

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No BS7266 of 2003

LIGHTBRIM PTY LTD
ACN 093 289 224

Plaintiff

and

SPEED RISE PTY LTD
ACN 097 050 354

Defendant

BRISBANE

..DATE 29/09/2003

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WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: By lease dated 11 February 2002 the plaintiff
as lessor leased the whole of the building on the land
situated at 18 Fox Street, Wynnum to the defendant as lessee
for a term of four years, commencing on 1 June 2001, with an
option for a further term of four years.

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The defendant operates a fish and chip shop and fishmongery
from the premises. Prior to the commencement of the lease
the plaintiff had been operating such a business from the
premises.

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Ms Wong, a director of the defendant, asserted that in June
2001 the defendant purchased the goodwill of the business
from the plaintiff for the price of \$40,000. Miss Hardy,
the employee of the plaintiff, who swore an affidavit on
behalf of the defendant, asserted that the payment of
\$40,000 was "an upfront goodwill payment" for the grant of
the lease.

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Whatever the exact characterisation of the payment the
defendant paid a capital sum of \$40,000 in connection with
commencement of the business from the premises.

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Clause 3.1 of the lease relevantly provides:

"The tenant will pay to the landlord (including by

way of periodic bank transfer if the landlord so requires) in each lease year the rent without any formal or other demand by equal monthly instalments in advance on the dates specified in item 4 C of the reference data."

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Item 4 C provides for the rent due date to be the first day of every month. Other relevant clauses of the lease are clauses 13.1 (1), 13.1 (4) and 15.1 which respectively provide:

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"13.1 Default by Tenant

(1) Events of Default Right to Re-Enter

If:

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- (a) The Rent or any part of it is unpaid for seven (7) days after it has become due whether any formal or legal demand is made for it or not; or

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THEN subject to the Landlord giving notice under s.124 of the Property Law Act 1974 the Landlord or any person duly authorised by the Landlord may at any time on one (1) days written notice or without notice re-enter the whole or part of the Premises in the name of the whole and determine this Lease but without prejudice to the right of action or other

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remedy of the Landlord in respect of any antecedent breach of the Tenant's covenants stipulations or agreements contained or implied in this Lease.

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13.1 (4) Reservation of Rights

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The rights and powers conferred on the Landlord by this clause 13.1 are in addition to any other right or power which may be conferred upon the Landlord at law or in equity.

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15.1 Time to be of the Essence

Time is essential for all obligations of the Tenant in this Lease. The Tenant indemnifies the Landlord against all losses, costs and expenses which the Landlord may sustain or incur as a consequence of any failure by the Tenant to perform and observe on the due date any obligations on its part contained or implied in this Lease.

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On 11 March 2003 the defendant was served with a Notice to Remedy breach of covenant given in accordance with section 124 of the Property Law Act 1974 ("PLA") on the basis of the breach by the defendant of clause 3.1 by not paying the monthly rent instalment of \$14,300 on 1 March 2003. The defendant paid the March instalment of rent on or about 14

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March 2003. The defendant paid the April instalment of rent on or about 11 April 2003.

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On or about 12 May 2003 the defendant was served with a Notice to Remedy breach of covenant on the basis of the breach by the defendant of clause 3.1 of the lease in failing to pay the monthly rental instalment of \$14,300 due on 1 May 2003. The defendant then deposited a cheque of \$14,300 to the plaintiff's account. The defendant did not pay the rent for June 2003 until or about 16 June 2003.

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On or about 4 July 2003 the defendant was served with a Notice to Remedy breach of covenant ("the Notice to Remedy"), dated 3 July 2003, in respect of the breach by the defendant of clause 3.1 of the lease in failing to pay the monthly rental instalment of \$14,300 due on 1 July 2003. The Notice to Remedy required the defendant to remedy the breach by attending to the payment within 14 days.

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On 11 July 2003 the defendant deposited a cheque in the sum of \$14,300 to the plaintiff's account. Ms Wong states that she believed there were sufficient funds to meet the cheque because of deposits she had made to the account. In late July 2003 Ms Wong was notified by the bank that the cheque had been dishonoured.

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The defendant had not paid the July monthly instalment of rent when the defendant was served on 8 August 2003 with a Notice to Quit, dated 5 August 2003. On that same day the defendant deposited a cheque for the July and August rent instalments, totalling \$28,600, to the plaintiff's account.

The operative part of the Notice to Quit states:

(a) You are lessee under a lease of the premises at 18 Fox Street, Wynnum, Queensland being the land described as lot 381 on RP 802684, County of Stanley, Parish of Tingalpa from Lightbrim Pty Ltd (ACN 093 289 224);

(b) Clause 3.1 of the lease obliges you to pay the rent reserved thereby on the first day of every month;

(c) Clause 13.1 of the lease provides that if the rent is unpaid for seven days after it has become due then subject to the giving of notice under section 124 of the Property Law Act 1974, Lightbrim Pty Ltd may at any time re-enter the premises and determine the lease;

(d) Clause 15.1 of the lease provides that time is essential for all your obligations in the lease;

(e) You failed to pay the rent of \$14,300 due under the lease on 1 July 2003;

(f) Lightbrim Pty Ltd gave you notice under section 124 of the Property Law Act 1974 requiring you to remedy that breach by paying the rent due on 1 July 2003 within 14 days;

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(g) The rent due on 1 July 2003 remains unpaid.

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TAKE NOTE that Lightbrim Pty Ltd hereby elects to terminate the lease and requires you to quit possession of the premises forthwith.

On 18 August 2003 this proceeding was commenced by claim and Statement of Claim, pursuant to which the plaintiff seeks to recover possession of the premises.

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Paragraph 2 of the Statement of Claim refers to the relevant obligations of the defendant under the lease as follows:

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(b) The defendant would pay the rent reserved thereby on the first day of every month;

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(c) If the rent was unpaid for seven days after it had become due then subject to the giving of notice under section 124 of the Property Law Act 1974, the plaintiff might at any time re-enter the premises and determine the lease;

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(d) Time was essential for all of the defendant's obligations in the lease.

The pleading then alleges:

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3. In breach of the lease, the defendant failed to pay the rent due thereunder on 1 July 2003.

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4. On or about 3 July 2003, the plaintiff gave the defendant notice under section 124 of the Property Law Act 1974 requiring it to remedy that breach by paying the rent due on 1 July 2003 within 14 days.

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5. The defendant failed to pay the rent due on 1 July 2003 within the time specified in the notice.

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6. On or about 6 August 2003, the plaintiff elected to terminate the lease and demanded that the defendant quit the premises forthwith.

7. Despite such demand, the defendant has failed to quit the premises and remains in possession as a trespasser.

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Not surprisingly, in view of the fact that the plaintiff had served the Notice to Remedy under section 124 of the PLA, the Notice to Quit relied on the rent remaining unpaid after the giving of the Notice to Remedy, and the Statement of Claim expressly pleaded that the defendant failed to pay the

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rent due within the time specified by the Notice to Remedy,
on 19 September 2003 the defendant filed an application in
the proceeding seeking relief that was focused on section
124 of the PLA and the Notice to Remedy. That application
seeks the following orders:

1. A declaration that the lease dated 11 February
2002 of premises at Lot 38 on RP 802684, County of
Stanley, Parish of Tingalpa has not been terminated
and remains valid and enforceable.

2. Alternatively, that the Defendant be granted
relief from forfeiture of the lease described in
paragraph 1 above pursuant to section 124 of the
Property Law Act 1974 (Qld).

At the outset of the hearing of this application on
26 September 2003, Mr Franco of counsel, on behalf of the
defendant, indicated that there was a threshold issue of
whether the Notice to Remedy was validly given when it was
served on 4 July 2003, when clause 13.1 (1) (a) of the
lease, stipulated that the relevant event of default which
gave the right to re-enter was:

"If the rent or any part it was is unpaid for 7 days
after it has become due."

This raised an issue of construction of clause 13.1 of the lease and section 124 of the PLA.

Mr Bland, of counsel on behalf of the plaintiff, disagreed that this could be described as a threshold issue. Apart from disputing the construction contended for by the defendant, Mr Bland submitted that, even if that construction were correct, the plaintiff could rely on the operation of the plaintiff's right to rescind the lease for fundamental breach as supporting the termination of the lease which did not allow for the exercise of the jurisdiction conferred by section 124 subsection 2 of the PLA to grant relief from forfeiture.

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I had difficulty with the position taken by the plaintiff in arguing this application. Despite the fact that the matter had proceeded on the plaintiff's part from March 2003 on the basis that a delay in payment of rent by the defendant under the lease required an opportunity to be given to the defendant to remedy the breach by making payment after Notice to Remedy was served, on the hearing of the application, the plaintiff, in effect, argued that failure to pay a monthly instalment of rent gave rise to a right to terminate at common law without the need to comply with

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section 124 of the PLA. It was argued that provision applied only to a right of re-entry or forfeiture as a result of a breach of the covenant, obligation or agreement in a lease, and not to the operation of the plaintiff's common law right to rescind.

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The defendant's application is brought in the context of the plaintiff's claim for possession based on failure to pay the rent due on 1 July 2003 within the time specified in the Notice to Remedy.

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As the Statement of Claim stood at the time that I heard this application, the plaintiff did not plead against the defendant that the plaintiff had exercised its common law right to rescind.

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When I was due to give judgment in this matter this morning I indicated to the parties the approach which I had taken to the plaintiff's Statement of Claim in order to give them an opportunity to make submissions, as this was not a matter which had been canvassed in argument when the matter was before me on 26 September 2003. Despite submissions from Mr Bland, on behalf of the plaintiff, that the Statement of Claim was broad enough in its terms to plead against the defendant the right to terminate the lease on the basis of the exercise by the plaintiff of the common law right to

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rescind, I did not consider that the Statement of Claim could, in fact, be shown to make such a claim.

With respect to the defendant's argument that the plaintiff did not comply with the provisions of section 124 of the PLA in relation to the Notice to Remedy, the defendant contends that the Notice to Remedy could not be issued until the rent was unpaid for 7 days after it was due.

The defendant argued that the 7 days has to expire before the Notice to Remedy is issued. The plaintiff argues that the Notice to Remedy can be issued forthwith upon non-payment of the rent on the due date, and the period of 7 days is only relevant in determining the period of time which must expire before re-entry can be effected.

Clause 13.1 (1) regulates the right of re-entry. It imposes conditions cumulative upon the relevant breach of the lease which the parties have agreed must be satisfied before determination of the lease by re-entry is effected. In addition, the right of re-entry conferred by clause 13.1 is regulated by section 124 of the PLA. Relevantly, what triggers the right of re-entry under clause 13.1 (1) is that rent has been unpaid for 7 days.

The express terms of clause 13.1 contemplate that the
Landlord will comply with section 124 of the PLA after the
right of re-entry has been triggered, but before it has been
exercised. That is also consistent with the structure of
section 124, subsection 1 of the PLA, which defers the
enforceability of a right of re-entry or forfeiture under
any proviso or stipulation in a lease, unless and until the
lessor serves on the lessee the statutory notice. This is
also consistent with the notice that is endorsed on the
Notice to Remedy in conformity with the approved form, which
would not make sense if the right to re-enter had not
otherwise accrued at the time of issuing the Notice to
Remedy.

I therefore accept that the Notice to Remedy failed to
comply with section 124, subsection 1 of the PLA.

Before giving this judgment today, as a result of the
indication to counsel of the view I took about the cause of
action that was the subject of the statement of claim, the
plaintiff obtained leave to amend the Statement of Claim to
plead that when the plaintiff elected to terminate the
lease, on or about 6 August 2003, it was in consequence of
the defendant's breach of an essential term. This means
that the pleading has now been put in a state which raises
the question of what was required on behalf of the plaintiff

to terminate in reliance on the common law right to rescind,
and, as is foreshadowed by the defendant's material, it is
likely that the defendant will now pursue the possibility of
whether it can gain equitable relief against forfeiture, if
relief against forfeiture under section 124 of the PLA is
foreclosed as a result of the reliance by the plaintiff on the
common law right to rescind.

The issues raised by the termination and reliance on the
common law right to rescind, and whether any equitable
relief against forfeiture is available are not matters that
were raised by the application filed by the defendant on
19 September 2003, and it is not appropriate to attempt to
deal with those issues until the parties have an opportunity
to put the pleadings in order. As the plaintiff has amended
its Statement of Claim, the defendant will now need to amend
the defence.

When I heard this application on 26 September 2003 I was
concerned about the injustice which appeared to be caused to
the defendant by the plaintiff's reliance on clause 15.1 of
the lease, which is a clause which makes time of the essence
of all the obligations of the tenant under the lease.

Without that provision, this was clearly a case, if relief
against forfeiture had to be considered under section 124,

where relief was appropriate.

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Ms Wong has deposed to the expenditure undertaken by the defendant in connection with the business since it commenced its operations. Ms Wong deposes to having spent approximately \$100,000 for improvements, and chattels in connection with the business. The improvements are mainly trade fixtures, which will have little residual value if removed from the premises.

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In view of the term for which the lease was granted, and the fact that there was an option for a further term of four years, it was not unlikely that the defendant would have undertaken expenditure in improving the premises.

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It is explicable why a contract for the sale of land may contain a clause, making time of the essence. The obligation of the purchaser under a contract for the sale of land is to pay the price of the land in exchange for the conveyance. There are usually one or two payments to be made by the purchaser in return for the conveyance. If the purchaser does not make a payment on time it usually follows that the vendor has the right to terminate the contract for failure to make that payment on time, and that is the expected result.

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Under a lease of business premises for a fixed term there are numerous obligations of the tenant which theoretically give rise to a right to terminate exercisable by the lessor if an obligation is not performed within the time allowed for and time has been made of the essence, of all obligations of the tenant.

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In the case of this lease not only would it apply to the payment of monthly instalments of rental, but it would also apply to the payment of turnover rent at the end of each quarterly period and the payment of outgoings.

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Unlike a contract for sale of land the payments made under a lease and the other obligations of the tenant, which are tied to a time period, are required to be observed on a continual basis. One asks why would a tenant agree to the onerous consequences of time being of the essence of every obligation of the tenant under the lease, no matter how trivial. It makes otiose the whole regime of giving the tenant an opportunity to remedy a breach before exercising the right of re-entry.

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The right of re-entry for nonpayment of rent has always been considered to be a provision to ensure performance of that principal obligation. Making time of the essence negates the

whole history behind a contractual right of re-entry.

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What remains to be done in relation to the application of the defendant is to make a limited declaration in respect of the notice to remedy.

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It is declared that the notice to remedy breach of covenant dated 3 July 2003 given by the plaintiff to the defendant in respect of the lease dated 11 February 2002 was not valid and the purported determination by the plaintiff of the lease to the extent that it relies upon the failure to comply with that notice was of no effect.

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It is unnecessary to consider relief from forfeiture under section 124 of the PLA at this stage.

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I will hear submissions on costs.

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HER HONOUR: In relation to costs, the plaintiff seeks an order that the costs be costs in the proceeding. The defendant seeks an order that the plaintiff pay its costs because the defendant has had some success on its application.

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I accept Mr Franco's submission that there has been a limited amount of success in the matter on the defendant's part and

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that it is appropriate that I determine the costs having regard to how the Statement of Claim stood at the time I heard the substantive argument in respect of this application. The plaintiff could well yet succeed in the matter. In those circumstances I consider that the appropriate order is that the costs of the application filed on 19 September 2003 be the defendant's costs in the proceeding.

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