UNIVERSITY OF NEW SOUTH WALES
CPD LECTURE

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DISPUTES IN COMMERCIAL AND RETAIL LEASES - INJUNCTIONS TO ENFORCE LEASES NOT PROPERLY RECORDED IN WRITING AND THE INTERACTION WITH CLAIMS FOR DAMAGES

(references to Injunctions are to my loose leaf work, together with Neggo, published by Thomson Reuters)

INTRODUCTION

1. There are various scenarios which re-occur in practice where leases are not properly recorded in writing, and where "lessees" seek injunctions for example:

   (a) where the lessee enters into possession, and begins paying rental whilst negotiating further terms;

   (b) where there is a detailed written lease, but the parties have failed to properly record their intentions correctly (for example *Randi Wix Pty Ltd v Kennedy* (2009) NSWSC 933);

(c) where the writing requirement required by section 23C of the *Conveyancing Act 1919* (NSW) and/or section 54A of the said Act (referred to as the *Statute of Frauds*), has not been complied with.

2. Each of these scenarios will be considered, although the primary focus of this seminar is (c) above.

LEGISLATION

3. Section 68 of the *Supreme Court Act 1970* (NSW) is headed "Damages in case for equitable relief" and provides:

> Where the court has power –
>
> (a) to grant an injunction against a breach of any covenant, contract or agreement, or against a commission or continuance of any wrongful act; or
>
> (b) to order the specific performance of any covenant, contract or agreement,
>
> the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

4. This section is referred to as *Lord Cairns' Act* and is reproduced in other jurisdictions, for example the *District Court Act 1973* (NSW), section 46 and the *Land & Environment Court Act 1979* (NSW), sections 22 and 23.

5. Division 5 of the *Supreme Court Act 1970* (NSW) defines "Court" to be the Supreme Court of New South Wales.

6. Section 23C of the *Conveyancing Act 1919* (NSW) provides:

> **23C Instruments required to be in writing**
>
> (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:
>
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts."

7. Section 54A *Conveyancing Act 1919* (NSW) provides:

54A Contracts for sale etc of land to be in writing

(1) No action or proceedings may be brought upon any contract for the sale *or other disposition of land or any interest in land*, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

(2) This section applies to contracts whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930* and does not affect the law relating to part performance, or sales by the court.

(3) This section applies and shall be deemed to have applied from the commencement of the *Conveyancing (Amendment) Act 1930* to land under the provisions of the *Real Property Act 1900*.

8. Section 8 of the *Retail Leases Act 1994* (NSW) ('*RLA*') is headed "When the lease is entered into" and provides as follows:

(1) For the purposes of this Act, a retail shop lease is considered to have been entered into when a person enters into possession of the retail shop as lessee under the lease or begins to pay rent as lessee under the lease (whichever happens first).

(2) However, if both parties execute the lease before the lessee enters into possession under the lease or begins to pay rent under the lease, the lease is considered to have been entered into as soon as both parties have executed the lease.

Note: Therefore, if the lessee starts to pay rent as lessee or enters into possession as lessee, the lease is considered to have been entered into even if neither party has executed the lease at that time. Money paid in advance (purportedly as rent) as a deposit to secure premises for a proposed lease does not constitute rent paid as lessee under the lease.

LORD CAIRN'S ACT

9. Section 20.120 of *Injunctions* states:

Historical Background to s68

The historical background to Lord Cairns' Act is set out in a recent Victorian appeal court judgment *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) VSCA 311 (21 December 2007).

36 According to longstanding equitable principle, the breach or invasion of a proprietary right, or a sufficient risk thereof, founded a prima facie entitlement to an injunction or specific performance. The unavailability of equitable damages prior to Lord Cairns' Act entrenched that principle.

37 The nineteenth century decision in Shelfer emerged as the leading authority on the correct approach to the then relatively new statutory jurisdiction under Lord Cairns' Act to award damages in equity for, inter alia, trespass, including compensation for both past and future conduct. Prior to Lord Cairns' Act, Courts of Chancery, although on the better view inherently empowered to award damages, as a matter of practice and principle ordinarily did not do so. Common law courts could award damages, but where limited to compensation for past wrongs, so that repeated or continued wrongs would require a new proceeding.

38 Lord Cairns' Act thus provided an express statutory basis for an award of equitable damages which was not limited to cases where damages could properly be awarded at law or as compensation for past injury. That development introduced the possibility of damages for, inter alia, trespass to freehold land, which could represent compensation 'once and for all', in circumstances where the trespass was permanent or continuing, thus obviating repeated applications for relief.

39 In Shelfer the Court of Appeal made plain that the unprecedented statutory power to award damages in equity did not introduce damages as the standard remedy for trespass, whereby wrongful acts could routinely be sanctioned by the effective 'purchase' of the landlowners' rights. Rather, it was necessary to make out a special case for the court to exercise its jurisdiction to award damages under Lord Cairns' Act. Although the Court of Appeal emphasised that an injunction remained the prima facie remedy for trespass, AL Smith LJ articulated, in 'a good working rule', guidance as to when, exceptionally, damages would be appropriate.

As noted by Smith J in [49] of *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 (2 April 2007), citing inter alia *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464, 467-9; *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635, "[t]he law places great importance on the right of owners of freehold land to control its use". The locus classicus is the judgment of A L Smith, LJ in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322-323, where the Lord Justice noted as follows:

> 'Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.

> In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section.
>
> In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the court may award damages in its place. So again, whether the case may be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

His Lordship went on to state as a "good working rule" the restrictive circumstances where a court *may, in the exercise of its discretion*, award damages in lieu of an injunction, as follows.

It would seem that a court will award damages if the following criteria are met:

- the injury to the plaintiff's right is small;
- the injury is capable of being estimated in money;
- the plaintiff is adequately compensated by a small money payment; and
- to grant an injunction would be oppressive to the defendant.

See also *Kennaway v Thompson* [1981] QB 8i8, [1980] 3 All ER 329.

Relevant factors as to whether an injunction should issue include whether the plaintiff is guilty of laches or whether the defendant has hurried up his work in an effort to avoid an injunction: discussion of the above cases in *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 (2 April 2007) [49] ff.

The awarding of damages might be inappropriate where would have the result of enabling the defendant to acquire from the plaintiff against its will the legal right to use its land (including air space): *Shelfer's* case (ibid).

As Hodgson J said in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 that, as a general principle a person should not be permitted to use the land of another for considerable commercial gain for himself simply because his use of the other person's land causes no significant damage to that land."

SECTION 8 OF THE RETAIL LEASES ACT 1994 (NSW)

10. Section 8 *RLA* cases raise issues of whether pre-trial injunctions ought issue to restrain the landlord from locking the lessee out of the premises; but do not raise any issue of interaction with damages or compensation in lieu of an injunction. Section 8 is all or nothing – there either is a lease implied by law; or there is not.

11. This is to be compared with the scenario considered more fully below.

12. There are four "P's "which must be agreed upon before there can be a lease namely parties, property, price and promises": *Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (1989) 6 BPR 30,448.

13. If the premises are "retail" within the meaning of the *RLA*, then a landlord lets a "tenant" into possession at the landlord's peril, if all that has been agreed upon are the "Four P's" but there are still further terms being negotiated which are significant to the landlord, for example the amount of the bond; outgoings & rental increases.

14. This is because section 8 of the *RLA* provides that a lease may spring into existence by operation of law, irrespective of the intention of the parties. This is the position, somewhat surprisingly, even if the parties proceed on the basis of "subject to contract".

15. It is easy to see how a case might begin with a tenant seeking an injunction pursuant to section 8 of the *RLA*, as read with the relevant rules of the Administrative Decisions Tribunal to restrain a landlord from evicting it on the basis of "no agreement".

16. The law regarding section 8, an oft-litigated section, has been recently summarized by the Appeal Panel of the Administrative Decisions Tribunal in *Spuds Surf Chatswood Pty Ltd v PT Ltd (RLD)* [2012] NSWADTAP 2 (30 January 2012). In that case, negotiations for a lease were specifically "subject to contract." One issue was whether there was a contractually binding lease. On appeal, it was doubted there was. However, that did not assist the landlord:

> [183] ….we consider, as did the Tribunal, that section 8(1) was applicable. In explaining our reasons, we think it important to summarise a number of Supreme Court and Tribunal decisions relating to this provision.
>
> [184] In *Aspromonte Pty Ltd v Zagari* [1999] NSWSC 831 (this being the first of the two authorities to which the Tribunal referred), Hodgson CJ in Eq explained the effect of section 8(1) as follows at [51 - 52]:-
>
> > 51 In an earlier decision of mine in *Whiteway House No.199 Pty Ltd v Abracoona Pty Ltd*, 29 May 1998, unreported, I said this in relation to the construction of s. 8(1):
> >
> > It would be possible to give a construction to **s. 8(1)** to the effect that there cannot be entry into possession as lessee under a lease, or payment of rent as lessee under a lease, unless the lease is already in existence in the full sense of the word; that is, unless there had already been a formally executed lease or at least a concluded agreement. However, in my opinion that construction of **s. 8(1)** should be rejected, particularly having regard to the terms of **s. 8(2).** Section 8(2) deals with a situation where both parties execute the lease before the lessee enters into possession under the lease, or begins to pay rent under the lease. *Those words, in my opinion, clearly contemplate the possibility that the lease may not be executed by both parties until after the lessee has entered into possession under the lease, or has begun to pay rent under the lease. That means in my opinion that the words "under the lease" in both subsections should not be given a narrow and restricted construction, but rather should be considered to be satisfied where there is entry into possession or payment of rent pursuant to a consensus as to terms which is subsequently given effect to by an executed lease. That is a situation which happens very commonly, and*

> *in my opinion that is the situation which the section is intended to deal with*.
>
> 52 I remain of the view that **s. 8(1)** discloses an intention that there can be entry into a retail shop as lessee and payment of rent as lessee under a lease, where these events occur at a time when there is consensus as to the terms of such a lease but not yet any written lease entered into.

[185] In *Randi Wixs Pty Ltd v Pokana Pty Ltd (No 2)* [2003] NSWADT 4, the Tribunal advanced two propositions relating to **section 8(1)** that are of direct relevance in the present context. These were (a) that the subsection may apply even though at no stage is a formal lease executed and (b) that the 'consensus' described by Hodgson CJ in Eq does not have to be a 'consensus' as to all of the terms of the lease. The Tribunal's discussion of these matters at [26 - 31] came after it had quoted the above passage from *Whiteway House*:-

> 26 If that quoted paragraph is relied upon to support the proposition that where there is no subsequently executed lease then **Section 8** does not apply, then in my opinion that submission should be rejected. What His Honour was referring to was the facts as put before him in that case, facts that are not unusual and where a lessee is allowed into possession by a lessor prior to the entry into of an executed lease. There is no question that in those circumstances **Section 8** applies (although it did not apply in that case because the lease in fact commenced prior to the commencement of the Act) and where it applies (and is not otherwise the subject of exclusion) then the lease is subject to a minimum term of five years (Section 16). In my opinion the submission goes against the definition of "lease" in Section 3 of the Act where it is defined as meaning:
>
> > "any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purposes of the use of the premises as a retail shop ...."
>
> 27 It is important to realise that it is quite specifically provided that in those circumstances a lease is deemed to exist 'whether the agreement

is express or implied, and whether the agreement is oral or in writing, or partly oral or partly in writing'. *Once it is accepted that an "agreement" can be theoretically implied and oral and such will constitute a 'lease' within the meaning of the Act, then it cannot be a pre-condition that there be an executed lease to call in aid* ***Section 8.*** Such a proposition in my opinion flies in the face of the definition of 'lease' and **Section 8(1).** The decision in *Whiteway House* is limited to an interpretation of **Section 8(2).** Support for that interpretation is obtained from another decision of Hodgson CJ in Eq in *Aspromonte Pty Limited v Zagari* [1999] NSWSC 831 where His Honour (at [51]) quoted from his previous decision in *Whiteway House* and then went on to say (at [52]):

> I remain of the view that **Section 8(1)** discloses an intention that there can be entry into a retail shop as lessee and payment of rent as lessee under a lease*, where these events occur at a time when there is consensus as to the terms of such a lease but not yet any written lease entered into.*

28 *So, it seems to me, there is no requirement for the operation of* ***Section 8*** *that there be at some stage or other after the lessee has entered into possession and paid rent the execution of a lease document.* This must be the case because the definition of 'lease' means 'any agreement', whether express or implied, oral or in writing or partly oral and partly in writing. It is predicated on there being an "agreement" - once it is established that there is an agreement and otherwise the terms of **Section 8(1)** are satisfied then there is created a statutory lease for the minimum term under section 16. The real question is always:

> Is there an agreement; if so what are the terms of the agreement; and has the lessee entered into possession of the retail shop as lessee under the agreement or has the lessee began to pay rent as lessee under the agreement (whichever happens first)?

29 Hodgson CJ in Eq in *Aspromonte* expressed the view that there must be "consensus as to the terms" of the lease. I am not entirely sure

precisely what is meant by the use of the word "consensus". If it is intended to mean that there must be, as a pre-condition to the operation of **Section 8**, an agreement by the parties to each and every term of the lease, then I would respectfully differ from His Honour's view. The whole purpose of **Section 8** is to create a statutory lease if the circumstances fall within the terms of the Section. After all, the terms of the Section are really quite simple and in my view there is a clear legislative intent that there will be created a statutory lease where a person enters into possession of a retail shop as lessee, or begins to pay rent as lessee, in circumstances where there is an agreement between that person and the person having the right to grant possession or receive rent whereby that person grants or agrees to grant to the other person for value a right of occupation of the premises for the purposes of the use of the premises as a retail shop.

30 *There is nothing in the combination of Sections 3 and **8** that requires the person granting or agreeing to grant the right of occupation to agree with the occupier or proposed occupier to all the terms of the right of occupation. The definition of "lease" in Section 3 (set out in paragraph 26 above) is in very simple terms and the legislative intent of **Section 8** is to create a statutory lease in the particular circumstances such that the occupant is protected by a statutory lease*. Once that interpretation is accepted then there is no requirement for there to be "consensus" as to the terms of, or each and every term of, the right of occupancy simply because the statute creates the lease (Section 3). Once the statutory lease is created then the only question is: what are the terms of that lease? In order to answer that question one needs to look at the extrinsic evidence that is available in order to establish the other terms of the agreement between the parties.

31 It is not my understanding that the law requires there to be a concluded agreement between the parties before **Section 8** applies. Mr Jacobs for the Respondent has strongly urged that proposition and for the reasons that I set out later in this Judgment *I am of the view that the combination of **Section 8** and the definition of "lease" in Section 3 is supportive of a different legislative regime designed to protect persons*

> *who enter into occupation or pay rent of defined premises such that the section "fills in the blanks" (so to speak) of contract law which would deny a concluded contract in circumstances where the evidence showed that there had not been agreement as to all the terms and in those circumstances would deny the occupant of retail shop premises the protection offered by* ***Section 8.***

[186] In *Protogeros v Fouzas* [2004] NSWADT 62, the Tribunal, referring to this passage, applied both of the propositions stated in the preceding paragraph so as to reach the conclusion that on the facts before it a lease arose under **section 8(1)**.

[187] By contrast, in *Burbridge v Vosedo Pty Ltd* [2005] NSWADT 8, it was held that there was insufficient 'consensus' to attract the operation of **section 8(1)** because, as the Tribunal stated at [44], 'there were matters of fundamental difference between the parties relating to the issues of rent-free period and amount of the bond'.

[188] In *Helou & Ors v Bong Bong Pty Ltd & Anor trading as Regional Health Properties* [2006] NSWADT 128, the owner of property, when conveying an offer of a lease to a prospective lessee, stated as follows in a covering letter (see the decision at [31]):-

> Acceptance of this offer by the lessor will not in any circumstances create a legally enforceable lease between the parties. The lease will be prepared by the lessor's Solicitors, incorporating the above terms and conditions and no agreement will be legally enforceable unless acceptable and executed by both parties.

[189] The Tribunal, relying on the line of authority that we have just described, held (at [83]) that this stipulation did not preclude the operation of **section 8(1)** and that, on the facts found by it, a lease did arise under this provision.

[190] Finally, in *Tarleton & Peters Pty Ltd v EK Nominees Pty Ltd* [2010] NSWADT 248, the explanation of **section 8(1)** given by the Tribunal at [9 - 10] included the proposition that the terms of a 'statutory lease' arising under this provision may be changed or 'overlaid' in a formal lease document subsequently executed by the parties.

> [191] Having taken careful account of this line of cases, we can discern no ground for disturbing the Tribunal's ruling that a lease arose under **section 8(1)** on the date (3 July 2002) when the Applicant took possession of the Premises with the consent of the Respondent. There was, at this time, a 'relevant mutual assent' such as to satisfy Hodgson CJ in Eq's requirement of a 'consensus'.

17. The Tribunal concluded its analysis as follows:

> At a later stage - some seven weeks later, in fact - Mr Mimis sought to insert the amendment of Item 10 into the formal lease document. *But this does not alter the fact that at the time of entry into possession the requisite 'consensus' existed. Having regard to the case law that we have just outlined, section 8(1) became operative at that time even though (a) the Respondent had previously stipulated that acceptance of its offer of a lease was subject to execution of a formal document, (b) there were some minor matters on which the parties had not yet reached agreement and (c) no formal document was ever executed.*

SUFFICIENT WRITING TO COMPLY WITH STATUTE OF FRAUDS

Introduction

18. Section 8.330 of *Injunctions* states:

> **Sufficient writing to comply with *Statute of Frauds***
>
> A distinction must be drawn between leases for less than three years (not required to be in writing – s 23D(2) of the *Conveyancing Act 1919* (NSW) and those for more than three years.
>
> Section 23C of the *Conveyancing Act* 1919 (NSW) requires all instruments conveying interests in land to be in writing. Section 54A of that Act focuses on whether there is a sufficient note or memorandum embodying an agreement to transfer an interest in land. If there is a sufficient note or memorandum, then even though the agreement itself might not be in writing in conformity with s 23C, it is nevertheless enforceable.
>
> Section 54A arises at the stage of agreement to create or dispose of an interest in land: *Baloglow v Konstantinidis* (2001) 11 BP 20,721; [2001]

NSWCA 451 (6 December 2001). See particularly the judgment of Giles JA at [162] (with whom Mason P agreed). The focus of the enquiry under s54A is whether there is a sufficient note or memorandum, signed by the agent, because even if there is an *oral* agreement on all relevant terms, while it may be valid, it simply is not enforceable by injunction (nor could its breach sound in damages) if the writing requirement is not complied with. An important case on the construction of s54A(1) of the *Conveyancing Act 1919* (NSW) is *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSW ConvR 56-189; [2007] NSWCA 176 (although this was not an injunctions case, but rather held that where there had been part performance of a contract otherwise struck down by s 54A(1), there could be no claim for common law damages). As stated by the NSW Court of Appeal in *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSW ConvR 56-189; [2007] NSWCA 176 at [39]-[40], the appropriate remedies in respect of leases which fall foul of the *Statute of Frauds*, are equitable remedies such as specific performance and injunction (and not damages at common law):

> [39] In *Powercell* (2004) 11 BPR 21,429, Giles JA said (at [29]):
>
> Equity has devised the doctrine of part performance as a basis of equitable relief in the absence of a written record, but part performance does not excuse the absence of a written record in an action for damages for breach of contract: *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282; *O'Rourke v Hoeven* [1974] 1 NSWLR 622.
>
> [40] The remarks of Campbell J at first instance in *Powercell* (at (2003) 11 BPR 21,385) have ineluctable persuasive force. His Honour commenced (at 21,391, [29]):
>
> "Part performance is a doctrine invented by the Chancery Court, and provides a basis upon which a court of Equity will provide equitable relief concerning a contract, when that contract is unenforceable by reason of non-compliance with the *Statute of Frauds*. The equitable relief most commonly provided when acts of part performance of a contract are established is

> specific performance of that contract. It may be that part performance can also provide a basis for other equitable remedies, such as an injunction to enforce a provision of the contract: R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's, Equity*: *Doctrines and Remedies*, 4th ed, LexisNexis Butterworths, Sydney, 2002, para 20-220), or some other equitable remedy: *Jones v Baker* (2002) 10 BPR 19,115. However, an action for damages for breach of contract is a common law action, to which part performance is irrelevant."

His Honour said (at 21,391 to 21,392, [30]) that these principles had been adopted, authoritatively, in New South Wales. He referred to *O'Rourke v Hoeven* [1974] 1 NSWLR 622 where Glass JA (with whom Reynolds and Hutley JJA agreed) said (at 626):

> "The doctrine of part performance was developed in the Equity courts and has never been available in an action at law for damages to excuse absence of the writing which the *Statute of Frauds* demanded. As Dixon J, as he then was, said in *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at p 297.
>
> 'An action of damages could not but fail, because, when a common law remedy is sought, part performance never did and does not now afford an answer to the *Statute of Frauds* … if the doctrine is not confined to cases in which a decree might be made for the specific performance of the contract, it is at least true that the doctrine arose in the administration of that relief and has not been resorted to except for that purpose' (and see per Starke J and Evatt J (1931) 45 CLR 282 at pp 294, 306). The position is in no way altered by the concurrent administration of law and equity directed by Pt IV of the Supreme Court Act. This is not a fusion of two systems of principle but of the courts which administer the two systems: *Britain v Rossiter* (1879) 11 QBD 123 at p 129. The rules continue to be influenced by the system to which

> they belong, so as to disentitle a party claiming damages at law from praying in aid an exemption from writing on equitable grounds'."

His Honour continued (at 21,392, [31]):

> "Before 1858 the Court of Chancery might have had a limited jurisdiction to award damages in lieu of, or in addition to, specific performance: *Meagher, Gummow and Lehane's, Equity: Doctrines and Remedies*, para 23-025. In 1858 Lord Cairns' Act conferred on the Court of Chancery jurisdiction to award damages either in addition to, or in substitution for, the grant of an injunction for specific performance; that provision now has its equivalent in New South Wales in s 68 Supreme Court Act 1970 (NSW)".

However, leases of less than three years need not be in writing to be valid. An oral agreement of a lease for three years with an option for three years is a lease for a term not exceeding three years (*195 Crown Street Pty Ltd v Hoare* [1969] 1 NSWR 193) and is thus not required to be registered.

There is, in effect, a presumption in New South Wales that where a lease is for more than three years, the parties did not intend to be bound until formal documents have been exchanged, because such a document must be registered to be enforceable: per Young J in *Landsmiths Pty Ltd v Hall* (1999) 9 BPR 17,057; [1999] NSWSC 735.

No serious question as to the existence of a valid lease for three years or more could arise without:

1. a signed lease agreement (obviously); or
2. a signed agreement to lease (obviously); or (less obviously);
3. a document recording the Four Ps (the parties, the property, the price and the promises being made by both parties: *Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (1989) 6 BPR 13,448; [1989] NSW ConvR 55-498 at 13,455 (BPR) (15 August 1989) per Young J – a sale of land case) and signed by the party to be charged or his or her agent (*Conveyancing Act* 1919 (NSW), s54A);

4. various documents which, when read together, contain the Four Ps and the necessary signature, even if oral evidence is necessary to show the connection between those disparate pieces of paper (*Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch D 146; [1974] 2 WLR 176; [1974] 1 All ER 209); or

5. an offer document signed by the party to be charged or its agent, together with oral evidence sufficient to raise and argument that the offer was accepted orally so long as the document was no phrased to be “subject to Contract” (*Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch D 146; [1974] 2 WLR 176; [1974] 1 All ER 209).

Tiverton was applied in *Duncan Properties Pty Ltd v Hunter* (1990) 1 Qd R 101 at 104 (33-45).

Pirie v Saunders (1961) 104 CLR 149; 34 ALJR 488 dealt with the adequacy of the writing requirement for s54A of the *Conveyancing Act* 1919 (NSW). Saunders alleged the existence of a lease of a shop. The dispute was whether negotiations had matured into an agreement and the case involved a claim for damages, not an injunction. The High Court held that for the form of writing to constitute a “note” or “memorandum”, it had to recognise the existence of a binding contract. It was held that the fact that both parties envisaged the preparation of a formal memorandum of lease made it “at the very least, doubtful whether the testimony of the latter is capable of supporting the conclusion that an oral contract was made” (at 152).

The court observed at 154: “[t]he principle applied in those cases can, we think, have no application to any document which is not in some way or other recognizable as a note or memorandum of a concluded agreement.

19. (Case summary below that of her Honour Bergin CJ in *Phillip Segal & Anor v Max Christopher Donnelly & Ors* [2012] NSWSC 833):

[*Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (1989) 6 BPR 13,448] involved an application for specific performance of an "informal contract", said to be evidenced by two letters dated 31 March 1989, for the purchase of a

rural property by the plaintiff from the defendant for $10.85 million. The first letter dated 31 March 1989 was from "The Manildra Group", rather than from the defendant, to the plaintiff and was signed by the managing director in terms that included the following:

> We wish to confirm our telephone conversation of today's date that you wish to purchase the property known as "Milton Downs" from us on the following basis:
>
> 1. Purchase Price - $10,850,000.
> 2. Included in the sale to be all plant, machinery and improvements as per the list given to you by Mr Honan yesterday, on a walk-in walk-out basis but not including livestock.
> 3. All existing sowing of crops to be continued on your behalf at your expense as from today's date including seed costs.
> 4. All works such as fencing to be continued at your expense and all accounts to be submitted to you.
> 5. The Manildra Group would want first option to purchase the wheat crop grown on "Milton Downs" this year.
> 6. Any claim for commission on this sale will be defended by the vendor in consultation with your solicitors but any settlement amount including our legal costs to be for the purchasers account.
> 7. We require back from you settlement terms and timing.
> 8. As we have discussed, all details of the sale to remain strictly confidential until settlement.
> 9. All expenses excluding salaries are at your expense as from today's date.

The response from the plaintiff on the same day was in terms that included the following:

> We confirm our agreement and acceptance of the purchase of Milton Downs in accordance with the understanding expressed in your fax of March 31st.

> Purchase Price $10,850,000
> Inclusions as per paragraph 2 of your fax
> I confirm that the houses as listed will be completed by you.
> Paragraphs 3 and 4 - confirmed.
>
> I will liaise with Mr Davis with respect to procedures, payments and approval of programmes.
>
> Paragraph 5 - confirmed.
> Paragraphs 6 – agreed
> Paragraph 7 - settlement terms normal period 6 weeks from exchange of contracts and 14 days notice to complete.
> Paragraphs 8 & 9 - confirmed.
>
> I further confirm that we would like first option to purchase the livestock on "Milton Downs".
>
> Further to our telephone conversation this afternoon I confirm you have agreed to sell and we have agreed to purchase Milton Downs in accordance with the above arrangement.
>
> Please sign as form of acceptance on your behalf and return to me by fax today.

After considering the principles in *Masters v Cameron* (1954) 91 CLR 353 at 360 and McLelland J's observations in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) NSW ConvR 55-299 in relation to the fourth class of case additional to the three mentioned in *Masters v Cameron*, Young J held that although the words used by the parties gave some indication of "present contract" they were weakened by several factors. They were not words of confirmation of a pre-existing agreement made verbally; the vendors were not identified; and there were obviously many matters, for instance, the deposit and the date of settlement "still to be sorted out" (at 13,453). The evidence established that "The Manildra Group" was a registered business name for all wholly owned companies of Honan Investments Pty Ltd. His Honour referred to the fact that the communications were between the chief

executive officers of the respective companies and in those circumstances it was more likely that such persons rather than "underlings" would make a binding agreement. His Honour said at 13,454:

> There are two possibilities, one is that the parties have made a contract in that they both recognize that was open to adjust their rights by consent when the replacement contract was made. The other possibility is that they have not yet reached the stage when they regarded themselves as having entered into binding relationships."

His Honour was satisfied that the material before him strongly favoured the view that "there was no intention of the parties to make a binding contract by their exchange of faxes" (at 13,454). The factors that pointed to that conclusion included the complexity of the transaction, the large purchase price, the fact that the deposit was not considered in the faxes, and that no contract was in fact exchanged between the parties. In this latter regard his Honour had referred to McHugh JA's observations in the appeal from McLelland J (*GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631) that there was a presumption that no binding contract existed until contracts were exchanged.

20. *Randi Wix Pty Ltd v Kennedy* (2009) NSWSC 933), was the working out of the saga that began in the ADT many years. The same tenant embarked upon litigation with the new owner of the building and was in effect deprived of at least part of the fruits of his earlier victory. What Smart J held demonstrates that, absent fraud, a lessee asserting rights pursuant to unregistered dealings with a landlord's predecessor in title is not able to seek an injunction nor specific performance; and as such, *Lord Cairns' Act* will be of no avail to it. It is suggested that the logic of the case extends to any term not properly recorded in writing and duly registered, for example agreement that a roof be repaired, which might have been made informally between the previous landlord and the tenant (or vice versa).

21. Smart J held that at [85] that section 36(1C) of the *Real Property Act 1900* (NSW):

> …enables the Registrar General to refuse to accept a dealing if it does not comply with any requirement made with respect to the dealing by or under this or any other Act. Under s 36(1E) the Registrar General may require the execution or attestation to be proved. Under s 36(6)(b) a dealing is deemed

not to be in registrable form it if requires a material correction, alteration or addition. Under s 36(6)(c) a dealing that is not in registrable form is deemed not to have been lodged with the Registrar General (LPI) until it is in registrable form. Because of s 34(4) and (5) it is important that dealings be lodged in registrable form. The Courts have declined to adopt a literal construction of s 41. They have enforced the rights that arise from the transaction lying behind the dealing and that led to the dealing being executed. The Courts have recognised that unregistered dealings may evidence unregistered interests in land under the *Real Property Act*.

86 Section 53(1) provides that where any land is intended to be leased for any term exceeding three years the proprietor shall execute a lease in the approved form.

87 In *Carberry v Gardiner* (1936) 36 SR (NSW) 559 Jordan CJ at 569 dealt with the situation where there is an unregistered lease. He said, amongst other things:

> "An informal instrument may, however, be treated as evidencing an agreement for a formal lease of which a Court of Equity may decree specific performance by the execution of a registrable instrument."

88 In *APA Association Ltd v Rogers* (1943) 43 SR (NSW) 202 Jordan CJ said of a woman who claimed under an unregistered lease for seven years, that, *until she chose to register the lease, it operated merely as an agreement specifically enforceable in equity but not of itself creating a term in the land.*

89 *In the present case, the "unregistered lease" subject to any question of rectification, operated as an agreement specifically enforceable in equity*. It had been signed by the landlord (Pokana) and on behalf of the plaintiff by its managing director. He had authority to do so. There is no good reason why an unregistered lease which operates as an agreement specifically enforceable in equity cannot be rectified as between the original parties. This is especially so where the lease that is sought to be enforced follows a written determination[n as to its principal terms. Where a third party is involved other consideration arise.

90 In *Bahr & Anor v Nicolay & Ors (No 2)* (1987 – [1988] HCA 16; 1988) 164 CLR 604, Wilson and Toohey JJ, in dealing with the Western Australian counterparts of s 42 of the NSW *Real Property Act*, said:

> "The fraud referred to in ss 68 and 134 is actual fraud, involving some act of dishonesty on the part of the person whose title is sought to be impeached." (citations omitted)

and:

> "It is equally clear that to acquire land with notice of an unregistered interest such as a lease, to become the registered proprietor and then to refuse to acknowledge the existence of the interest is not of itself fraud (citation omitted). The point is made by Kitto J in *Mills v Stokman* (citation omitted), where his Honour said 'but merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud'."

91 In *Farah Constructions Pty Ltd and Others v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 the High Court considered the Real Property Act (NSW). It held at [192]:

> *"* 'Fraud' in s 42(1) means 'actual fraud, moral turpitude' ...

In personam exception. An exception operating outside the language of s 42(1) can exist in relation to certain legal or equitable causes of action against the registered proprietor."

92 The Court referred with evident approval to the judgment of Tadgell JA in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* (1998) 3 VR 133 at [280] and those in *LHK Nominees Pty Ltd v Kenworthy* [2002] WASCA 291; (2002) 26 WAR 517.

The judgment of Tadgell JA includes these statements:

> "If registration of the mortgagee's interest is achieved dishonestly then the registration, and with it the interest, are liable to be set aside not because, on registration, the registered holder becomes a constructive trustee, but because s 42(1) recognises that fraud renders the interest defeasible. If, on the other hand, the registration is not achieved by fraud, the Act provides, subject to its terms, for an indefeasible

> interest. Those terms allow ... a claim in personam founded against the holder of a registered interest to be invoked to defeat the interest ..."

93 I do not think that fraud has been proven as against the defendant. He and his solicitor were provided with a copy lease document purporting to be signed on behalf of the plaintiff by Mr A Ostrovsky and on settlement a lease document signed on behalf of the plaintiff by Mr Ostrovsky and on behalf of Pokana. Neither Mr Kennedy nor his solicitor were apparently told that it was incorrect and did not represent what the parties had agreed to as determined by the ADT. At the time nobody connected up the payments being sought and made by the plaintiff to the defendant with the terms of the lease. That position continued until September 2004. It was not until shortly after 17 November 2003 that the plaintiff realised that the terms of the lease documents did not represent what had been agreed as determined by the ADT.

94 The plaintiff relied heavily on *Ong & Anor v Luong & Anor* NSWSC, McLelland J, 30 August 1991, 1991 NSW Conv R 55,597. By a lease the owners of the freehold leased, to Ong, a shop in Canley Vale for three years with a three-year option for renewal. The lease of Torrens title land was in registrable form but had not been registered. Ten days later the lessor agreed to sell the property subject to this lease. The Court held that the rear yard was not included as part of the leased property on the correct construction of the lease. McLelland J next dealt with the claim for rectification, stating:

> "The defendants as registered proprietors of the subject land have the benefit of the protective provisions of sec 42 and 43 of the *Real Property Act 1900.* Under sec 42(1) they hold the subject land, except in case of fraud, absolutely free from unregistered estates and interests with certain specified exceptions, none of which are relevant. That section does not however protect them from personal equities arising from transactions entered into by themselves, and the acknowledged obligation to recognise the plaintiff's rights as lessees on the terms of the lease...is such a personal equity. The extent of that equity is to require them to give effect to the plaintiff's lease in the same way as if that lease had been registered prior to the registration of the transfer to the defendants. *However sec 42 protects the*

defendants from any equity, such as an equity to rectification, arising between the plaintiffs and the predecessors in title of the defendants, and even if they were to be held to have had notice of any such equity prior to becoming registered proprietors of the subject land (and this has not in my opinion been established), they are, by the express terms of sec 43(1), except in the case of fraud, not to 'be affected by notice direct or constructive of any…unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such...unregistered interest is in existence shall not of itself be imputed as fraud'."

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