SUPREME COURT OF QUEENSLAND

CITATION:	*Chelfield Pty Ltd v Goldsea Pty Ltd* [2003] QSC 040 *Re: WC Pty Ltd* [2003] QSC 040
PARTIES:	**CHELFIELD PTY LTD ACN 010 250 665** (applicant) **v** **GOLDSEA PTY LTD ACN 009 637 521** (respondent) **WC PTY LTD ACN 081 699 407** (applicant) **v** **GOLDSEA PTY LTD ACN 009 637 521** (respondent)
FILE NO/S:	SC No 489 of 2003 SC No 492 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2003
JUDGE:	Holmes J
ORDER:	**The applications to set aside statutory demands are dismissed**
CATCHWORDS:	LANDLORD AND TENANT – TERMINATION OF TENANCY – FORFEITURE – RELIEF AGAINST FORFEITURE – RELIEF UNDER STATUTE – NOTICE BEFORE RE-ENTRY – whether assignor had right to be notified – whether "lessee" included assignor LANDLORD AND TENANT – ASSIGNMENT, SEVERANCE AND UNDERLEASE – ASSIGNMENT OF LEASE – EFFECT OF ASSIGNMENT – whether assignor had right of re-entry LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – WAIVER OF FORFEITURE – whether waiver or election by the lessor

Conveyancing and Law of Property Act 1881
Corporations Act 2001
Law of Property Act 1925 s 146(1)
Property Law Act 1974 s 124(1)

Baynton v Morgan (1888) 22 QBD 74
Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd (1994) 13 ACSR 37
Church Commissioners for England v Ve-Ri-Best Manufacturing Co. Ltd [1957] 1 QB 238
Cusack-Smith v Gold [1958] 1 QLR 611
Eng Mee Yong v Letchumanan [1980] AC 331
Horsey Estate Ltd v Steiger and the Petrifite Company Ltd [1899] 2 QB 79
Ladies Sanctuary Pty Ltd v Parramatta Property Investment Ltd (1997) 7 BPR 15,156
Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Limited (No. 2) [1979] 1 WLR 1397
Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd & Ors [2003] WASCA 11
Milmo v Carreras [1946] KB 306
Picton-Warlow v Allendale Holdings Pty Ltd [1988] WAR 107
Sargent v A.S.L. Developments Ltd (1974) 131 CLR 634
Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 72 FCR 452
WEC Pty Ltd v Cypriot Community of Queensland Inc. [2002] QCA 506

COUNSEL: Mr P Favell for the applicants
Mr I Perkins for the respondent

SOLICITORS: H Drakos & Company for the applicant
Phillips Fox for the respondent

The applications

[1] The applicants are the assignors of leases of two sets of premises at a Broadbeach shopping centre. They seek to have set aside statutory demands served on them by the respondent lessor of the premises in respect of arrears of rental and outgoings owed by the assignee, arguing that they have an "offsetting claim" within the meaning of s 459H(1)(b) of the *Corporations Act* 2001, or, alternatively, that the demands should be set aside for "some other reason" under s 459J(1)(b), that being substantial injustice caused by the lessor respondent's conduct. Those grounds depend on a contention that the respondent by unlawfully re-entering the premises deprived them of the opportunity to re-take possession and to revive the restaurant business run there, so that the arrears could be made good. They argue that the respondent was not entitled to rely, in order to enforce its right of re-entry, on notices to remedy breach of covenant served on the assignee pursuant to s 124 of

the *Property Law Act* 1974, for two reasons: it had waived compliance by the assignee with the notices; and it had not served the notices on the applicants.

The leases and their assignment

[2] On 4 January 1993 the respondent leased one of the two sets of premises in the shopping centre (shop 2.27-2.35) to Paceland Pty Ltd for a term ending in December 1997. On 12 November 1996 Paceland Pty Ltd assigned the lease to one of the applicants, Chelfield Pty Ltd, and two other companies as trustees. On 1 July 1999 the lease, the term of which had been extended to 10 December 2002, was further assigned to both applicants and a third company. On 19 December 2000 the lease was assigned to Digga's Pty Ltd. Both the lease and the deed of covenant by which the assignment was governed contained clauses to the effect that the assignor was not released from its obligations under the lease by the assignment.

[3] Also on 19 December 2000 the respondent leased the other set of premises (shop 2.25) to the applicants and another company as tenants in common for a term to expire on 10 December 2002. On the same day, this lease was, like the earlier lease, assigned to Digga's Pty Ltd. Again a deed of covenant preserved the obligations of the assignor under the lease.

The dealings between the assignee and the respondent

[4] Using both sets of premises, Digga's Pty Ltd continued to run a brasserie that the applicants had formerly operated. It encountered some trading difficulties, and in April 2002 it ceased to pay rent and outgoings. On 14 June 2002 the respondent served on it two Form 7 notices to remedy breach of covenant under s 124 of the *Property Law Act* 1974 in respect of the arrears under each of the leases.

[5] Mr Cherry, a director of Digga's Pty Ltd, has sworn an affidavit on behalf of the applicants. He deposes that in December 2001 he advised the manager of the shopping centre, Mr Richard Goodfellow, that his company could not meet a five per cent rent increase. The centre manager told him to continue to pay at the earlier rate while the respondent considered his request for rent relief. On 26 June 2002, after having received the notices to remedy breach of covenant, Mr Cherry says, he met Mr Goodfellow and a representative of the lessor, Mr Adamson, and agreed with the latter that the formula for payment of the rent under the lease would be altered, that the lease would continue and that

> "in relation to other outstanding matters, namely rent and outgoings in arrears, these would be subject to ongoing discussions and negotiations, and that it was not necessary to pay same in terms of the notice previously served. "

(The reference to "the lease" seems, in context, to encompass both of the leases assigned to Digga's Pty Ltd.)

[6] Mr Cherry goes on to say that the matter had in his view been settled on those terms. The "default notice" was no longer on foot, and if no agreement were reached for payment for arrears the respondent would be obliged to issue another notice. However, contrary to that agreement he was locked out of the premises on 15 July 2002. He says in a further affidavit that at some unspecified time he offered rent calculated on what he says was the agreed formula, but the respondent rejected it.

[7] Mr Goodfellow denies that any such agreement was reached at the 26 June meeting. Rather, he says, the lease was to be terminated, with the prospect of a monthly tenancy being agreed in its place; and if that were to occur, the eight per cent of turnover formula would be considered.

[8] Mr Goodfellow's affidavit has annexed to it a letter from Mr Cherry dated 5 July 2002 and directed to Mr Hudson, executive director of Thakral Holdings Pty Ltd, apparently the respondent's parent company. Those parts material to the negotiations between Mr Cherry and the respondent's representatives are as follows:

> "Thank you for your action on receipt of my last letter dated June 14. I was very relieved when a meeting was convened with John Adamson.
>
> Rather than resolve the issue, that meeting has now brought the situation with our tenancy to the brink of total collapse. I fear that my approach to you may have created some animosity. This appears to me the only answer to what has transpired since my meeting with John Adamson.
>
> As a result of that meeting, bank guarantees have been accessed. There was no suggestion that this would take place after our meeting. Our bankers have interpreted this as a real threat to our business and therefore their security against borrowings.
>
> Their action was swift, and they have appointed Price Waterhouse Coopers to attend our business to assess their position and exposure. They have already served us with notice of demand to repay all loans. This of course is not possible, and because of the depressed trading over recent months, we would have no prospect of re-financing.
>
> I carefully explained our plight to John Adamson who seemed to be aware of this urgency, and appeared to be attempting to reach a position that would allow us to work through our current problems. In spite of 4-hourly telephone calls to Richard Goodfellow for information to pass on to our bankers to provide them with some comfort that the situation was not irretrievable, I was unable to get any answer until another call to Richard at 4.30pm yesterday (Thursday).
>
> Richard advised me as follows –

> "You have your 8% rent arrangement. John will not budge on the guarantees issue. He requires that rent to be paid weekly, and he will continue with the action to terminate the lease. He will not put any of this in writing."
>
> I asked what decision had been made on the back rent and Richard said that John did not mention that.
>
> My plea to you for intervention is the only option left open to me. If I must pass this information on to the bank as the final decision of Thakral in relation to our tenancy, they will undoubtedly move instantly to wind up the business and realize on the assets."

[9] Consistently with the advice recorded in that letter that action to terminate the lease would continue, the respondent re-entered the premises on 14 July 2002. On 15 July 2002, Mr Geldard, the respondent's solicitor, forwarded a draft monthly tenancy agreement to Mr Cherry. According to Mr Goodfellow's affidavit, at the time of re-entry the amount of $150,593.73 was outstanding in respect of the first lease and $21,995.84 in respect of the second lease. Goldsea presented the bank guarantees given by Diggas's Pty Ltd which totalled some $33,000. Mr Goodfellow goes on to depose that the amount received under the guarantees have been deducted from the outstanding arrears but, in fact, the statutory demands seem in each case to be in the original amounts without such deduction. I will return to this matter later.

The applicants' position

[10] Mr Calogerakis, a director of each of the applicant companies, has deposed in his affidavit that he and his partners had previously operated the restaurant business on the premises profitably. If they had been notified of the circumstances – one assumes, of Digga's Pty Ltd's failure to meet its obligations – and had been given an opportunity to take possession once more, they would have done so.

Waiver or election

[11] It is clear from the material, including Mr Cherry's affidavit, that there was not at any time an agreement by the respondent to forgo payment of the arrears of rent and outgoings, and I did not understand Mr Favell, for the applicants, to be contending otherwise. On no view, then, was there a waiver of compliance with the requirement in the notices to remedy breach of covenant that Digga's Pty Ltd pay the amounts outstanding. Rather, the assertion by Mr Cherry is that there was an agreement that the lease would continue on foot and, by implication, that the respondent would not seek to rely on the notices. Although the applicants rely on those matters as constituting a waiver of compliance with the notices, the case is better seen as one of election falling as it does (at least as described by Mr Cherry)

within the class of cases described by Mason J in *Sargent v A.S.L. Developments Ltd*[1]*:*

> "A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, i.e. when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract."

[12] In the present case, clearly enough, the respondent was entitled to rely on the notices to remedy breach of covenant in proceeding to re-entry of the premises and termination of the leases or, on the other hand, to elect to continue with the existing leases. It contends that it did the former; whether that is so is a question of fact. I am not concerned to resolve such questions on these applications, but it is necessary that I undertake some assessment of Mr Cherry's allegations in order to reach a view whether there are "real and not spurious, hypothetical, illusory or misconceived" grounds for the applicants' contentions[2]; whether there is some substance to the claim of election or waiver.[3]

[13] Taken in context, Mr Cherry's account of the agreement reached with the respondent's representatives is implausible. His affidavit is devoid of detail of what was said and by whom; nothing is suggested as to why the respondent might be prepared to abandon its right to rely on the notices, notwithstanding that several months rent and outgoings remained in arrears, without resolution as to how they might be paid; and, if indeed such an election had been made, why the respondent would then proceed to re-enter on 15 July without warning. But the strongest piece of evidence against Mr Cherry's version as presented in his affidavit is his own letter of 5 July 2002, which does not suggest any agreement reached at the meeting nine days earlier. The only offer from the respondent to which it refers is that of an eight per cent rent arrangement on the basis that the respondent's action to terminate the lease would continue. That is consistent with Mr Goodfellow's account of events, that the lease was no longer on foot and had been replaced by a monthly tenancy. Mr Cherry's version is, in my view, justly described as "equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself"[4]. I conclude that the applicants' offsetting claim insofar as it relies on waiver or election is without real foundation.

The failure to serve the notices to remedy on the applicants

[14] The applicants also argued the ineffectiveness of the notices to remedy breach of covenant because of the lack of service on them. Section 124(1) of the *Property Law Act* precludes enforcement of a right of re-entry or forfeiture "unless

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1 (1974) 131 CLR 634 at 655.

2 *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at 464.

3 *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 ACSR 37*; Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452*; WEC Pty Ltd v Cypriot Community of Queensland Inc.* [2002] QCA 506.

4 *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341.

and until the lessor serves on the lessee" a notice to remedy breach of covenant. Section 123 defines "lessee" as including:

> "an original or derivative under-lessee, a grantee under such a grant, a grantee's executors, administrators, and assigns, a person entitled under such an agreement, and the executors, administrators and assigns of a lessee".

This non-exhaustive definition is not illuminating as to the position of assignors.

[15] Mr Favell, for the applicants, pointed out that the deeds of covenant governing the assignments of the leases expressly preserved, in each case by cl 3.1, the applicants' obligations under the lease. Clause 4.1 of each deed contained the assignee's covenant to observe the covenants and conditions

> "contained or implied in the Lease and on the part of the 'Lessee' thereunder to be carried out, observed, performed and fulfilled in the same manner and to the same extent as if the Assignee had been the 'Lessee' originally named in the Lease and as if the Lease had been entered into between the Lessor and the Assignee in the first instance."

Following clauses similarly dealt with the assumption by the assignee of obligations of the "lessee". The wording of the clauses drew a distinction, Mr Favell submitted, between assignee and lessee. I doubt, however, that there is much comfort to be drawn from these clauses for the applicants; the use of inverted commas around the noun "Lessee" suggests to me that it is being used, not in its ordinary sense, but rather to designate those who might formerly have been so identified under the lease.

[16] As to the meaning of "lessee" in s124, Mr Favell argued that the better construction of the section was one which would require an assignor to be given notice of a breach of covenant on the part of the assignee. Here, the applicants remained under an obligation to ensure that the terms of the lease were met, including the payment of rent, so that the assignee's breach equally constituted a breach by them. It was appropriate therefore, that they be given notice of the breach and their right to remedy it.

[17] The difficulty for the applicants in arguing a purposive construction of s 124 is that the provision is designed to provide relief against the lessee's loss of its interest in the lease. Its object is that ascribed by the English Court of Appeal in *Horsey Estate Ltd v Steiger and the Petrifite Company Ltd*[5] to a similar provision in the *Conveyancing and Law of Property Act* 1881:

> "to require … (1.) that a notice shall precede any proceeding to enforce a forfeiture, (2.) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3.) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason

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5 [1899] 2 QB 79 at 91.

> is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

But the applicants here, having assigned their estate, had no such interest.

[18] The weight of English authority is against the applicants' proposition that they were entitled to service. Section 146(1) of the *Law of Property Act* 1925 is in identical terms to s 124(1) of the *Property Law Act.* Section 146 contains a definition of "lessee" [6] which, although not precisely the same as that in the *Property Law Act*, is in similarly wide, non-exhaustive terms. A number of authorities address the question of who is the lessee who must be served with a notice under s 146(1). In *Church Commissioners for England v Ve-Ri-Best Manufacturing Co. Ltd*[7] Lord Goddard CJ, determining a preliminary question, observed that the relevant definition of "lessee" was sufficiently wide to include a mortgagee. But, he said, it did not follow that it was entitled to be served, concluding that what s 146(1) required was service of the lessee in possession.

[19] In *Cusack-Smith v Gold*[8]*,* at issue was the position of the tenth defendant in the proceedings. He had assigned his underlease prior to the relevant breach of covenant. Since he had parted with his estate and interest in the premises, re-entry and forfeiture were not remedies available against him, and he was not, Pilcher J considered, entitled to receive a notice. "Lessee" as used in the section could only refer to "a lessee in possession or one who has a subsisting lease at the time when proceedings for forfeiture or re-entry are taken"[9].

[20] *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No. 2)*[10] concerned a lease assigned in breach of covenant. The Court of Appeal held that the assignment, nonetheless, operated to vest the remainder of the term in the purported assignee, creating a privity of estate between lessor and assignee. In those circumstances notice should have been served on the assignee, who was the person concerned to avoid forfeiture, not the original lessee who, although "liable to fulfil the covenants under the lease after the assignment [was] no longer the tenant or lessee of the lessor"[11].

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6 Section 146(5)(b) "'Lessee" includes an original or derivative under lessee, and the persons deriving the title under a lessee: also a grantee under any such grant as aforementioned and the persons deriving title under him."

7 [1957] 1 QB 238.

8 [1958] 1 WLR 611.

9 At 616-617.

10 [1979] 1 WLR 1397.

11 At 1399.

[21] *Old Grovebury Manor Farm* was applied, in the Australian context, in *Ladies Sanctuary Pty Ltd v Parramatta Property Investment Ltd*[12]. Windeyer J, while not concerned with questions of service of notices, was dealing with an assignment in breach of covenant. The assignment was not, he found, ineffective; it passed the estate to the assignee. Consequently, the assignor, having no right to the estate, could not seek relief against forfeiture. Similarly, in *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd & Ors*[13] the full court of the Supreme Court of Western Australia held that where a leasehold estate had been assigned in law the proper plaintiff to seek relief from forfeiture was the assignee.

[22] *Picton-Warlow v Allendale Holdings Pty Ltd*[14] involved construction of a lease to determine whether its assignor was entitled to be served with notice of a rent increase. The appellant contended that "lessee" for the purposes of the relevant term in the lease meant both the original lessee and any assignee; while the respondent argued that "lessee" meant, where the lease had been assigned with the lessor's consent, the assignee. Brinsden J, with whom Rowland J agreed, approached construction of the relevant term in the lease by reference to the general law. Upon assignment of the lease the appellant had divested himself of his interest in it; and while he remained liable to observe the covenants under the original lease, his rights of enforcement passed to the assignee. It was improbable therefore, that the word "lessee" in the lease had any further reference to him. That view was re-enforced by a consideration of the provisions of the lease, which contained various terms unlikely to apply to an original lessee out of possession by reason of an assignment. *Baynton v Morgan*[15] was authority for the proposition that

> "a lessee by assigning all his interest in the term to an assignee empowers the assignee, if he so desires, to surrender to the lessee all or any part of the demised premises. He gives to his assignee the powers which he might himself have exercised, and, as he himself might have surrendered part of the premises, he authorises his assignee to do so".

[23] Similarly where, as in the present case, an original lessor assigns the lease he no longer has any interest in it which would entitle him to seek relief against forfeiture. There is therefore, no reason to construe s 124 as requiring service upon him of a notice to remedy.

Did the applicants lose anything by the failure to serve them?

[24] Finally, it is to be noted that the applicants' assertions of an offsetting claim and the suffering of substantial injustice were based on a claim of damage to them allegedly incurred by the respondent's unlawful entry, in the form of the loss of revenue to be gained by their re-entering the premises themselves and operating the brassiere once more, and the loss of the business' goodwill occasioned by its closure. It was not suggested that they would, had they been served, sought to remedy the breach of covenant by paying the arrears of rent. The respondent argued that there was no

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12 (1997) 7 BPR 15,156.
13 [2003] WASCA 11.
14 [1988] WAR 107.
15 (1888) 22 QBD 74 at 78.

evidence to support the claims that the applicants would have been able to make good the arrears by trading once more.

[25] The problem, I think, is more fundamental. The applicants having assigned the leases had no right to re-enter at all. The position of an assignor was set out by the English Court of Appeal in *Milmo v Carreras*[16] in which a lessee had granted a sub-lease which, because it exceeded the term of the lease, amounted to an assignment:

> "The plaintiff became a stranger to the land. He had no estate in the land, the whole estate which he had held under the head lease passed to the [assignee], and from that moment onwards, although some contractual relationship might still remain between him and the [assignee], in the sense that perhaps he could have sued for the so called rent, he no longer had any connexion with the flat in the capacity of landlord."

So it was here: the applicants after assignment had no right to possession.

Orders

[26] For all of these reasons I am not satisfied that the applicants have an offsetting claim against the respondent or that there is any other reason that the demand should be set aside. Subject to the parties' submissions as to whether the demands ought to be varied because of the apparent failure to credit the amounts received on bank guarantees, the applications will be dismissed. Again subject to any submissions the parties might have, the appropriate costs order is that the applicants pay the respondent's costs of the applications.

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16 [1946] KB 306 at 311.