SUPREME COURT OF QUEENSLAND

CITATION:	*Tripple A Pty Limited v WIN Television Qld Pty Ltd* [2018] QCA 246
PARTIES:	**TRIPPLE A PTY LIMITED** **ACN 609 514 418** **(appellant)** **v** **WIN TELEVISION QLD PTY LTD** **ACN 009 697 198** (respondent)
FILE NO/S:	Appeal No 4895 of 2018 DC No 632 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2018] QDC 58
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2018
JUDGES:	Morrison and Philippides JJA and Bowskill J
ORDERS:	**The appeal is dismissed, with costs.**
CATCHWORDS:	LANDLORD AND TENANT – RENEWALS AND OPTIONS – EXERCISE OF OPTION – VALIDITY OF EXERCISE – where the parties to a commercial lease entered into an agreement for a further lease, in purported exercise of an option to renew, after the expiry of the time limit specified for exercise of the option – whether the lessor could be said to have waived compliance with the time limit, such that the further agreement was the result of the exercise of the option – or whether the option lapsed upon expiry of the time limit, and the further agreement was the result of a negotiation in accordance with ordinary contractual principles of offer and acceptance LANDLORD AND TENANT – RENT – PROVISIONS AS TO RENT IN AGREEMENT FOR LEASE OR LEASE – DETERMINATION OF RENTAL – dispute as to the proper construction of the agreement between the parties for a lease for a further term, in particular as to the rent payable and whether a market rent review process applied – whether subsequent conduct of the lessor could be relied upon *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008)

238 CLR 570; [2008] HCA 57, cited
BS Stillwell & Co Pty Ltd v Budget Rent-A-Car System Pty Ltd [1990] VR 589; [1990] VicRp 52, considered
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, considered
Duncan Properties Pty Ltd v Hunter [1991] 1 Qd R 101, considered
Elsafty Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd [2007] QSC 394, considered
Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd (1957) 59 SR (NSW) 122, considered
Glenlaton Investments Pty Ltd v Weemah Park Pty Ltd [2010] QSC 445, cited
Grepo v Jam-Cal Bundaberg Pty Ltd [2015] QCA 131, considered
JLF Corporation Pty Ltd v Matos [2016] QCA 355, cited
Johnston v Brightstars Holding Company Pty Ltd [2014] NSWCA 150, considered
JV Pub Group Pty Ltd v Red Carpet Real Estate Pty Ltd [2014] QSC 232, considered
Phillips Fox (a firm) v Westgold Resources NL [2000] WASCA 85, considered
Re Copperart Pty Ltd (1995) 16 ACSR 351, cited
Rushton (SA) Pty Ltd v Holzberger [2003] ANZ ConvR 316; [2003] QCA 106, considered
Traywinds Pty Ltd v Cooper [1989] 1 Qd R 222, considered

COUNSEL: A W Duffy QC, with P D Hay, for the appellant
C Wilson for the respondent

SOLICITORS: Rees R and Sydney Jones for the appellant
Andrew Morris Legal for the respondent

[1] **MORRISON JA:** I agree with the reasons of Bowskill J and the orders her Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Bowskill J for the reasons given by her Honour.

[3] **BOWSKILL J:** The appellant (as lessor) and the respondent (as lessee) entered into a lease of commercial premises in Rockhampton. The original term commenced on 1 November 2012, for a period of five years. The lease provided for two options of five years each. Following a purported exercise of the first option, on or about 29 August 2017 the parties entered into an agreement for a further lease. They are agreed on that. But there is a dispute about the rent that is payable.

[4] The respondent contends that a market rent review process applies to the new lease, and says the appellant has never properly invoked that process by giving the requisite notice. The respondent commenced the proceeding in the District Court, seeking declarations to that effect. Central to the respondent's position in the court below was that the option under the lease had been exercised. Although that

occurred out of time, the respondent contended the appellant had waived the time limit.

[5] The appellant contends that no market rent review process applies, because the parties agreed to a new lease "at the current rate [of rent] with no increase". In the District Court, the appellant cross-applied for a declaration as to the binding effect of the agreement it contends was made, and specific performance of that agreement. Central to the appellant's position in the court below was that the option had not been exercised; rather, the parties had entered into a new agreement for a further lease.

[6] For reasons given on 11 April 2018, the learned primary judge allowed the respondent's application and dismissed the appellant's cross-application.[1] A declaration was made that the appellant had not given the respondent a valid notice setting out reviewed market rent pursuant to clause 8.1 of the lease between the parties made on 23 November 2012.

[7] On this appeal, there is no challenge to the finding underpinning that declaration. What the appellant challenges is the decision dismissing its cross-application. If that challenge is successful, the declaration is of no relevance. The grounds of the appeal are that:

(a) the learned primary judge erred in holding that the appellant and the respondent had not reached agreement as to the rent payable for the new term of the lease agreed to by the parties on 29 August 2017;

(b) the learned primary judge erred in holding that the appellant had, by correspondence of 8 August 2017, waived the time limit within which the option could be exercised under clause 42.1 of the lease; and

(c) the learned primary judge ought to have found that a binding agreement between the appellant and the respondent was formed by the exchange of correspondence detailed in paragraphs [9] to [12] of the Reasons (which will be outlined below).[2]

[8] In relation to the second ground, the respondent contends that if there was no "waiver" of the time limit for the exercise of the option to renew the lease, the decision of the District Court should be affirmed in any event on the basis that the parties agreed to enter into a new lease *as if* the respondent had effectively exercised the option.

The original lease

[9] The original lease commenced on 1 November 2012, for a five year term. The expiry date was 31 October 2017. The rent was $80,000 per annum plus GST.

[10] The lease provided, in clause 7, for an annual CPI rent increase.

[11] Clause 8 of the lease provided for market rent reviews, as follows:

---

1 *WIN Television Qld Pty Ltd v Tripplea Pty Ltd* [2018] QDC 58 (the **Reasons**).

2 A further ground, that the learned primary judge erred in failing to provide adequate reasons, was not pressed at the hearing, and so it is unnecessary to deal with that.

> "8.1 We shall review the rent based on the current market rent, at each market review date in Item 10. In the period from ninety (90) days before to ninety (90) days after each market review date, we must endeavour to give you a notice setting out the reviewed rent. However, even if we are late in giving you our notice, we will not lose the right to review the rent.
>
> 8.2 You must pay us the reviewed rent from the market review date. Until we give you a notice under clause 8.1, you must pay us the old rent, and any adjustment is calculated from the market review date.
>
> 8.3 If you dispute the reviewed rent, and the dispute cannot be resolved by negotiation between you and us, the procedure in clause 9 must be followed.
>
> 8.4 If you do not give us a notice under clause 9.1 within the time referred to in that clause, you are deemed to agree to the reviewed rent."

[12] The procedure in clause 9 is as follows:

> "9.1 If you dispute the reviewed rent, within one (1) month after receipt of our notice to you pursuant to clause 8.1 you may give us a notice requiring the reviewed rent to be determined by a specialist valuer. If you give us a notice under this clause 9.1 a specialist valuer is to be appointed (either by agreement between you and us, or to be nominated by the President of the Queensland Institute of Valuers or its successor organisation) to determine the current market rent and you must pay the rent as determined.
>
> 9.2 The specialist valuer must act as an independent expert and not as an arbitrator, and must make and give his determination in accordance with recognised professional valuation standards for commercial offices. You and we must share the specialist valuer's costs equally.
>
> 9.3 Until any dispute is resolved you must pay the old rent. Any adjustment is calculated from the market review date, and you must pay us any adjustment, or we must credit you with it, when your next monthly payment is due."

[13] The "market review dates" at item 10 of the reference schedule were: "On commencement of any new term entered into as a consequence of the exercise of any option".

[14] The original lease provided for two options, of five years each (item 13). In this regard, clause 42 of the lease provided:

> "42.1 If Item 13 provides for an option to renew, then you may give us a notice asking us to give you a new lease for the option period specified in Item 13. Your notice will not be effective unless it is given to us at least three (3) months before the

expiry date but no more than six (6) months before the expiry date.

42.2 If you give us a notice under clause 42.1, we must give you a further lease for the option period as long as there is no unremedied breach of this lease as at the time of your notice and as at the expiry date.

42.3 The further lease shall contain identical terms as this lease, but it shall not contain this clause unless Item 13 provides for a further option period or unless we agree. The further lease may contain any other terms that you and we agree to. You and the guarantor must execute the further lease and return it to us within fourteen (14) days after we provide to you the further lease.

42.4 The rent to be paid by you during the further lease will be determined by treating the option period as a continuation of the term of this lease, and applying clauses 5, 6, 7 and 8.

42.5 The grant of any further lease is conditional on the guarantor entering into a guarantee in the form contained in clause 44 of this lease in respect of the option period. If the guarantor does not provide a guarantee in respect of this lease for the option period, you are not entitled to a further lease for the option term (or any future option term)."

Correspondence leading to the agreement for a new lease

[15] Under clause 42.1, to be effective a notice of exercise of the option had to be given no later than three months prior to the expiry date (so by 31 July 2017). No such notice was given.

[16] On 8 August 2017 the appellant's agent, Ms McClymont, sent a letter, by email, to the respondent, saying:

> "As you would be aware your 5 year option is due on the 01st November 2017.
>
> We would appreciate your response ASAP if you intend to exercise this option term."[3]

[17] On 10 August 2017 the respondent's properties manager, Ms Dimitrievski, responded by email:

> "Thanks for [contacting] me regarding this, yes we would like to stay in the premises for an additional 5 years. Please let me know the new lease terms so I can have them agreed with Executive Management."[4]

[18] It is not in issue that each of Ms McClymont and Ms Dimitrievski had the requisite authority to bind their respective principals.

---

3 AR 63.
4 AR 64.

[19] On 28 August 2017 Ms McClymont, for the appellant, sent an email to Ms Dimitrievski, of the respondent, saying:

> "Please see attached letter of offer for WIN option term."[5]

[20] The attached letter, also dated 28 August 2017, was in the following terms:

> "Thank you for advising that WIN would like to exercise their 5 year option due 1st November 2017.
>
> The Owner is offering the new 5 year term at the current rate with no increase.
>
> As a further gesture of good will he will forego the next review in 2018.
>
> Rent would increase as per lease on the 01 November 2019.
>
> Please advise when the executive management have approved and we shall have the necessary paperwork prepared."[6]

[21] Ms McClymont said, in an affidavit sworn by her and relied upon by the appellant in the proceedings below:

> "12. Prior to sending the notice contained in my letter dated 28 August 2017 to Ms Dimitrievski of WIN TV, I had requested that one of the Knight Frank principal's (sic), Mr Neale Crow, review rental information that was available to Knight Frank to ascertain details of comparable rents being paid for fully fitted out and furnished commercial office space in Rockhampton. Those enquiries failed to identify any such comparable commercial office space as the lease of a fully fitted out and furnished commercial is uncommon. After discussions with Tony Feitelson [the Managing Director of the appellant[7]] and in accordance with his instructions, I forwarded the proposed rent offer for the new term as detailed in the notice dated 28 August 2017.
>
> 13. With reference to the previous lease, no notice pursuant to Clause 42.1 was provided by WIN TV to Tripple A within the timeframe prescribed by the lease."[8]

[22] The following day, 29 August 2017, Ms Dimitrievski responded, by email, saying:

> "Thankyou for your letter, WIN Executives accept if you would please provide the appropriate documentation for signature."[9]

[23] About three weeks later, on 20 September 2017, the solicitor for the appellant sent an email to Ms Dimitrievski of the respondent, attaching a form 13 amendment to the lease, which records the parties agreeing that the lease be amended by:

---

5 AR 67.
6 AR 69.
7 AR 97 (Ms McClymont's affidavit at [8]).
8 AR 98.
9 AR 71.

(a) providing for a commencement date of 1 November 2017 and an expiry date of 31 October 2022;

(b) providing for rent of $90,040.56 per annum plus GST (which it is uncontroversial was the current rent at that time);

(c) providing for CPI rent increase on each anniversary of the commencement date, excluding 1 November 2018 and any market review dates; and

(d) providing for one option period of 5 years; and

(e) providing for deletion of clause 60 and replacement of clause 62 in relation to a car parking fee.[10]

[24] The respondent was asked to sign that amendment document, and return it to the appellant's solicitor for the appellant to sign. That did not occur.

Subsequent correspondence

[25] About another three weeks later, on 11 October 2017, Ms Dimitrievski of the respondent sent an email to Ms McClymont, the appellant's agent, in the following terms:

> "Hoping you can have another look at the offer we have been given for the space we currently occupy at East Street in Rockhampton.
>
> As a market review we have been offered the same rental at just over $90,000 for 331m2 ($272/m2).
>
> I have had a look at a few comparitable (sic) sites which are much less than that;
>
> - 156 Bolsover Street, Rockhampton 332m2 for $66,400 ($200/m2)
> - 2B Denham Street, Rockhampton 300m2 for $40,000 ($133/m2)
>
> Both of these listed with Knight Frank, would you please be able to have another look at our market rent review for the exercise of our option for a further 5 year term."[11]

[26] Ms McClymont responded by email dated 17 October 2017:

> "I have reviewed your lease and as per Clauses 8.3, 8.4 and 9.1 you had 1 month from our advice (28/08/17) to dispute the rent.
>
> You originally confirmed acceptance on the 29/08/17, lease documents have now been prepared for signing.
>
> Unfortunately as your request below was on the 11/10/17 it is outside of the above time frame."[12]

[27] Ms Dimitrievski responded by email on the same day, saying:

---

10 AR 74-76.
11 AR 79.
12 AR 78-79.

> "I understand this and would have to check dates of correspondence, but believe we have been good tenants and I would like the landlord to review in light of the listings I have found rent seems to be extremely high in comparison to what he is offering as a 'Market Rent Review'.
>
> Can I please ask that you contact the landlord and request that he reconsider despite the week delay in our response to the proposed rental amount."[13]

[28] It seems Ms McClymont did that, as she sent an email to Ms Dimitrievski on 23 October 2017, in which she advised:

> "I have passed on your request for the Owner to reconsider the rent review.
>
> Whilst he agrees that WIN is a good Tenant, he has advised that he has declined your request."[14]

[29] What followed next, on the material, was a letter from the respondent's solicitor on 15 December 2017, stating its position that the appellant's agent's letter of 28 August 2017 did not constitute a valid or effectual notice of reviewed rent for the purposes of clause 8.1 of the lease, and inviting the appellant to provide such a notice.[15]

[30] The appellant's solicitor responded to that by letter dated 22 December 2017, as follows:

> "We act on behalf of Tripplea Pty Ltd, the owner of 34 East Street. We have been provided with a copy of the Lease for part of the 6th floor of the building in which your client WIN Television Qld Pty Ltd is the tenant.
>
> We note that the Lease contains an option period of 5 years commencing on 1 November, 2017 and expiring on 31 October, 2023.
>
> Your client exercised the option to renew the lease. Our client's agent by letter dated 28 August 2017 clearly set out the reviewed rent in accordance with clause 8.1 of the lease by proposing a rental of '*the current rate with no increase*'.
>
> If your client had issue with the reviewed rent, your client, in accordance with clause 9.1 of the lease had one (1) month after receipt of this notice to dispute the rent. Your client did not. To the contrary, via an email sent on the 29th of August you (sic) client stated; '*WIN Executives accept if you would please provide the appropriate documentation for signature*.'
>
> Accordingly, we would request that your client execute the Amendment to Lease as a matter of urgency and return it to this office."[16]

---

13 AR 78.
14 AR 78.
15 AR 84-85.
16 AR 87.

[31] The respondent commenced the proceeding below, seeking a declaration that the appellant had not given a valid notice setting out reviewed rent for the purposes of clause 8.1 of the lease. Shortly before the hearing, the appellant filed its cross-application, seeking a declaration that a valid and binding agreement for a lease at the current rent had been entered into on 29 August 2017, and an order for specific performance of it. In its submissions before the District Court, on the hearing of the applications, the appellant argued, in the alternative to its primary contention, that its letter of 28 August 2017 did constitute an effective notice of reviewed rent (that is, the position articulated in its solicitor's correspondence of 22 December 2017).

The decision below

[32] The learned primary judge accepted the respondent's argument that, by the appellant's correspondence of 8 August 2017, the appellant had "apparently waived the time limit which required notice of the exercise of option under clause 42.1 to be at least three months before the expiry date"; but said that "[i]n any event, by letter dated 28 August 2017, [the appellant] confirmed the exercise of the option".[17]

[33] The learned primary judge rejected the appellant's primary contention, saying that he was "not persuaded on the material before me as to an express agreement as to the rent payable in the new term" and that "[f]urther all of the documents seem to have been done in anticipation of exercising an option".[18]

[34] As already noted, his Honour was not satisfied the appellant had given a valid notice setting out reviewed rent.[19] Accordingly, his Honour granted the declaratory relief sought by the respondent before him; and dismissed the appellant's cross-application.

[35] In practical terms, the consequence of this is that there has been found to be a valid agreement for a further lease between the parties, to which clause 8 (market rent reviews) applied and applies, from the commencement of the new term on 1 November 2017, which is still to be invoked, in the first instance by the appellant (lessor) giving the requisite notice of reviewed rent under clause 8.1.

What is the proper characterisation of the agreement for lease between the parties?

[36] The characterisation of the agreement between the parties as a result of the correspondence exchanged in August 2017 depends, in one respect at least, upon the correct legal characterisation of the option.

[37] There have been divergent views expressed about this, going back at least as far as 1910 in *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674.[20] It is an "academic riddle"[21] that an ensuing over 100 years of judicial analysis has not seemingly resolved.

---

17 Reasons at [17] and [18].

18 Reasons at [22].

19 Reasons at [15], [16], [21], [23]-26].

20 In which Griffith CJ (at 678-9) and O'Connor J (at 685) were of the view that an option is a conditional contract, not an irrevocable offer, but Isaacs J (at 691) considered the true characterisation of an option is as an irrevocable offer.

21 *Lontav Pty Ltd v Pineross Custodial Services Pty Ltd* [2011] VSC 485; (2011) V ConvR 54-805 at [114] per Dixon J.

In some cases, the characterisation matters;[22] in others it does not.[23] For reasons I will explain, this is a case in the latter category. For that reason, and because there was no substantive argument on this appeal about it,[24] the riddle will remain unresolved.

[38] The competing views are demonstrated by reference to two appellate decisions, one from Queensland and one from New South Wales.

[39] In *Traywinds Pty Ltd v Cooper* [1989] 1 Qd R 222 a lease included an option clause which provided relevantly that if the lessees give notice of the intention to exercise the option within a certain time period, the lessees "shall have the right to be granted a further lease". A letter found to be notice of intention to exercise the option was provided to the lessor outside the requisite time. As to whether the notice could nonetheless be effective for the purpose of exercising the option, Kelly SPJ at 226 expressed the view that:

> "On the basis of the reasoning of Gibbs J [in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 76] I would consider that the view may properly be taken that cl 15(a) amounts to a conditional agreement to grant a lease for a further three years and gave the appellants the right, provided that they performed stipulated conditions, to become lessees for such further term… the only condition which is relevant is that relating to the time for giving notice in writing of their intention to exercise the option of renewal.
>
> On the footing then that there is a conditional agreement to grant a lease for a further term, there is, as I would see it, no apparent reason why in accordance with ordinary principles a stipulation for the benefit of one party, in this case a stipulation as to the time for the giving of notice, could not be waived by that party or, alternatively, varied by requiring some lesser period of notice than that originally stipulated. If waiver were thus permissible, the finding of waiver made by the learned trial judge would be sustainable. Alternatively, the view could be taken that an agreed variation of the stipulation as to the time for the giving of notice to permit of it being given at the time at which it was in fact given is to be implied from the conduct of the parties. In either case the option would have been effectively exercised."[25]

[40] A contrary view was expressed by the New South Wales Full Court in *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122. In that case the Full Court held that an option for renewal is "no more than an offer to make a

---

22 Gibbs J gives some examples in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 (the authority often cited in support of the conditional contract characterisation) at 72 and 75; another example is *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd* (2005) Q ConvR 54-630.

23 For example, *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131; (2015) Q ConvR 34-829 at [64].

24 Although the appellant contended the learned primary judge erred in concluding there had been a waiver by the appellant of the time limit for exercise of the option, that was not the focus of its primary argument on the appeal; and the respondent did not strongly argue against that, in any event, having regard to *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101, and subsequent decisions following it (cases which were not referred to the learned primary judge): respondent's written submissions at [8]-[10] and T 1-27.

25 Underlining added.

contract" which, if under seal or given for consideration, is a contractual offer which cannot be revoked. At 123, the Full Court said:

> "In the present case the lessor irrevocably offered to grant a lease. Its offer prescribed the time and manner for acceptance. 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."

[41] As Kelly SPJ observed, in *Traywinds* at 227:

> "It would seem that *McCaul's Case* was impliedly accepted by the High Court in *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8, 10 per Barwick CJ and at 17-18 per Stephen J, although this was obiter and there is no express adoption of the passage to which I have referred. Some support for the view taken in *McCaul's Case* may also be found in a passage in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 81, per Lord Denning MR in which it is said:
>
> > 'In point of legal analysis, the grant of an option in such cases (which included cases of an option to renew a lease for a further term), is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer.'"

[42] No concluded view on the characterisation issue was expressed in *Traywinds*, with the result being the same whether there was waiver of the time stipulation under an irrevocable offer, or the coming into existence of a fresh agreement upon acceptance of a counter-offer (the offer to exercise the option out of time).

[43] In Queensland (and elsewhere) there are subsequent lines of authority supporting both views.

[44] In *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101 de Jersey J (as his Honour then was) adopted *Gilbert J McCaul*[26] and reasoned from the principle that

---

[26] Referring also to *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 at 928-929, which in turn adopted Lord Denning MR's analysis in *United Dominions Trust (Commercial) Ltd v*

the due exercise of the option of renewal in the lease depended on exact compliance with its notice requirement. That notice not having been given by the requisite time, the option lapsed completely. His Honour held that the reliance by the plaintiff (lessor) on the doctrine of waiver was misconceived (referring to *Gilbert J McCaul* at 124): as the date for exercise of the option passed, "so the option lapsed completely" (at 103-104). His Honour found, however, that the parties did subsequently agree to a new lease. In that case, after the time for exercise of the option had passed, the lessor encouraged the lessee to prepare a letter exercising the option and backdate it, saying that the lessor would accept that as a valid exercise of the option. The backdated letter was sent, and was accepted by the lessor. His Honour found:

> "That should be construed, in the circumstances, as an agreement to give and take a fresh five year lease, *as if* the option provision had been effectively utilised, although of course it had not been." (at 104)

[45] *Duncan Properties* was followed by White J in *Re Copperart Pty Ltd* (1995) 16 ACSR 351 at 356-357, by Margaret Wilson J in *Glenlaton Investments Pty Ltd v Weemah Park Pty Ltd* [2010] QSC 445 at [63]-[64] and by Mullins J in *JV Pub Group Pty Ltd v Red Carpet Real Estate Pty Ltd* [2014] QSC 232 at [20] and [22].

[46] In *Rushton (SA) Pty Ltd v Holzberger* [2003] QCA 106; [2003] ANZ ConvR 316 at [14]-[18] the Court of Appeal (Williams JA, McMurdo P and Philippides J, as her Honour then was, agreeing), without expressly referring to the competing characterisations of an option, referred with apparent approval to the passage from Lord Denning MR's judgment in *United Dominions Trust* case, the Full Court's decision in *Gilbert J McCaul* and de Jersey J's decision in *Duncan Properties*. But this was in the context of affirming the principle that the terms of an option clause must be strictly complied with; as to which see also *JLF Corporation Pty Ltd v Matos* [2016] QCA 355.[27] In that regard, in *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85 at [67], White J observed that:

> "Whether an option is to be construed as an irrevocable offer supported by consideration or as a conditional contract, the grantee is not entitled to enforce the option, unless he has complied strictly with such of its terms as, upon the proper construction of the option, must be strictly complied with for its valid exercise."

[47] On the other hand, in *Elsafty Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd* [2007] QSC 394 McMurdo J (as his Honour then was) said at [52]:

> "The prevailing view is that an option is a conditional contract rather than an irrevocable offer: *Laybutt v Amoco Australia Pty Ltd,*[28] *Traywinds Pty Ltd v Cooper*[29] and *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*.[30] Gibbs J said in *Friedman v Barrett*,[31]

Eagle Aircraft Services Ltd. His Honour was referred to *Traywinds*, but found it "not of great help" to the resolution of the case before him (see at 106).

27 Referring to *Phillips Fox (A Firm) v Westgold Resources NL* [2000] WASCA 85 and *Quadling v Robinson* (1976) 137 CLR 192 at 200-201.

28 (1974) 132 CLR 57 at 71-76.

29 [1989] 1 Qd R 222.

30 [2005] QCA 270 (see particularly at [22]-[23] in the reasons of Keane JA, with whom McMurdo P and Williams JA agreed).

31 [1962] Qd R 498 at 507.

> that whichever view is correct, the exercise of an option to renew results in a new lease."[32]

[48] Most recently, in *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131 the Court of Appeal (Holmes JA, as her Honour then was, Morrison JA and Douglas J agreeing) referred to the competing characterisations, but found it unnecessary to decide between them as it would not affect the outcome (see at [58]-[64]).

[49] If the doctrine of waiver were available, the characterisation of the option in this case might matter. But even apart from the analysis reflected in de Jersey J's decision in *Duncan Properties*, in my view there is no role for waiver in this case. A waiver of a right is "an intentional act, done with knowledge, whereby a person abandons a right by acting in a manner inconsistent with that right": *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [56] per Gummow, Hayne and Kiefel JJ. As Gray J observed in *BS Stillwell & Co Pty Ltd v Budget Rent-A-Car System Pty Ltd* [1990] VR 589 at 603-604, even if the conditional contract analysis is correct:

> "… the reasoning of *Gilbert J McCaul* in relation to waiver is unaffected. Upon the assumption of a conditional contract it remains true that the grantee cannot be required to perform the conditions. The grantor has no right to have the conditions performed and, thus, has nothing to waive. If the grantee fails to perform the conditions but seeks to renew the lease, he is merely making an offer."

[50] In any event, having regard to the principles referred to above, as to the requirement for the conditions of an option to be strictly complied with, once the time for performance of the stipulated condition(s) for exercise of the option has passed (whether on the irrevocable offer or conditional contract analysis), there is nothing to waive. In this case, the first correspondence from the appellant was dated 8 August 2017, which was after the time for exercise of the option.

[51] What followed, in the exchange of correspondence between the parties, was not an exercise of the option *per se* but was a negotiation, in accordance with the elementary rules of offer and acceptance, for a renewal of the lease.

What were the terms of the agreement for renewal of the lease?

[52] The only dispute concerns the rent payable under the new lease, commencing on 1 November 2017: was it, as the appellant contends, the "current rate" of rental which the respondent was paying at that time, without reference to any market review; or was it, as the respondent contends, to be determined by reference to a market review process under clause 8 of the lease.

[53] As the course of correspondence set out above demonstrates, this was not a case in which there was simply a purported exercise of the option by the lessee, out of time, which amounted to a counter-offer, upon acceptance of which by the lessor there came into existence the very same agreement that would have been formed *as if* the option had properly been exercised. In that respect, it is factually distinguishable

---

[32] See also *Wilbow Corporation Pty Ltd v Mailli* [2002] 1 Qd R 574 at 575 per Douglas J and *Osaka Enterprises Pty Ltd v Seaview Pacific Pty Ltd* [2010] QSC 112; (2010) Q ConvR 54-734 at [22] per McMurdo J.

from *Duncan Properties* (at 104) and *JV Pub Group Pty Ltd v Red Carpet Real Estate Pty Ltd* (at [8], [12], [13] and [23]).

[54] In this case, the respondent's agent's email of 10 August 2017 did not constitute a counter offer. It was in the nature of an invitation to treat, advising that "we would like to stay in the premises for an additional 5 years", and asking the lessor's agent to "let me know the new lease terms".

[55] The offer came from the appellant's agent in the letter of 28 August 2017. That offer was unequivocally accepted by the respondent, an acceptance which was communicated on 29 August 2017.[33]

[56] The question is, what did the parties agree in terms of rent? More particularly, the question is whether a market rent review was or was not a term of the renewed lease from its commencement.

[57] The relevant principles of construction are uncontroversial. The agreement is to be construed objectively, by reference to what a reasonable person in the position of each of the lessor and the lessee would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to them at the time of the transaction and the commercial purpose or objects to be secured by the agreement.[34] As articulated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352:

> "… [w]hen the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting."

[58] Here, the objective framework of facts, as at the end of August 2017, was as follows:

(a) The parties are commercial entities, lessor and lessee respectively under a lease of commercial premises which had been in force since 1 November 2012, and was due to expire on 31 October 2017.

(b) The provisions of the lease – including the provision for market rent review on the commencement of a new term entered into as a consequence of the exercise of the option (clause 8 and item 10 of the reference schedule).

(c) Further to (b), time was not of the essence of the market rent review process; it could be instigated 90 days after commencement of the new term, or even later (clause 8.1).

---

33 Placing the agreement in the first of the classes identified in *Masters v Cameron* (1954) 91 CLR 353 at 360.

34 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[47]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 343 ALR 58 at [16], [17] and [73].

(d) Although the respondent had failed to exercise the option to renew in the time specified, both parties were proceeding on the basis that in agreeing to renew the lease, they were doing so by way of exercise of the option.

(e) The correspondence exchanged between the parties, by their agents, on 28 and 29 August 2017 did not contain all the terms agreed between them; the entirety of their agreement had to be informed by reference to the terms of the lease itself.

(f) Whilst the "amendment" to the lease document provided by the appellant's agent to the respondent's agent, for signing, provided for a rental figure (the current rent) to be included in item 6 of the reference schedule (by reference to clause 4, the general obligation to pay rent), it did not record any amendment to item 10, nor the deletion or any amendment of clause 8.

[59] The respondent relies on subsequent conduct, both of the appellant's agent, and its solicitor, to support its construction. The general principle is that it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made.[35] However, a distinction is sometimes drawn between proof of a term and the meaning of a term. Evidence of subsequent conduct may be admissible on the former question, particularly where the contract is not wholly in writing, but not the latter.[36]

[60] Another variation on the rule is that evidence of subsequent conduct may be relevant and therefore admissible in another way, namely as an admission. The relevant principles are discussed in *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [56]-[58] and [78]-[84] per Beazley P, at [119]-[124] per Basten JA (Gleeson JA agreeing at [134]).

[61] In that case, there was a dispute as to the terms of a variation to a deed of settlement, in terms of whether one side's liability to pay an amount of money was expunged, or merely deferred. The evidence relied upon included post-contractual statements said to constitute admissions that the liability was merely deferred. Basten JA said this:

> "121 … where [post-contractual statements] provides evidence of facts, the assertion of which is against the interests of one party, it may be admissible as an admission by that party. However, to the extent that the evidence reveals an opinion as to a question of law rather than fact, the admission may be irrelevant or valueless. (The relevant authorities were collected by Campbell JA in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; 261 ALR 382 and in *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303.) Alternatively, the evidence may establish contextual facts in existence at the time the contract was executed.
>
> 122 These principles apply to the determination of the meaning of a written document. However, in this case, as succinctly stated

---

35 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35].

36 Cf *Winks v WH Heck & Sons Pty Ltd* [1986] 1 Qd R 226 at 238 per Thomas J; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [114] per Campbell JA. See also NC Seddon and RA Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis, 11th ed, 2017) at [10.16].

by Spigelman CJ in *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [7]:

> 'The issue is not one of interpretation, because there are no words to interpret. The issue is one of fact: what did the parties agree?'

123 The conclusion reached by the trial judge was based primarily on the post-settlement conduct of the parties, which, he held, demonstrated that, over a period of some six months, the appellants acted on the basis that they had a continuing obligation to pay $170,000.

124 To the extent that post-settlement conduct could be considered, the appellants sought to rely upon communications between themselves and their solicitor as evidence that they did not personally believe they had any obligation to pay Willis & Bowring's fees, although their solicitor was of a contrary view. The trial judge did not rely upon this material and was correct not to do so. With respect to an alleged agreement not wholly reduced to writing, the post-agreement conduct of one party known to the other, and communications between the parties, which reveal a common assumption as to the existence and terms of an agreement may provide evidence of such an agreement. However, the subjective views or reservations of one party, undisclosed to the other, cannot provide a basis for inferring the terms of a pre-existing agreement."[37]

[62] The issue in this case is not whether the parties entered into an agreement, but as to whether the terms of that agreement were as contended by the appellant or the respondent. That is a question of fact.[38]

[63] It is apparent from the appellant's agent's email of 17 October 2017 that the appellant considered that the market rent review process applied to the agreement for a new lease and, further, that it had been instigated by the appellant, in its letter of 28 August 2017, nominating the "current rent" as the reviewed rent for the purposes of clause 8.1.

[64] That is reinforced by the appellant's solicitor's letter of 22 December 2017, which states that the appellant's agent's letter of 28 August 2017 "clearly set out the reviewed rent in accordance with clause 8.1 of the lease by proposing a rental of 'the current rate with no increase'".

[65] In the circumstances, taking into account the objective framework of facts, together with the appellant's admissions, in the email and letter just referred to, I consider the preferable construction is that contended for by the respondent, that the parties agreed to a further lease of the premises, at the current rent, subject to the operation of the market review process provided for in clause 8.

[66] Although that conclusion is reached through a subtly different process of reasoning to that undertaken by the learned primary judge (and, it should be noted, by

---

37 Underlining added.

38 *Johnston v Brightstars Holding Company Pty Ltd* at [84] and [122].

reference to authorities not provided to his Honour), the effect of the conclusion is the same.

[67] The appellant considered it had validly and effectively instigated the market review process, by its letter of 28 August 2017. The learned primary judge found to the contrary, and there has been no appeal from that conclusion.

[68] It follows that the appeal ought to be dismissed, with costs.