

# Breaches of lease between exercise of option to renew and expiry of lease in Queensland

## Introduction

The decision of *Greppo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131 illustrates a defect in s 128 of the *Property Law Act 1974*(Qld) which gives a right to a lessee to apply for relief against forfeiture against loss of a right to exercise an option to renew. The defect arises because the legislation does not adequately deal with breaches that occur after the exercise of the option but before the expiry of the lease. Most commercial leases of all kinds have a standard provisions, as the lease in this case, as a conditions of the exercise of the option to renew that the lessee will have given notice of exercise within the time specified to the lessor and will have up to the date of expiry of the lease paid all rent and observed all lessee's covenants. The difficulties occur because invariably an option must be exercised before the expiry of the lease when a lessee may not be in breach of the lease but may later prior to the expiry of the lease fall into breach. As this decision indicates, at least in Queensland, that the lessee who desires to challenge the lessor's right to enforce those conditions can neither seek relief under s 128 against forfeiture of the right to exercise the option ,or indeed, under s 124 of the *Property Law Act 1974* to preserve the agreement for lease brought about by the otherwise regular exercise of the option to renew. The decision cries out for legislative reform along the lines of s 133E of the *Conveyancing Act 1919*(NSW) which was amended in 2001 to meet this contingency.

## Facts

A lessee gave proper written notice of exercise of option on 5 November 2012 in respect of a three year lease which expired on 13 May 2013 Notices to Remedy Breaches of Covenant had been served on the lessee during October and December 2012 and August 2013 (although the lease had expired on 30 May 2013) .In October 2013, the lessors ,apparently believing that a lease existed gave notice to the lessee to deliver possession. At first instance, the lessee successfully contested the fact that there were any breaches that would deprive them of the right to exercise option to renew although ,in respect of two alleged breaches ,(subletting without consent and failing to keep the premises clear of termites) the Court of Appeal found the breaches proven.However, the

lessors failed to give any “prescribed notice” pursuant to s 128(4) during the period of 14 days after the purported exercise of the option.

### **Arguments of parties**

The lessees alleged that the lessors could therefore not rely upon any of the breaches stipulated in the Notices to Remedy Breach to deny them the right to renew the lease. The lessee argued that the “purported exercise” of the option to renew effectively occurred in two stages, the first stage was the giving the written notice within the period the lease, and the second stage was the ensuring that the lessee had not breached the lease between the giving of the notice of exercise and the expiry of the lease. Only after the expiry of the lease could it be determined that all preconditions of successful exercise had been met. In respect of the breaches complained about by the lessor, the lessee argued that no “prescribed notice” had been served within 14 days after the expiry of the lease.

Alternatively, the lessee argued that as an equitable lease had come into existence upon the exercise of the option to renew, pending the commencement of the new term, the lessee could seek relief against forfeiture under s 124 of the *Property Law Act* 1974 relying upon the fact that “lease” for the purposes of that section, included by virtue of the extended definition in s 123 included “an agreement for lease where the lessee had become entitled to have the lease granted.”

The lessors argued firstly, that s 128 did not apply to breaches which occurred after the “purported exercise” of the option, and, secondly, that s 124 could not apply to relieve the lessees against a possible forfeiture of the agreement for lease as one of the necessary preconditions (the maintenance of no breaches up until expiry of the lease) had not in this case been satisfied and that the agreement for lease could not be described as being one “where the lessee had become entitled to have the lease granted.”

### **Analysis**

Holmes JA delivering the main judgment (with whom Morrison JA and Douglas J agreed on this issue) analysed a number of conflicting New South Wales authorities on an identical section in the New South Wales *Conveyancing Act* 1919 (prior to an amendment in 2001 clarifying this doubt) which directly applied to s 128 at present. Her Honour came to a number of conclusions in respect of the interpretation of s 128

Firstly, Holmes JA found that the expression “purported exercise” of the option to renew occurred at the time the notice of exercise was given. Her Honour held that the notice gave notice of intention by the lessee to take up the entitlement of a new lease but such a right was subject to the precondition that the lessee was not in breach of their obligations until the expiry of the lease. In other words, the option was not exercised in two stages, but only one stage and the issue of a new lease was subject to a precondition (no breaches to expiry of the lease) which may or may not be met at the expiry of the lease. Any “prescribed notice “ under s 128(4) had to be given by the lessor within 14 days of the giving of the notice “purporting “ to exercise the option.

Secondly, Holmes JA then turned her attention to the status of the alleged “agreement for lease” which, according to the lessee, came into effect between the date of exercise of the option and the expiry of the lease. In two Queensland decisions (*Eighteenth Ashlaw Nominees Pty Ltd v Vadelly Pty Ltd* unreported, Supreme Court of Queensland, 4864/1986, *Williams J and Jack Butler & Staff v Black* (1991) ANZ Conv R 186) the status of an agreement for lease had been raised but not concluded as being necessary for decision. In any event, Holmes JA found that as the court had found that there had been breaches of lease up until the expiry of the lease, given the wording of the option clause, the lessor was not obliged to grant a new lease at the time of exercise of the option and until the expiry of the lease, given the failure of the precondition of no breaches, the lessee’s rights could not be described as being based upon “an agreement for lease whereby the lessee was entitled to have a new lease granted” in conformity with the extended definition of “lease” in s 123 of the *Property Law Act* 1974. Therefore, the lessee could not avail itself of a right to relief against forfeiture under s 124.

## **Conclusion**

The Court found that the lessee was not entitled to exercise the option to renew because of the breaches of covenants after the “purported exercise” by delivery of the notice and therefore s 128 did not apply. As no agreement for lease came into existence sufficiently to satisfy the definition of “lease” under s 123, the lessee could not take advantage of the rights afforded under s 124. The lessee was found to be in possession under a holding over provision in the original lease which made the lessee a monthly tenant from the date of expiry of the lease.

This decision clarifies the position in Queensland in respect of the application of both sections 123, 124 and 128 of the *Property Law Act* 1974 with respect to post notice breaches. It is not a happy story for a lessee. It leaves a lessee in this position unable to test whether or not the breaches after the purported exercise of an option to renew are of sufficient gravity to bring about a forfeiture of the new lease. By characterising the condition that the lessee not be in breach of the lease until expiry of the term as a precondition to taking up the new lease, it takes consideration of those breaches out of the statutory framework of protection. The position was clarified in New South Wales by an amendment to s 133E (1) and (3) of the *Conveyancing Act* 1991 (NSW) by the *Land Titles Legislation Amendment Act* 2001, Schedule 1. This amendment requires a lessor seeking to rely upon post exercise of option breaches to terminate a lease to give a “prescribed notice” in respect of those breaches so that their seriousness can be tested to determine whether or not they might lead to a forfeiture of the new lease.

It is respectfully suggested that such an amendment should be considered in Queensland as without it the lessee remains, somewhat irrationally, in the difficult and virtually irremediable situation between exercise of the option and expiry of the lease.

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