

**SEMINAR FOR THE CLE CENTRE OF THE UNIVERSITY OF NEW SOUTH WALES**

**RELIEF AGAINST FAILURE  
TO EXERCISE AN OPTION TO RENEW A LEASE**

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**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.
3. 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.”
4. 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.
5. 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**

6. 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 understood .....So 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 granted .....or 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 lessor .....Whether 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]].....

7. 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 ?**

8. 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.

9. One line of authority, associated with *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122 ('*McCaul*'), says an option is not a contract, but rather is an irrevocable offer, although conditional. On this theory, there can be no waiver.
10. Another line of cases, associated with *Traywinds Pty Ltd v Cooper* (1988) 1 Qd. R 222 ('*Traywinds*'), says an option is a conditional contract, for the benefit of the lessor, and thus can be waived.
11. Yet a third line has emerged, associated with *Jiwunda v Trustees of the Travel Compensation Fund* [2006] NSWSC 741 ('*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 to see if it can be inferred from all the circumstances that a new lease was agreed to.
12. Moreover, many of the cases below proceeded without all relevant authorities being brought to the attention of the court. It may be that the issues have never been fully argued.
13. The New South Wales Full Court in *McCaul* (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.
14. The Full Court of the Supreme Court of Queensland came to a different view in *Traywinds* (1988) 1 Qd. R 222, at 226-227.
15. 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.

16. In *Traywinds* (1988) 1 Qd. R 222, 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 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.
17. 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).
18. 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.
19. *Smoothseas Pty Ltd v Law Loan Mortgages Pty Ltd* (2007) QSC 82 ('*Smoothseas*'), 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.
20. Again *Traywinds* (1988) 1 Qd. R 222 was referred to and again *McCaul* (1957) 59 SR (NSW) 122 was not.
21. Moreover, in *Smoothseas* (2007) QSC 82, Mackenzie J, referring to the High Court's decision in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 ('*Alphapharm*') observed at [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.
22. The decision was upheld on appeal: [2007] QCA 445, argued by senior counsel on both sides, and again *McCaul* (1957) 59 SR (NSW) 122 was not referred to.
23. 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* (1988) 1 Qd. R 222 than in *McCaul* (1957) 59 SR (NSW) 122.

24. The Supreme Court of Victoria followed *McCaul* (1957) 59 SR (NSW) 122, which it described as “entirely convincing” in *BS Stillwell v Budget Rent-a-Car System Pty Ltd* [1990] VR 589 (*‘Stillwell’*) 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.” Vickery J recent cited *Stillwell* [1990] VR 589 in footnote 20 to *Xiao v Perpetual Trustee Company Limited* [2008] VSC 412 (*‘Xiao’*).
25. None of the Courts were referred to *Traywinds* (1988) 1 Qd. R 222.
26. In *Restuccia v Entasil Pty Ltd* [2008] NSWADT 248, the issue arose as to whether the lessor’s letting agent had authority to, and in fact did, waive the formal requirements of the lessee, under the lease, to provide notice of the exercise of the option. The Tribunal was apparently not referred in argument to the controversy as to whether a time stipulation could be waived, and the argument proceeded on the assumption that it could be; but it was held, on the facts, that the tenant had not discharged its onus of proving the relevant acts of waiver.
27. The judgment contains a, with respect, excellent discussion of the circumstances in which agents such as the letting agents, have authority to accept or give notices.
28. *McCaul* (1957) 59 SR (NSW) 122 seems to have come in for some polite reading down in *Jiwunda* [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. ... ."
29. 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.
30. McMurdo J. in the *Elderslie Property Investments No. 2 Pty Ltd v Dunn* [2007] QSC 372 has stated at [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 [71]-[76].
31. 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.
32. Until recently, in light of *McCaul* (1957) 59 SR (NSW) 122, there would have been a large obstacle to running a "waiver of time stipulation" argument in New South Wales.
33. However, *Jiwunda* [2006] NSWSC 741 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* (1957) 59 SR (NSW) 122, remains to be seen. *Jiwunda* [2006] NSWSC 741 seems to not have been relevantly cited since.
34. 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 if 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.
35. 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 courts think appropriate.

### **General equitable principles on relief against forfeiture of leases**

*Mistake, surprise or accident; lessor's unconscionable conduct*

36. Relief against forfeiture of leases can be on two bases: statutory or under general equitable principles.

37. 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 at [66].
38. 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; and
  - (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.
39. 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 at [58] to [59].
40. 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”.
41. 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.
42. 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).
43. 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).
44. There are two forms of relief against forfeiture: one where the landlord has re-entered and the other where it has not.

45. 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.
46. 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.
47. 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.
48. As Brereton observed in *Mineaplenty Pty Ltd v Trek 31 Pty Ltd* [2006] NSWSC 1203 at [68] (*'Mineaplenty'*):
- 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.

49. 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]).
50. Section 73 of the *Supreme Court Act 1970* (NSW) 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.
51. 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.
52. 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.
53. 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.
54. In *Mineaplenty* [2006] NSWSC 1203, Brereton J held at [68] 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.
55. 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].

56. 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); and
- (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)).

57. 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.
58. 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.
59. 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.
60. The example there given was where a tenant genuinely disputed whether it was obliged to pay an insurance premium.
61. 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**

62. The above sections create a regime which protects lessees who have been in breach over the course of a lease but who nevertheless wish to exercise the option to renew.
63. Significantly, there is nothing in the section about relief against forfeiture being granted because the lessee has acted negligently or worse in relation to its interests eg by serving its notice of renewal of option too late; or too early; or to the attention of the wrong person.
64. 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.
65. 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 ('*Evanel*'). *Evanel* 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.

66. 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. ....*”
67. 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).
68. Thus, before the offer can be exercised, the condition must be met.
69. 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.
70. 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.
71. 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.
72. *Evanel* [1982] 1 NSWLR 380 was upheld on appeal; (1983) NSW Conv R 55-118, Hope JA, with whom Glass and Samuels JJA agreed.
73. Factors relevant to the exercise of the statutory discretion are listed in section 133F(3) of the *Conveyancing Act 1919* (NSW) and include “any other circumstance considered by the court to be relevant.”
74. Factors which have been held relevant to the exercise of the statutory discretion include
  - (1) whether the lessee took immediate, urgent and effective steps to remedy the matters concerned (*Re Denny’s Restaurants*);

- (2) 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;
- (3) see further the general equitable principles on forfeiture of leases, below.
75. 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.
76. A contrary view to *Evanel* [1982] 1 NSWLR 380 expressed in *Leads Plus Pty Limited v. Kowho Intercontinental Pty Limited* [2000] NSWSC 459 ('*Leads Plus*'): relief against forfeiture where unconscionable conduct by lessor in not accepting exercise of an option.
77. *Leads Plus* [2000] NSWSC 459 involved an application for an interim injunction by a lessee that stood to lose everything –it had a technology business and had put expensive and special cables throughout its premises. However, it purported to exercise the option to renew a day or two late: at [3].
78. The tenant obviously had no recourse in section 133.
79. It thus was forced to seek refuge by contending, upon the application for an injunction, that the general equitable jurisdiction to relieve against forfeiture of a lease, extended to the circumstance where the option had not been renewed in time. However, senior counsel for the tenant conceded that there was no recorded case where such relief had been granted.
80. Young J (as HH then was) observed that that even in a case where "time was essential with respect to the exercise of the option" (as in the case before him), there may be some circumstances where the Courts "would be prepared to go a little further" and even "if there is a condition which is essential not only in law but essential in equity, and even though equity would not grant specific performance because of a time condition which is essential ... it will do this only in exceptional circumstances ... (where the) "case hinges on the existence of unconscionable conduct" (at [19]).
81. His Honour found, "tentatively" that "equity does have jurisdiction to make such an order but one must find that there is unconscionable conduct before one can exercise that discretion" (at [21]). The circumstances have to be "exceptional" and must be "connected with the existence of unconscionable conduct" and His Honour observed [24] that there "will be some cases where it will be unconscionable for a landlord to take advantage of a small mistake

on behalf of a tenant to obtain a windfall".

82. His Honour asked a number of questions at [25] to determine the parameters for the dialogue as to whether the landlord had engaged in unconscionable conduct, namely:

(1) Did the conduct of the lessor contribute to the lessee's breach ?

(2) Was the lessee's breach:

(a) trivial or slight ; and

(b) inadvertent and not willful ?

(3) What damage or other adverse consequences did the landlord suffer by reason of the lessee's breach?

(4) What is the magnitude of the lessor's gain and the lessee's loss if the forfeiture is to stand;

(5) Is specific performance with or without compensation an adequate safeguard for the lessor ?

83. HH concluded that the want of due notice was due to "slack office procedure" and answered most of the questions adversely to the lessee and refused relief.

84. This was so, even though the lessee (at [26]) did "indeed stand to lose everything by its failure" to exercise the option. His Honour observed at [28], that the "failure to exercise the option was purely a matter of the tenant failing with reasonable diligence in managing its own affairs. It was in no way the fault of the landlord nor is the landlord going to gain a windfall of any great moment at a result of what happened. Even if the facts are found in the plaintiff's (lessee's) favour the chances of the plaintiff being successful at the trial to my mind appear to be merely speculative. Furthermore, to grant an injunction will have the effect of compelling the landlord to have the plaintiff in its premises after the agreed period for the lease to come to an end, so that it will be more than merely preserving the status quo".

85. As to the matter of principle at stake, HH held as follows:

22 The cases on relief against forfeiture generally have been far more sympathetic to a plaintiff whose misfortune has come about as a result of accident or surprise rather than one that has come about through negligence. Indeed the view that was taken in the 19th century commencing with the attitude of Lord Eldon and which is still much in vogue in England today is, as Sir John Leach MR put it in *Harries v Bryant* [1827] EngR 836; (1827) 4 Russ 89, 91; [1827] EngR 836; 38 ER 738:

Ignorance is considered to be wilful, where a person neglects the means of information, which ordinary prudence would suggest; and accident is not unavoidable, which reasonable diligence might have prevented.

23 Whichever way one looks at it, in the instant case there was not pure accident or surprise. The tenant did not look at the lease until just before the last day the option could be exercised, and at the very least slack office procedures were the reason why the option was not exercised in time. These are matters involving failure to act with reasonable diligence or prudence rather than pure accident or surprise.

24 Apart from pure accident or surprise, the Court only gives relief in this sort of case, even on the most benign view of the law towards a plaintiff, where there are exceptional circumstances which are connected with the existence of unconscionable conduct. The clearest case of unconscionable conduct is where the grantor of an option (the lessor) deliberately avoids the proper attempts of the lessee to exercise the option; see, for instance, *Bragg v Alam* [1981] 1 NSWLR 668. However, unconscionable conduct may take other forms. It is not necessary that the conduct involve some fault on the part of the landlord, though normally that will be the case. There will be some cases where it will be unconscionable for the landlord to take advantage of a small mistake on the part of a tenant to obtain a windfall.

86. Of curiosity value, at least, was that the Evanel line of authority was not directly referred to, despite the case being argued by senior counsel on both sides of the record.
87. Neither Young J (as HH then was) nor senior counsel on both sides of the record (both experienced equity lawyers) referred to ss 128 and 129 of the *Conveyancing Act 1919* (NSW), as a source of power to relieve against forfeiture for failure to exercise an option in time. No doubt, because of the *Evanel* line of authority.
88. However, the equivalent Victorian legislation is s 146 (2) of the *Property Law Act 1958* (Vic), which was held in *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 235 ('*Beamer*'), to confer jurisdiction to relieve against forfeiture in respect of breaches of covenants other than the payment of rental; and that this power is in addition to the inherent right of the Supreme Court to grant relief.
89. *Beamer* [2005] VSC 235 was more recently followed by Vickery J in *Xiao v Perpetual Trustee Company Limited* [2008] VSC 412:

100 An option to renew a lease does not constitute a contract, but constitutes an offer to grant a further term which the landlord is contractually precluded from withdrawing so long as the option remains exercisable.<sup>[20]</sup> It is not necessary for me to decide whether an option to renew a lease creates an equitable interest in land. However, it is a contractual right which, if forfeited, can be the subject of equitable relief against forfeiture.

101 The equitable principles governing relief against forfeiture of the right to exercise an option are of some antiquity. *Bateman v Murray*<sup>[21]</sup> was decided in the year of Captain Cook's death in Kealakekua Bay on the big island of Hawaii. The economic conditions of rural Ireland in the eighteenth century provide the context for the

case.<sup>[22]</sup> In the early part of the century property values in Ireland had slumped and land was difficult to sell. In order to preserve value, landlords entered into long term leases with tenants in return for a combination of a price representing a substantial part of the value of the property together with a fixed annuity. However, the lease in most cases had to be periodically renewed and express conditions of the lease met before the option to renew could be exercised. Many tenants had become casual about their renewals and did not meet the conditions. Land values substantially increased in the course of the century, an event which inspired the original owners and their successors in title to challenge the validity of these leases. Bateman was such a case. The tenant pleaded relief against forfeiture of the option to renew his tenancy. Lord Chief Justice Mansfield recognised that relief against forfeiture of an option to renew the lease was open, but was a form of relief to be exercised within narrow boundaries.<sup>[23]</sup> He said:

That whenever a Court of Equity is resorted to for relief against the lapse of time, it is incumbent on the party applying, to allege and prove some favourable circumstances in excuse for the omission.

90. Vickery J then canvassed examples in the case law of a tenant who had been ten days late in exercising the option to renew; and a purchaser of a fabulously expensive house in Hong Kong who had paid a large deposit and been, quite literally, only 10 minutes late in tendering the settlement amount . Both were denied relief, although it was recognised as follows:

That is not to say that if because of fraud, representation or request the optionee (purchaser) fails to declare himself before the due date, he could not be entitled to relief. Clearly he would have an equity, but if, simply by his own decision, unilateral mistake, misjudgment or even sheer incompetence, he does not in fact exercise his legal entitlement, then in my view it is doubtful whether equity would come to his aid.

91. Vickery J endorsed the principle extracted from Lord Wilberforce's speech in *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 722 as follows:- "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, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs."
92. In such cases the court will, despite the express words of forfeiture in the mortgage or lease, "mould them into mere securities": see Viscount Haldane LC in *G. and C. Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1913] UKHL 1; [1914] AC 25, 35.
93. At [104] , Vickery J referred to *Beamer* [2005] VSC 235 and then, in obiter dicta, summarised the position (obiter, because HH held that the option had in fact been exercised in time and hence no question of relief from forfeiture arose):

In *Legione v Hately*, Mason and Deane JJ endorsed the view that when the equitable jurisdiction is invoked to relieve against forfeiture, equity looks to unconscionable conduct especially when unconscionable conduct is associated with fraud, mistake, accident or surprise.

The test to be applied is one of unconscionability – that is, whether in the light of the tenant's remedying breach of covenant, resort by the landlord to the strict legal right of re-entry would be unconscionable. Various cases illustrate that even if the breach is remediable because of its minor nature, it is not always unconscionable for a landlord to rely on its strict legal rights. The court must be satisfied in relieving against forfeiture that there is a reasonable expectation that the tenant will honour the lease obligations in the future. Certain circumstances may arise where the court cannot be so satisfied. In particular, the tenant may be guilty of "serious misconduct" beyond the breach of covenant. This being conduct of such gravity that, even accepting the default for which the right of re-entry as security has been satisfied, it would not be unconscionable on the landlord's part to insist on strict legal rights.

Therefore, much of the court's consideration of whether or not to grant relief will focus on the conduct of the tenant. A tenant must, so far as possible, attempt to remedy the breach or breaches alleged in the notice served and pay reasonable compensation for the breaches which cannot be remedied. The tenant must come to court with clean hands and ought not to be relieved if evincing an intention to continue or to repeat the breach of covenant. Where the conduct of the tenant reveals a clear history of wilful breaches of more than one covenant, a case of contumacious disregard by the tenant of the landlord's rights over a period of time, and a total lack of evidence as to the tenant's ability to speedily and adequately make good the consequences of the default, relief against forfeiture will not be granted.

Equally so, if the essentials of the bargain can be secured for the landlord, it is fair and just to prevent the landlord from exercising strict legal rights. Thus, if the landlord has suffered no appreciable damage from a breach, if the breach was not wilful, or if the breach was otherwise remediable because of its minor nature, consideration will be given to granting relief.

106 I am therefore of the opinion that, in the appropriate case an option to renew a lease is a contractual right which, if forfeited, can be the subject of equitable relief against forfeiture.

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

94. 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 notice and that, where the parties have agreed to a mechanism for bringing about legal relations, it must be complied with.

95. 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.
96. Johnson J was persuaded there were various serious questions and the estoppel issue was only one of them and a textual analysis suggests that HH would almost certainly not have been so persuaded had this been the only issue (see, for example, at [45]).
97. 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.
98. 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, for example 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.
99. 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.

100. 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.
101. *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.
102. 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.
103. 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.
104. A new memorandum of lease was duly executed in May 1991 on which day the lessee executed a surrender of the 1986 lease.
105. 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.
106. 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.
107. 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.
108. 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.
109. The primary judge reasoned, in six steps, that the lessor was estopped, as follows:

- (1) 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;
- (2) 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;
- (3) 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;
- (4) the lessor and its relevant director knew or intended that the lessee would act in this way;
- (5) 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; and
- (6) 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.

110. 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.

111. 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 (Cth)*, section 52AA and the *Retail Leases Act 1994 (NSW)*, section 72(1)(d) ; and cognate sections of the *Australian Competition and Consumer Law***

112. Section 51AA of the *Trade Practices Act 1975 (Cth)* 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."

113. The metes and bounds of unconscionability as contemplated by section 51AA is considered in para [8.270] of *Injunctions : Law and Practice* by Jacobs , McCarthy and Negro (ThomsonReuters looseleaf) work which reads as follows:

“.....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 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. ....

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].

114. 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.
115. 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.
116. That case illustrates that the power vested in the Tribunal by section 72(1)(d), will be informed and guided by general equitable principles.
117. It is submitted that even where *Retail Leases Act 1994* (NSW) and *Australian Competition and Consumer Law* notions of unconscionability are advanced, it

would be an adventurous court or tribunal which gave these sections any more expansive meaning than that attributed, in this context, by cases such as Vickery J's decision in *Xiao* [2008] VSC 412 and Young J's decision in *Leads Plus* [2000] NSWSC 459.

### **Rights of sub-lessees on forfeiture**

118. 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: see section 130 of the *Conveyancing Act 1919* (NSW) and analogous sections in the Victorian, Queensland, Western Australian and Tasmanian Acts.
119. 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.
120. 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.
121. 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.
122. 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.
123. In any event, the lessee would have rights in detinue and conversion; and it may well be that the landlord becomes the bailee in respect of chattels left behind in the evacuation.

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