001] UNSWLJ 10 and especially the treasure trove of footnotes dealing with the extension of these principles to options namely footnotes 46 and 47.

32. However, equity is slower to grant relief in commercial transactions than in matters pertaining to a domestic or consumer contract: per Assoc Prof Rossiter in the, with respect, excellent article *The Essence of Punctuality* in [2001] UNSWLJ 10 (available on austlii).
33. In many of the cases below, the plaintiff sought interlocutory relief by seeking to demonstrate a serious question that there ought to be relief against forfeiture (eg *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [84]-[87] per Young CJ).
34. There are two forms of relief against forfeiture: one where the landlord has re-entered and the other where it has not.
35. Where there has been a re-entry at law, equity's usual order is that there be a re-grant of a new lease. That has stamp duty implications. Where there has been no re-entry, equity usually issues an injunction to prevent the landlord re-entering consequent upon that forfeiture: *Dendy v Evans* [1910] 1 KB 263; see also *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [86] per Young CJ.
36. So long as the lease remains on the title, a court can restrain the landlord from taking any action to enforce the forfeiture up to the hearing of the proceedings and restrain the landlords from approaching the Registrar General to remove the lease pursuant to s 55 of the *Real Property Act 1900* (NSW): *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [88] per Young CJ.
37. The statutory provisions are mainly in Pt 8 Div 2 of the *Conveyancing Act 1919* (NSW). Section 129 is the central section and provides, inter alia:
 - (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement (express or implied) in the lease,

shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice:

- (a) specifying the particular breach complained of, and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and
- (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same,

and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and where compensation in money is required to pay reasonable compensation to the satisfaction of the lessor for the breach.

- (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may personally bring a suit and apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

38. As Brereton observed in the *Mineaplenty* case para [68] :

“In resisting a claim for relief against forfeiture, the lessor is not entitled to rely on any ground that could have been the subject of a [s 129](#) notice but in respect of which no such notice was given.”

39. Other provisions dealing with forfeiture are in ss 8 and 9 of the *Landlord and Tenant Act 1899* (NSW) and following which, “although they do not cover the field, give a ‘statutory flavour’ to the proposition that relief should be given to a tenant whose rent is not in arrears for more than six months if the rent is paid” (per Young CJ in *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [22]). The *Supreme Court Act 1970* (NSW) s 73 stipulates that in proceedings for forfeiture for non-payment of rent, the Supreme Court may give relief on terms, and that if the lessee is so relieved, it then holds the demised premises according to the terms of the lease, and without the necessity of a new lease.

40. The above section is important as it appears that formerly, when relief was sought in the inherent jurisdiction of the Supreme Court, then it

would be granted, if at all, upon terms that a new lease be entered into. That obviously has implications for costs and stamp duty.

41. The key case in New South Wales is *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562. Other important cases are *Platt v Ong* [1972] VR 197, *Stieper v Deviot Pty Ltd* (1977) 2 BPR 9602, *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 (by reason that it is a recent summary of the principles by Young CJ) and *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247; [1988] NSW ConvR 55-375. For a recent discussion of the principles in a vendor-purchaser context, see *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 77 ALJR 1853; 201 ALR 359; [2004] NSW ConvR 56-062; [2003] HCA 57.
42. The principle is that where there has been a breach or breaches by a lessee that have been or can be cured, and if the lessee can make up arrears (if any) and continues paying rent, then whilst a lessee is not entitled to re-entry as of right, a court of equity has a discretion to grant relief against forfeiture.
43. In *Mineaplenty*, Brereton J held at para [68] that that in resisting a claim for relief against forfeiture, the lessor is not entitled to rely on any ground that could have been the subject of a [s 129](#) notice but in respect of which no such notice was given.

HH rejected a submission that it is relevant to have regard to other breaches, in respect of which a [s 129](#) notice could have been but has not been given, holding that
 “The position is well established in this state: a lessor is ordinarily entitled to rely on breaches of covenant other than that for which the re-entry was effected only if the lessor is entitled to effect a forfeiture by reason of those breaches, which cannot be said of a breach of which notice under [s 129](#) is required but has not been given
Moreover, examination of the decision of Ashley J in *Novasource* reveals that his Honour held only that earlier defaults involving non-payment of rent could be considered: “There is a question whether defaults otherwise may be considered in such a case” [at [109]], citing *Cherry Lane Fashion Group Ltd v Jam Factory Pty Ltd* (1989) VConvR ¶54-354, 64,412-64,413.”

44. Factors relevant to the exercise of the discretion include:
 1. whether the breaches have been willful and repeated *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562).
 See *Constantine v Sanders* [2007] NSWSC 250 as an example of where breaches were found not to be wilful (lessees income was dependant on another business where he had been paid irregularly; problem cured by time relief sought).

2. whether the relationship between the landlord and lessee has been combative and has become poisoned by the lessee's conduct (*Batiste v Lenin* (2002) 11 BPR 20,403; [2002] NSWCA 316 at [63] per Sheller JA (Giles and Santow JJA concurring));
 3. where there has not been a proper notice given under s 129 of the *Conveyancing Act 1919* (NSW), one does not take into account breaches of the lease, other than non-payment of rent, when considering relief against forfeiture (*Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247; [1988] NSW ConvR 55-375; *Dalla Costa v Beydoun* (1990) 5 BPR 11,379; [1991] NSW ConvR 55-559);
 4. relief against forfeiture is ordinarily given to a lessee whose sole breach is non-payment of rent where the rent has now been paid (per the NSW Court of Appeal in *Tutita Pty Ltd v Ryleaco Pty Ltd* (1989) 4 BPR 9635; [1989] NSW ConvR 55-486);
 5. “the prevailing thought amongst courts dealing with this sort of case is to permit the tenant to have relief against forfeiture notwithstanding a poor rent history, at least on the first application for relief against forfeiture” (per Young CJ in *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [33]);
 6. if the lessor has the benefit of a bank guarantee in relation to rental, then even if the lessee has a habit of paying his creditors at the last moment, has curious books of account and if the landlord can have no certainty that the whims of the lessee will favour him or her in any particular month, the court will tend towards proposition 5 above (*Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [28]-[33] per Young CJ);
 7. a distinction may need to be drawn between positive and negative covenants. “A positive covenant such as ‘The tenant shall ensure’ is usually ... capable of remedy by actually doing the thing covenanted to be done, albeit late. However, a negative covenant, a covenant not to do something, is usually not capable of remedy; see *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340; [1985] 3 WLR 359; [1985] 2 All ER 998” (*Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [43] per Young CJ).
45. If the lessee’s breach is for one other than failure to pay rental, then final relief will generally only be granted if that failure is made good: *Wilkinson v S & S Gikas Pty Ltd* [2006] NSWSC 1314 at [30] per Campbell J.
46. Similar principles are applied in Queensland: *World by Nite Pty Ltd v Michael* [2004] 1 Qd R 338; [2003] QSC 52, to which Young CJ referred in *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236 at [33] in support of proposition 5 above.

47. However, the mere raising of this head of relief may involve an admission that the lease has been breached; but such an admission probably does not arise where the relief is asked for in the alternative and is not ultimately required or where litigants appear in person: *Kumaragamage v Rallis* [2001] NSWSC 466 at [17]-[19] per Austin J. Indeed, it would seem to be the position that in the past, a plaintiff could not obtain relief without formally admitting breach and (if it had occurred), the forfeiture: see the cases cited in *Mineaplenty Pty Ltd v Trek 31 Pty Ltd* [2006] NSWSC 1203 at [69], where it is noted that a lessee who *bona fide* but unsuccessfully argues that it has not breached the lease, may yet obtain relief against forfeiture.

The example there given was where a tenant genuinely disputed whether it was obliged to pay an insurance premium

48. As to the vexed question of whether relief for forfeiture is available when the lessee serves a valid notice of renewal but thereafter breaches the lease, see Windeyer J's discussion in *Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd* (1999) 9 BPR 17,067; [1999] NSW ConvR 55-920; [1999] NSWSC 999.

Relief under the Conveyancing Act 1991 sections 133 C-G

49. The above sections create a regime which protect lessees who have been in breach over the course of a lease but who nevertheless wish to exercise the option to renew.
50. The effect of the section is that if a lessee serves a notice of option to renew the term, the notice is effective despite breaches which might otherwise render it ineffective, unless the lessor gives a notice in accordance with the section (a "prescribed notice") specifying breaches and stating that these breaches are to be relied on. The burden of proving breaches is on the lessor and the burden of proving that the statutory discretion should be exercised in the lessee's favour, is on the lessee.
51. See *Re Denny's Restaurants Pty Ltd* (1977) Qd. R 92, followed in *Evanel Pty Ltd v Stellar Mining N/L* [1982] 1 NSWLR 380.
52. *Evanel Pty Ltd* appears to be the first or at least one of the first decisions of the NSW Equity Division to consider why section 133 was necessary; and how to exercise the discretion pursuant to it.
53. Wootten J. noted at page 386D-E that "neither equity's traditional jurisdiction to relieve against forfeiture, nor the long-standing statutory provisions relating to forfeiture of leases, extended to relief against the loss of a right to exercise an option... The provision for an option subject to performance of the conditions of the lease was regarded simply as a conditional offer, and unless the conditions were fulfilled

the offer could not be accepted: *Gilbert J. McCaul (Aust.) Pty Ltd v Pitt Club Ltd.*”

54. In other words, Wootten J.’s holding that there was no equitable jurisdiction to relieve against the loss of a right to exercise an option to renew a lease, was upon the express basis that the option was simply a conditional contract (as opposed to an irrevocable offer).
55. Thus, before the offer can be exercised, the condition must be met.
56. Wootten J. concluded that the discretion to relieve against forfeiture under section 133F should be exercised in accordance with the general equitable principles regarding forfeiture of leases, except in so far as those principles may be inconsistent with the legislation or with any policy indicated by it, or inappropriate having regard to the nature of the matter against which relief is given.
57. His Honour said that regard may be had in addition to the matters specified in section 133F(3), to the nature, circumstances and importance of the breach, the likelihood of its repetition and the effect of its repetition on the lessor in the future.
58. His Honour placed great emphasis, in granting relief in that case, that whilst rental had fallen into arrears over a fairly long period, and at irregular intervals, so soon as same was brought to the attention of one of the directors, he immediately rectified same. Great emphasis was also placed on the fact that the plaintiff had expended considerable amounts of money in getting the premises fit, they being in a state of utter disrepair at the time the lease began. There was also no relevant hardship on the defendant, whilst there would have been substantial hardship to the plaintiff, had the lease not been renewed.
59. *Stellar* was upheld on appeal (1983) NSW Conv R 55-118, Hope JA, with whom Glass and Samuels JJA agreed.
60. Factors relevant to the exercise of the statutory discretion are listed in section 133F(3) of the New South Wales *Conveyancing Act* and include “any other circumstance considered by the court to be relevant.”
61. Factors which have been held relevant to the exercise of the statutory discretion include
 - (i) whether the lessee took immediate, urgent and effective steps to remedy the matters concerned (*Re Denny’s Restaurants*);
 - (ii) where the tenant was not only dilatory in payment of rental, but in addition had failed and refused up to the hearing of the section 133 application, to clean the premises, and had

moreover, given explanations as to why his cheques had bounced all around town, which bordered on the incredulous, Hamilton J. in *Ell v Cicera* [2000] NSWSC 768, refused to exercise the discretion in favour of relief against forfeiture of the option;

- (iii) see further the general equitable principles on forfeiture of leases, below.

62. So long as the lessee has responded to the lessor's notice within the statutory one month period by seeking relief from a court, then even though the lessee does not seek relief specifically in terms of the section, so long as it responds to the lessor's notice "by asking the court to rule on the exercise of the option then, in my view, the statutory jurisdiction has been invoked, though the words used be informal, ambiguous or vague." *Re Tabtide Pty Ltd* (1989) 1 Qd. R 604 at 608, particularly lines 16-29.

Relief against forfeiture of a deposit

63. Sec 55 (2) A of the *Conveyancing Act* provides :

"In every case where the court refuses to grant specific performance of a contract , or in any proceedings for the return of a deposit , the court may , if it thinks fit, order the repayment of any deposit with or without interest thereon."

64. [Section 55\(2A\)](#) confers upon a Court a statutory jurisdiction to return a forfeited deposit, which was not previously available at common law or in equity to the same extent : HN 1 , *Havyn Pty Ltd v Webster* [\[2005\] NSWCA 182](#); (2005) 12 BPR 22,837.
65. The discretion can be exercised even where the deposit has not been paid : per McLelland CJ in Eq in *Socratous v Koo* [\(1993\) NSW ConvR 55-685](#); ; foll'd in *Kylsilver Pty Ltd v One Australia Pty Ltd* [\[2001\] NSWSC 226](#).
66. I will momentarily address the principles informing the exercise of the discretion, but illustrating that that *quot homines, tot sententiae* is *Romanos v Pentagold Investments Pty Ltd* [\[2003\] HCA 58](#); [\(2003\) 217 CLR 367](#) where the judgment of five members of the Court contained the following paragraph at its conclusion:

"27. The appeal to the Court of Appeal should have been dismissed. The appeal to this Court should be allowed with costs. The orders made by the Court of Appeal should be set aside. In place of those orders it should be ordered that the appeal to the Court of Appeal

should be dismissed with costs and the cross appeal should be allowed with costs. Involved in allowing the cross appeal is the conclusion that Windeyer J erred in the exercise of his discretion under [s 55\(2A\)](#) of the [Conveyancing Act](#) in ordering the return of the deposit where evidence was insufficient to show that it would be unjust or inequitable to allow the vendors to retain the total sum of \$50,000 paid as deposits under the contracts for sale. There should be a declaration that that sum of \$50,000 is forfeited to the appellants.”

67. As to the principles on which the discretion should be exercised, in *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 [NSWLR 268](#) Street CJ in Eq (as he then was) said at 272 - 273:

“It is one thing to recognize that there is a wide discretion conferred upon the court under this section; it is another thing to determine the guide lines for the exercise of that discretion . The section was designed to provide relief to a purchaser against an unjust and inequitable consequence of forfeiture of a deposit. It is clear enough that at law a vendor's right to forfeit a deposit to himself in the event of a purchaser's default bears no necessary relation to the damages actually suffered by a vendor. At law a forfeited deposit could result in a vendor making a profit which in justice and equity he ought not to be permitted to enjoy at the purchaser's expense.

In a complementary sense, an order for the return of the deposit does not necessarily affect the vendor's right to sue a defaulting purchaser at law and recover against him such damages as the vendor can prove. The jurisdiction under [s55\(2A\)](#) does not give to a court an overall discretionary supervision of monetary adjustments between parties to a contract under which a deposit was paid but which has been terminated. A vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under [s55\(2A\)](#) unless it is unjust and inequitable to permit him to retain it. If the court would not, in its discretion specifically enforce the contract against the purchaser, then it may follow that it would be unjust and inequitable to allow the vendor to retain the deposit. In appropriate cases he should be left to prove the damages payable to him by the defaulting purchaser in accordance with the established rules governing the measure of damages, rather than simply pocketing the deposit, which might in some cases exceed the damages which would properly be recoverable by him at law. Equity has always looked with disfavour upon penalties or stipulations which result in a party to a contract making a profit at the expense of a defaulting party. It is clear that where the court in its discretion refuses specific performance, whether or not it also orders repayment of the deposit under [s55\(2A\)](#), it will still remain open to the vendor to sue the defaulting purchaser and recover against him whatever damages may be due to the vendor at law in the event of the contract having gone off through the purchaser's breach. The ordinary principles of contract law and of damages stand untouched by this section except in so far as it operates to qualify the ordinary right of a vendor to forfeit and retain a

deposit.

Just as the judges whose words I have quoted declined to put a limiting gloss upon the scope of the section, I decline to state my view upon where the boundaries of the discretion are to be drawn. Specific instances of its application are to be found in the cases. They all, however, come under the general category of circumstances in which the court held it to be just and equitable to deny to the vendor the enjoyment of a forfeited deposit.

Attempted classifications within this general category will tend only to obscure rather than to elucidate the approach to the exercise of this statutory discretion .”

68. This has come to be regarded as providing the test generally applied in such cases in New South Wales : see the decision of Young J in *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189 at 15,201 - 15,203 and *Baynard Pty Ltd v BRDG Holdings Pty Ltd* (1998) 9 BPR 16,991 at 17,003 - 17,004.
69. The fact the vendor misrepresents a matter of substantial significance to the purchaser prior to exchange; and makes a substantial windfall upon resale shortly after termination (after taking account of the costs of the resale and the loss of interest by reason of the delayed completion) may militate in favour of the return of the deposit (but in the final analysis , did not , in the view of the majority in *Nassif & Ors v Caminer* [2009] NSWCA 45).
70. The onus lies upon the purchaser to establish that it would be unjust and inequitable to permit the vendor to retain the deposit: *Clarke v Dilberovic* (1982) NSW ConvR par 55-083, at 56,494; *Terry v Permanent Trustee Australia Ltd* (1995) 6 BPR 14,091 at 14,105.
71. Extracts from the Headnotes to *Havyn Pty Ltd v Webster* [\[2005\] NSWCA 182](#)

“(2) It would be wrong to confine the jurisdiction conferred by the plain words of the statute by analogy with principles relating to relief against penalties or forfeiture

(3) The jurisdiction conferred by [s55\(2A\)](#) is wide and no limiting gloss should be placed upon its words, which allow a Court to order a deposit to be returned “*if it thinks fit*”.

(4) It is not necessary for an applicant to show special or exceptional circumstances before an order under [s55\(2A\)](#) can be made

(5) Although the jurisdiction is wide, it is not unbounded and the Court must consider the context of a deposit and should not take adopt an

approach which weakens the proper function of a deposit as an earnest for performance.

(6) For this reason it is important for a Court when considering the discretion under [s55\(2A\)](#) to consider the terms and conditions of the contract, and the circumstances of its breach which gave rise to the forfeiture of the deposit, and to be careful to avoid characterising a deposit as a windfall merely because it is forfeited.”

Where landlord estopped from treating matters as breaches of the lease/denying valid exercise of option

72. In *Doradel Holdings Pty Ltd v Tiger Kart Club Inc* [2003] WASC 221 (10 November 2003) the lessee obtained an injunction preventing the respondent lessor from relying on a notice to quit, in circumstances where the lessee alleged, inter alia, an oral exercise of an option to renew. The lessee was required to side-step the line of cases which hold that oral notice is not sufficient notice¹ and that, where the parties have agreed to a mechanism for bringing about legal relations, it must be complied with.² This the applicant succeeded in doing by invoking *Photo Art & Sound (Cremorne) Pty Ltd v Cremorne Centre Pty Ltd* (1987) 4 BPR 9436; [1987] ANZ ConvR 347 at 351 and *Waltons Stores (Interstate) Ltd v Maher* (1986) 5 NSWLR 407; [1986] NSW ConvR 55-301 (NSWCA) as authority for the proposition that an applicant may wield, as a “sword”, a claim that the lessor is estopped from denying the existence of a contract (at [42]). Johnson J noted at [42] that the High Court, on appeal in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 62 ALJR 110; 76 ALR 513, did not confirm or reject the views of the NSW Court of Appeal on this point.
73. Johnson J. was persuaded there were various serious questions and the estoppel issue was only one of them and a textual analysis suggests that his Honour would almost certainly not have been so persuaded had this been the only issue (see, for example, at [45]).
74. Johnson J. noted (at [43]-[44]) that *Photo Art & Sound (Cremorne) Pty Ltd v Cremorne Centre Pty Ltd* (1987) 4 BPR 9436; [1987] ANZ ConvR 347 involved a much stronger claim in estoppel. There, the lessee verbally advised the lessor's representative within the time stipulated by the option/renewal clause that he wished to extend the lease and was advised that he need not do so in writing and, on the assurance the lease would be renewed, incurred expense in adding to the fittings in the premises and thus acted to his detriment.
75. In *Century Yuasa Batteries Pty Ltd v Martin* [2002] TASSC 91 (4 November 2002) Blow J. granted an interlocutory injunction restraining the landlord from re-entering the premises. The lease allowed the tenant to give a notice to exercise its option to renew the lease, but only if it were not in breach of the lease. There had been

various relatively minor breaches, eg the construction of a glass door without the landlord's permission. It also appeared as though a franchisee of the tenant had gone into possession, but apparently with the landlord's knowledge, who did not object to that.

76. At [10] Blow J. concluded on the estoppel point, after referring to *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 62 ALJR 110; 76 ALR 513 and *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321:

“In the light of those two cases, I think it would arguably be open to the trial judge, if all of the plaintiff's allegations as to the conduct of the defendant and her husband were found proven, to conclude that the plaintiff had been led to believe that the defendant would not treat the giving of possession to the franchisee, the erection of the glass door, or the erection of the sign as breaches of the lease; that the plaintiff had acted to its detriment by not seeking alternative premises, not seeking to remedy any such breaches, and purporting to exercise the option without remedying any such breaches; and that the defendant was therefore estopped from treating any of those three matters as breaches of the lease.”

77. Although his Honour regarded the argument based on relief against forfeiture as much weaker, serious questions were found to be raised and an interlocutory injunction was issued. See, for example, *Bava Holdings Pty Ltd v Pando Holdings Pty Ltd* (1998) 9 BPR 16,295; [1998] NSW ConvR 55-862 at 56,760 per Santow J.; [*Gilbert J. McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122; 76 WN (NSW) 72; *Phillips Fox (a Firm) v Westgold Resources NL* [2000] WASCA 85 at [50] per White J.
78. *S&E Promotions Pty Ltd v Tobin Bros. Pty Ltd*, unreported Federal Court, 20 April, 1994, is a classic illustration of the circumstances in which a lessor can rely on promissory or equitable estoppel, in relation to the renewal of a lease.
79. Although the case involved a sub-lessor of a Crown lease and a sub-lessee, to simplify matters, I will refer only to the parties as the lessor and lessee. In 1986, the lessor executed a lease of premises in Canberra to the lessee to be used as a funeral parlour/ monumental masons. The lease was to expire June 1991 and provided an option to renew for three years on terms that the lessee was to give notice by March 1991.
80. In 1998 a director of the lessor approached the lessee in relation to a proposal to redevelop the land and there ensued lengthy negotiations relating to the scope of the development eg how many car spaces would be available and so forth. In the course of those negotiations,

agreement was reached in principle that in return for the lessor being permitted to go ahead and develop, the lessee would be granted options permitting it to extend the lease by 27 years. It was also agreed in principle that the rental would increase by a not insubstantial amount.

81. A new memorandum of lease was duly executed in *May 1991* on which day the lessee executed a surrender of the 1986 lease.
82. The new memorandum of lease provided for a lease of three years commencing *July 1988*. The option for a further period was to be exercised by *March 1991*.
83. Thus, at the time at which the new memorandum of lease was executed, the time for the exercise of the option to renew under both of the original lease and also the new lease, had expired.
84. Invoking doctrines of promissory and equitable estoppel, the primary judge held that the lessor was estopped from denying that it was obliged under the terms of the new lease, to grant the lessee a further lease for the term of three years ending June 1994.
85. The relief granted was analogous to specific performance and this was upheld by the Full Federal Court, comprising Neaves, Gummow and Higgins JJA, on appeal.
86. The primary judge reasoned, in six steps, that the lessor was estopped, as follows:
 - (i) the lessee had assumed in about March 1991 that the legal relationship of landlord and tenant in respect of the funeral premises existed from 1988 and expected that it would continue until June 1994 with options thereafter;
 - (ii) the lessor induced the lessee to adopt that assumption or expectation by negotiating for the long term occupation of the premises, by accepting a higher rate of rent and other matters;
 - (iii) the lessee had acted in reliance on the assumption or expectation by abstaining from giving formal written notice of the exercise of the option under the original 1986 lease. It also acted on the assumption and expectation of the existence of a new lease in marketing and promoting its business as a long term occupier of the premises;
 - (iv) the lessor and its relevant director knew or intended that the lessee would act in this way;

- (v) the lessee's inaction would cause it a detriment if its assumption or expectation was not fulfilled. Namely it would be deprived of specialised and unique premises from which to conduct its business and the possibility of trading from those premises for the 27 year period negotiated and agreed to;
- (vi) the lessor failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. In particular, the lessor had served a notice which purported to terminate the new lease.

87. In upholding (by and large, subject to one minor matter) this conclusion, the Full Court specifically applied the six matters articulated by Brennan J. in *Waltons Stores (Interstate) Ltd v Maher* 1988) 164 CLR 387; 76 ALR 513, at CLR 428-9; ALR 542.
88. There is in addition, a masterful summary of the *Waltons Stores* case at pages 639-640 of the judgment on appeal.

Further research: see the extracts from the article by Brereton J at the end of this paper, summarising the integers of various species of estoppel

Unconscionability: *Trade Practices Act 1975*, section 52AA and the *Retail Leases Act 1994*, section 72(1)(d)

89. Section 51AA of the *Trade Practices Act 1975* provides in sub-section 1 that "a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."
90. The metes and bounds of unconscionability as contemplated by section 51AA is considered in paragraph 8.270 of my *Injunctions* (together with McCarthy and Neggo) work which reads as follows:

8.270 Unwritten law and ss 51AA, 51AB and 51AC of the TPA

Section 51AA(1) of the *Trade Practices Act 1974* (Cth) (TPA) provides that "[a] corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories". Unconscionability pursuant to the unwritten law is analysed in cases such as *Blomley v Ryan* (1956) 99 CLR 362, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 57 ALJR 358; 46 ALR 402 and *Bridgewater v Leahy* (1998) 194 CLR 457; 72 ALJR 1525; 158 ALR 66; [1998] HCA 66.

In *Blomley v Ryan* (1956) 99 CLR 362 Fullagar J at 405 observed that the circumstances of disability or disadvantage that can be involved in unconscionable conduct are of great variety and are difficult to classify, but gave, as examples, “poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary”. The golden thread of such circumstances is that they place one party at a serious disadvantage in dealing with the other.

It is useful to bear in mind the legislative history of s 51AA. In the Second Reading Speech of the *Trade Practices Legislation Amendment Bill 1992* (Cth), which introduced the provision, it was said:¹

Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an “unconscionable” taking advantage of that disability or disadvantage by another. The doctrine does not apply simply because one party has made a poor bargain. In the vast majority of *commercial transactions* neither party would be likely to be in a position of special disability or special disadvantage, and no question of unconscionable conduct would arise. Nevertheless, unconscionable conduct can occur in commercial transactions and there is no reason why the *Trade Practices Act* should not recognise this.

(emphasis added)

The application of these principles in a leasing context is explored by the High Court in *Australian Competition & Consumer Commn v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; 77 ALJR 926; 197 ALR 153; [2003] HCA 18, where the tenants (through the ACCC) alleged that the landlord of a shopping centre had engaged in unconscionable conduct: the lessees had no option for renewal and the landlords were not obliged to provide them with any renewal. Thus, their businesses were, by the end of their leases, worthless, since no one would purchase them without tenure. The lessors were willing to grant them options to renew, but only on condition the lessees waived rights they asserted, and this put the lessees in a difficult bargaining position.

In his separate judgment (as part of the majority) Gleeson CJ made these observations:

Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There

may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s 51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer [at [14]].

In the present case, there was neither a special disadvantage on the part of the lessees, nor unconscientious conduct on the part of the lessors. All the people involved in the transaction were business people, concerned to advance or protect their own financial interests. The critical disadvantage from which the lessees suffered was that they had no legal entitlement to a renewal or extension of their lease; and they depended upon the lessors' willingness to grant such an extension or renewal for their capacity to sell the goodwill of their business for a substantial price. They were thus compelled to approach the lessors, seeking their agreement to such an extension or renewal, against a background of current claims and litigation in which they were involved. They were at a distinct disadvantage, but there was nothing "special" about it [at [15]].

Kirby J noted at [77] that:

[w]hile the present appeal was substantially argued by reference to the principles of unconscionable dealing as elaborated in cases such as *Blomley* and *Amadio*, the reach of the section, in my view, goes further. Its full scope remains to be elaborated in this and future cases.

Gummow and Hayne JJ, at [45]-[46], also made it clear that the outer compass of s 51AA has yet to be settled, as did Callinan J to similar effect at [186].

¹ Second Reading Speech, *Trade Practices Legislation Amendment Bill 1992* (Cth), Australia, [House of Representatives, *Debates* (3 November 1992), p 2408].

91. There are analogous provisions relating to unconscionability in section 62B of the *Retail Leases Act 1994* (NSW) and I deal with them in paragraph 8.290 of my *Injunctions* text.
92. A case demonstrating the approach taken by the Administrative Decisions Tribunal, in application for relief against forfeiture and unconscionable conduct claims, is *Galaxy Catering Pty Ltd v Trust Company of Australia Ltd* [2006] NSW ADT 182.
93. That case illustrates that the power vested in the Tribunal by section 72(1)(d), will be informed and guided by general equitable principles.

Rights of tenants on forfeiture

94. Where a lessor is seeking to enforce a right of re-entry or forfeiture, the court may, on application of the sub-lessee, make an order staying such action on terms the court deems just, and vesting the whole of the lease or any less term in any sub-lessee upon such conditions as the court determines. Section 130 of the *Conveyancing Act 1919* (NSW) and analogous sections in the Victorian, Queensland, Western Australian and Tasmanian Acts.
95. The policy of the legislation is to enable the sub-lessee to stand in the shoes of the lessee and take over the balance of the term: *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630 at 631.
96. It seems as though the discretion is exercised but sparingly, because the courts are reluctant to foist a sub-lessee upon an unwilling lessor: *Creery v Summersell & Flowerdew & Co. Ltd* [1949] Ch 751 at 767.
97. See further Duncan, *Commercial Leases in Australia*, 3rd edition, pages 296-297.
98. The rights of the lessee whose lease has been forfeited would, in the first instance, be determined by the terms of the relevant lease and would thus be a matter of construction.
99. Absent any clause dealing with same, one imagines the lessee would have the right to remove fittings which have not become affixed, for example cash registers, fridges and the like. The same would apply to stock.
100. In any event, the lessee would have rights in detinue and conversion; and it may well be that the landlord becomes bailee in respect of chattels left behind in the evacuation.

Enforceability of negotiations following failure to exercise option to renew

101. As demonstrated by the cases above, even where an option to renew is not exercised in accordance with its tenor, all may not be lost as the negotiations which follow may give rise to an argument that a new contract has sprung into being; or that a time stipulation has been waived.
102. It is however, difficult to conceive that arguments based on equitable or promissory estoppel, or unconscionability whether at common law or statutory, could give rise to any relevant rights, as the analysis in those respects is necessarily focussed on what occurred prior to the time for exercising the option.

Further research referred to in paragraph 75 above

103. The criteria for equitable estoppel were articulated by Brereton J, writing extra judicially in *Equitable estoppel in Australia: The court of conscience in the antipodes* (2007) 81 ALJ 638, 645 as follows:

“In equitable promissory estoppel, it is necessary for a plaintiff to establish:

- (1) that it has adopted an assumption as to the terms of a legal relationship with the defendant;
- (2) that the defendant has induced or acquiesced in the plaintiff's adoption of that assumption;
- (3) that the plaintiff has acted in reliance on its assumption;
- (4) that the defendant knew or intended that the plaintiff so act; and
- (5) that it will occasion detriment to the plaintiff if the assumption is not fulfilled.”

104. In that article, Brereton J articulated the criteria for proprietary estoppel as follows

First, as to the conduct of the plaintiff: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff would acquire some interest in the defendant's property;

Secondly, as to the conduct of the defendant: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation with knowledge that the plaintiff was relying on it to the plaintiff's potential detriment and that it could be fulfilled only by transfer of the defendant's property, a diminution of the defendant's rights or an increase in the defendant's obligations;

Thirdly, as to the subject matter: that the assumption or expectation in respect of it was one that the defendant could lawfully satisfy.”

What is significant when considering equitable estoppel, is what the representee *reasonably understood* by the representations.

Galaxides v Galaxides [2004] NSWCA 111 paras [81] ff; especially paras [91-105].

Postscript

I have attempted to correctly state the current state of the law , but experience indicates that such a goal is easier to state than achieve. I thus welcome any comments or positive criticism to sjacobs@13wentworthchambers.com.au

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