SUPREME COURT OF QUEENSLAND

CITATION:	*Bites Restaurant Pty Ltd & Anor v Carla Zampatti Pty Ltd* [2003] QSC 300
PARTIES:	**BITES RESTAURANT PTY LTD (ACN 102 766 110)** (first applicant) and **LI JING MING** (second applicant) **v.** **CARLA ZAMPATTI PTY LTD (ACN 001 336 036)** (respondent)
FILE NO:	6555 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2003
JUDGE:	Chesterman J
ORDER:	**1. Application adjourned** **2. Order that the application be transferred to the civil list where directions will have to be obtained for further conduct** **3. Costs reserved**
CATCHWORDS:	LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – Relief against Forfeiture – Relief under a Statute – where applicant seeks relief against forfeiture pursuant to s 124 of the *Property Law Act* 1974 *Property Law Act* 1974, s 124
COUNSEL:	Mr D D Bates for the applicant Mr D J Campbell for the respondent
SOLICITORS:	Reynolds Lawyers for the first and second applicants Adamson Bernays Kyle & Jones for the respondent

[1] The first applicant ("the applicant") seeks relief from the forfeiture of its lease from the respondent of premises known as Lots 6 and 7 on BUP 3314 in the County of Ward Parish of Gilston. They are commercial premises in a building

located in Orchid Avenue in Surfers Paradise. The applicant proposed to use them for a restaurant. A similar application by the second applicant in respect of Lot 8 on the same BUP was abandoned at the hearing.

[2] The lease was for a term of eight years commencing on 1 November 2002 and ending on 31 October 2010. The lease was executed by the applicant on 17 January 2003. The respondent's execution of the lease is undated. The rent was $120,000 per annum payable by equal monthly instalments in advance on the first day of each month.

[3] Clause 18 of the lease provided that:

> '… The (applicant) shall not be required to pay and the (respondent) shall not be entitled to demand payment of rent for the period from the 1st day of November 2000 until the 30th day of November 2000 and the (applicant) shall not be required to pay and the (respondent) shall not be entitled to demand payment of half of the rent for the period commencing from the 1st day of December 2000 until the 31st day of March 2001.'

[4] The parties are in agreement that the years specified in Clause 18 have been wrongly identified. It is accepted that the year 2000 should in fact be the year 2002 and the year 2001 should be 2003.

[5] There is, however, disagreement between the parties as to the operation of the clause. The applicant contends that the real agreement between the parties was that the moratorium on rent should commence from the date on which it went into possession, which it says was 31 December 2002. The respondent contends that the clause means what it says (with the agreed adjustment for years). In other words the applicant contends that it was not obliged to pay rent until a month after it went into possession and thereafter was obliged to pay half the rent for four months. The respondent contends that the obligation to pay rent, subject to the moratorium, commenced on the date specified in the lease as its commencement date i.e. 1 November 2002.

[6] The parties have corresponded between themselves and their respective solicitors for months without reaching any agreement. Proceedings have been commenced in the Magistrates Court of Southport to which the parties' respective complaints have been committed for determination.

[7] Clause 4 of the lease provided:

> '4.3 The (applicant) must not:
>
> (e) Damage the premises.
>
> (f) Alter the premises, install any partitions or equipment or do any building work.
>
> (n) Make holes, deface or damage floors, walls or ceilings or other parts of the premises.

4.4 The (applicant) may seek the (respondent's) written consent to any of the matters in clause 4.3 which can be granted at the (respondent's) discretion.'

Clause 5.4 provided:

'(1) The (applicant) must not carry out any building work without the (respondent's) consent. The (respondent) cannot reasonably refuse to give its consent if:

(a) The (respondent) approves the (applicant's) drawings and specifications for the works.

(b) The (applicant) and the (respondent) agree on the type, quality, colour and size of the materials to be used.

(c) The (respondent) reasonably approves of the (applicant's) builder.'

[8] By Clause 9 of the lease it was agreed:

'The (applicant) is in default of this lease if:

(a) It breaches an essential term of this lease.

(e) It does not comply with any other term of this lease within a reasonable time after receiving notice from the (respondent) to do so.

9.3 (1) If the (applicant) is in default and does not remedy the default within the time stated in any notice from the (respondent), the (respondent) may do any one or more of the following without prejudice to any other right which it may have against the (applicant):

(b) By notice … terminate the lease and take possession of the premises.'

[9] The premises adjoining Lots 6 and 7, Lot 8, had been used as a restaurant by a partnership of three people one of whom was the second applicant who is the wife of the applicant's sole director and shareholder, Mr Johnson. They proposed to conduct the applicant's restaurant from both premises i.e. Lots 6, 7 and 8. That meant expanding the restaurant in Lot 8 into the adjoining lots. That required building work, the extent of which is disputed. There is no precise testimony as to what the work involved. Mr Johnson deposed:

'… Neither shop 6 nor shop 7 could contain any cooking equipment … I proposed to the respondent that the kitchen in shop 8 be the kitchen for the expanded restaurant business and that shop 6 and 7 be the internal dining area for the restaurant … The respondent accepted the proposal … The extension of the restaurant requires substantial capital expenditure. The only internal renovation

> required was the insertion of an internal doorway between shop 7 and 8. The first and second applicants applied for and obtained from the respondent authorisation for the internal renovation.'

[10] The respondent's property manager, Ms Malone, disputes that testimony. Her affidavit reads:

> '… Whilst I understood that the (applicant) would be using the additional area contained in shop 6 and 7 for seating purposes, there was never any discussion between myself and Mr Johnson or any other party on behalf of the (applicant) regarding proposed works … I have not received any written or oral requests from Mr Johnson for approval of any works, and no plans and specifications have been submitted to me as to what works are proposed. …
>
> I have inspected the premises and I have observed that extensive renovation work has been commenced … including the removal of fixtures and fittings and floor coverings and wiring can be observed hanging from the ceiling. I have received no request from the (applicant) for approval of construction of a doorway … and no plans and specifications for the intended fit out of these premises has been presented to the respondent for approval.'

[11] By letter dated 11 July 2003 from the respondent's solicitors to the applicant the respondent gave notice that the applicant was in breach of the lease and that unless the breach were remedied within the time specified in the letter and the enclosed notice the respondent would move to re-enter the lease premises and determine the lease. The letter said:

> 'We enclose … notice of breach of covenant …
>
> Your obligation is to remedy the breach of covenant, if it can be remedied, within a reasonable time after service of this notice. The lessor has not specified … the maximum date for compliance, as that is a matter of law. However, we are instructed to indicate that the lessor regards the following periods as reasonable for remedy of the various breaches …
>
> (a) Payment of all outstanding rent … within seven days.
>
> (b) Cessation of unauthorised works … immediately.
>
> (c) Reinstatement of the premises to their condition prior to commencement of those building works … within fourteen days.
>
> If those breaches are not remedied within the respective periods set out … the lessor will regard itself as being legally justified to terminate your lease.'

[12] The notice drew attention to the covenants in the lease by which the applicant promised to pay rent at the times and in the manner referred to in the lease; not to

damage the respondent's property; not to alter the premises or install any partitions or equipment or do any building work without consent; and not to carry out any building work without the respondent's consent. The notice then went on to require the applicant to remedy the breaches by paying outstanding rent, immediately ceasing the execution of building works and to reinstate the premises to their former condition. The notice did not specify any time for the performance of these remedial acts.

[13] By written notice dated 21 July 2003 the respondent told the applicant that it had re-entered into possession of Lots 6 and 7 as a result of the applicant's failure to remedy 'the breaches of the lease as set out above.' The two particular breaches specified in the notice were:

(i) not immediately ceasing building work and
(ii) not paying outstanding rent.

[14] The applicant seeks relief against forfeiture pursuant to s 124 of the *Property Law Act* 1974. That provides, relevantly:

> '(1) A right of re-entry or forfeiture under any … stipulation in a lease, for a breach of any covenant, obligation, condition or agreement … in a lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice –
>
> (a) specifying the particular breach complained of; and
> (b) if the breach is capable to remedy, requiring the lessee to remedy the breach; and
> (c) …
>
> and the lessee fails within a reasonable time after service of the notice to remedy the breach …
>
> (2) The lessee may … in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in the case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise … as the court … in the circumstances of each case thinks fit.'

[15] The application was argued with scant regard to the terms of the section or the need to adduce clear evidence of the existence of the breaches of the lease and to the circumstances relevant to the exercise of the discretion to grant relief from the consequences of the breaches.

[16] The applicant was disposed to argue that the notice of 11 July was invalid because it imposed times for remedying the specified breaches which were inadequate and therefore unreasonable. This overlooks altogether the fact that the notice did not specify a time and that the letter enclosing the notice expressly drew attention to the fact that the applicant had a reasonable time to make good its breaches of the lease.

Mr Johnson in his affidavits did not contend that he was given an inadequate time. His case is that he is not relevantly in breach of any term of the lease. He contends that properly construed the applicant was not obliged to pay rent until it went into possession in December 2002 and that calculated from that date, taking into account the terms of the moratorium provision, payments of rent are up to date. In relation to the building work the applicant contends that it had the respondent's consent to the work necessary to extend the restaurant over the three lots. He has not attempted to reinstate the premises because he contends he is entitled to complete the work.

[17] The applicant also objects that the notice did not specify the amount of rent involved and the period to which it related as required by the additional note to form 7 of the approved forms. This overlooks the point that the parties know precisely what is involved in dispute over rent: it is whether the lease commenced from the expressed commencement date of 1 November 2002 or whether it was to commence from the date on which the applicant maintains it went into possession.

[18] Instead of concentrating on these points the parties adduced copies of letters which, though numerous, are clearly only a part of the disputatious correspondence that has occurred between them in the last eight months. The applicant in particular adduced much evidence concerning work involving the repair of a grease trap which services the demised premises but is external to them. The work on the grease trap appears to have only one relevance. That is that it gives rise to a distinct suspicion that Mr Johnson sought to defraud the respondent. That is contested but, as I say, the suspicion remains. That fact would be relevant to the exercise of the discretion given by s 124(2). I apprehend that a court would be reluctant to order the reinstatement of a lease where the lessee has shown signs of dishonesty in its dealings with its lessor.

[19] It is common ground that the applicant has not paid rent in accordance with the express terms of the lease by which the obligation to pay rent commenced on 1 November 2002. It is not clear that it would accept the obligation to pay the outstanding rent if the question of construction concerning the commencement date for the moratorium period went against it. If the only point of dispute was the payment of rent for the disputed period and if the applicant made it clear that it would pay should the court construe the lease in favour of the respondent it would probably be a case for giving relief against forfeiture. The applicant has not made its attitude clear.

[20] The more important matter is the building works undertaken by the applicant which appear to be more extensive than Mr Johnson admits. A breach of that covenant is, *prima facia*, more serious but there is an immediate difficulty. Mr Johnson claims he had the respondent's consent to the work. This is denied but it is impossible to resolve the conflict on the affidavits. Counsel for the applicant appear to concede that its client was in breach because, although it had the respondent's consent to the work undertaken, it did not have that consent in writing. The lease does not require the respondent's consent to carry out building work under clause 5.4 of the lease to be in writing. It is true that clause 4 does refer to written consent but the contrast with clause 5 is obvious. Clause 5.4 appears to be the relevant provision. The result is that the application has been fought on a false premise and on the material it is impossible to know whether there has been a breach and, if there has, how serious it was. Even if written consent were required the fact, if it be the fact, that the

respondent gave oral consent to the building work would be most relevant to the exercise of discretion, and the terms on which relief would be ordered.

[21] Unsatisfactory as it is the only course is to adjourn the application and order that it be transferred to the civil list where directions will have to be obtained for its further conduct. There should probably be an exchange of pleadings and disclosure so that the real issues can be identified and litigated. Costs should be reserved.

[22] The result may be that the respondent will re-let the premises before the trial of the application can be heard in which event the applicant's right will be lost. This is a consequence of the applicant's own failure to appreciate that the nature of the dispute could not be resolved on affidavits and would require a trial. Given the nature of the proceedings an urgent trial could have been obtained. There are cases in which the court has, in recent times, heard and given judgment in an action within three weeks of the issue of the writ. That is shorter than the time the applicant allowed to elapse between filing its application and the return date it chose.