SUPREME COURT OF QUEENSLAND

CITATION:	*Mirage Resorts Holdings P/L as Trustee of the Mariners Paradise Property Trust v Brellen P/L* [2003] QCA 579
PARTIES:	**MIRAGE RESORTS HOLDINGS PTY LTD AS TRUSTEE OF THE MARINERS PARADISE PROPERTY TRUST** ACN 010 814 347 (plaintiff/respondent) **v** **BRELLEN PTY LTD** ACN 085 190 094 (defendant/appellant)
FILE NO:	Appeal No 10462 of 2003 SC No 6573 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2003
JUDGES:	Williams JA and Chesterman and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	LEASES AND TENANCIES – COMMERCIAL TENANCIES – RETAIL TENANCY DISPUTES – where dispute between parties – whether option to renew lease for another term was validly exercised – whether written notice of exercise of option was delivered to the business premises of the respondent – where purported notice of exercise of option was discovered after the lease had terminated – where relief sought under s 128 *Property Law Act* 1974 (Qld) in relation to option PRACTICE AND PROCEDURE – JUDGMENTS AND ORDERS – REASONS FOR JUDGMENT – EXTENT OF DUTY – whether duty to give reasons encompasses every matter raised in proceedings – whether trial judge had ignored or not given sufficient weight to certain evidence *Property Law Act* 1974 (Qld), s 128 *Beale v Government Insurance of NSW* (1997) 48 NSWLR 430, considered *Fox v Percy* (2003) 77 ALJR 989, discussed

Kiama Constructions Pty Ltd v Davey (1986) 40 NSWLR 639, cited
Mifsud v Campbell (1991) 21 NSWLR 725, considered
Rock Bottom Fashion Market Pty Ltd v HR & CE Griffiths Pty Ltd [1998] Q Conv R 54-505, considered
Romanos v Pentagold Investments Pty Ltd (2003) 77 ALJR 1882, cited
Tanwar Enterprises Ltd v Cauchi (2003) 77 ALJR 1853, cited

COUNSEL: P J Dunning for the appellant
R N Traves for the respondent

SOLICITORS: Bell Legal Group for the appellant
Allens Arthur Robinson for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of both Chesterman J and McMurdo J. I agree with all that has been said therein and with the orders proposed.

[2] **CHESTERMAN J:** The appellant and respondent were respectively lessor and lessee of premises located adjacent to the Broadwater at Southport. The respondent is, in effect, the owner of the Marina Mirage shopping centre. The appellant was the lessee of the food court area which it sublet.

[3] The lease was for a term from 1 August 2000 to 30 November 2003. The particulars in the schedule to the lease identified the respondent as the landlord and gave its address as 14th floor, 215 Adelaide Street, Brisbane. Clause 2.3 provided:

> 'Further Term
>
> (a) If the Tenant:
>
> (i) wishes to have a lease of the Premises granted to it for the Further Term to commence immediately after the Expiry Date;
>
> (ii) gives a notice to the Landlord not more than nine months' (sic) nor less than six months' (sic) before the Expiry Date; and
>
> (iii) at that time and at the Expiry Date is not in default under this lease,
>
> the Landlord will grant to the Tenant a lease of the Premises for the Further Term upon the same provisions as are contained in this lease …'

[4] The particulars defined the further terms as being of five years duration each, the first commencing on 1 December 2003, the second on 1 December 2008, the third on 1 December 2013 and the fourth on 1 December 2018. By Clause 23 no base rent was to be payable by the appellant to the respondent for the first year of the lease. From 1 July 2003 to 31 July 2004 the rent was to be $10,000 per annum. For

the next year it was to be $25,000. In subsequent years it was to be adjusted in accordance with the formula taking as its base increases in the consumer price index. It will be appreciated that these increases in rent would be applicable only in the event that the lease was extended pursuant to Clause 2.3. Otherwise the lease would terminate on 30 November 2003.

[5] By Clause 18.2 it was agreed that the appellant might serve a notice on the respondent:

> '(b) By delivering, posting or faxing it to the landlord's address in the Particulars or any other address notified by the landlord to the tenant.'

Clause 18.1 provided that all notices required by the lease must be in writing.

[6] The action raised for determination one point of fact only. It was whether the appellant had given notice to the respondent pursuant to Clause 2.3 within the time stipulated in that clause expressing its wish that it be granted a lease for a further term of five years.

[7] The trial judge found that notice had not been given and made a declaration to that effect. The appellant challenges the finding and attacks the reasoning that led to it.

[8] The trial judge delivered a judgment of admirable conciseness and comprehension. His Honour found:

> '5. Mr Lindsay Sinclair, the sole director of the (appellant), swears that he delivered a written notice of exercise of option to the business premises of the (respondent) in the Marina Mirage Centre on the morning of 28 May 2003. The (respondent) denies receiving any notice of exercise of option … on or prior to 31 May 2003.
>
> 6. Mr Sinclair … was reminded by his diary entry of 31 May 2003 'that the option letter still had to be done'. … he asked his son James to prepare the notice for him. That was done on 27 May.
>
> 7. On the morning of 28 May 2003 he consulted the latest invoice received …, ascertained that $11,278.97 was outstanding and wrote out a cheque for that amount. … He then … went to the (respondent's) office, spoke to a receptionist at the front desk and asked to see Amanda Burling, the (respondent's) Centre manager. He was told that Mrs Burling was in the Centre somewhere and was not available, whereupon he put the envelope containing the notice of exercise of option on the counter above the receptionist's desk saying "Can you give this to Amanda?". The envelope did not have a name on it and Mr Sinclair did not see the receptionist take the envelope or place a date stamp on it.
>
> 8. Mr Sinclair then asked if he could see Russell Purchase, the (respondent's) accountant. Mr Purchase came out "fairly

quickly" to the reception area. Mr Sinclair … gave him a cheque made out to the (respondent) in the sum of $11,278.97 on account (of) outgoings owing under the lease. … It is common ground that on payment of that sum the (appellant) was no longer in breach of any obligation under the lease to pay moneys.

9. This was the first time he had been up to date with outgoings under the lease and he paid them "for the purposes of the notice to exercise the option".

10. **Jane-Marie Doody** was the (respondent's) receptionist … She … had not met Mr Sinclair before the occasion on which he came into the office, introduced himself and said he had a cheque for "Russell". She was expecting Mr Sinclair to come into the office around that time, having been told by Mrs Burling that he might do so in order to exercise the option … Her recollection is that Mr Sinclair said nothing about an option, that in response to a request by Mr Sinclair she telephoned Mr Purchase's extension and told him Mr Sinclair was at reception. Mr Purchase then came out and spoke to Mr Sinclair. She … did not accept any envelope from Mr Sinclair.

11. **Amanda Burling** had responsibilities for … managing the Centre generally. She was the senior employee … On 28 May 2003, on returning to the office … she was told by Mr Purchase that Mr Sinclair had brought in a cheque. On the next day she was given a phone message which Mr Sinclair had left with Mrs Doody requesting that either she or Mr Purchase return the call. She asked Mr Purchase to do this. She did not see the document purporting to be a notice of exercise of option by the defendant until … 19 June …

12. **Mr Purchase**, the (respondent's) administration manager … on the morning of 28 May 2003 … received a telephone call from Mr Sinclair who requested copies of invoices … Mr Purchase arranged for the invoices to be left in an envelope at reception. Later in the day, in response to a call from Mrs Doody, he went to … reception where Mr Sinclair gave him a cheque and left. Mr Sinclair did not give him anything else and the exercise of option was not mentioned. He noticed that Mr Sinclair was carrying a cheque book or a cheque book folder but nothing else.'

[9] It is necessary to refer to some other facts found by the trial judge but they can be summarised.

[10] On 18 June 2003 Mrs Burling and Mr Sinclair spoke by telephone. Both of them made a note of the conversation. Mrs Burling's note was that Mr Sinclair:

> '… said he dropped in a letter to take up his option when he paid the cheque …. (to) which I replied "We did not receive any letter …

> only a cheque". He … replied he gave it to Russell …, I replied that he did not give any letter to Russell, only a cheque. (Mr Sinclair) then said he had given it to the receptionist …, I replied he did not give the receptionist any letter. He then said "Well, I'll drop in a copy … tomorrow". … I repeated … "No letter was ever received".'

[11] Mr Sinclair's note was made on 24 June after he and Mrs Burling spoke a second time. His reads:

> '… I said on the 18th when we were speak I ask you if you had receive the notice. You said no. I said I will drop in another copy. Amanda said that okay. I also said the notice was given to either Russell when I gave him the cheque or left at the front desk when I was asking for Russell. I said to you on the 18th have you asked Russell and you said … I don't want to talk to you any more …'

[12] The next day, 19 June, Mr Sinclair gave an envelope to another of the respondent's employees with a request that she give it to Mrs Burling. The envelope contained a document in these terms:

> 'MIRAGE RESORT HOLDINGS PTY LTD
> 27th May, 2003
>
> Please be advised that Brellen Pty Ltd gives notice to you that we wish to have our lease at the Mirage Premises renewed for a further term – commencing 1st December, 2003.
>
> Lindsay Sinclair'

[13] Mr Sinclair signed the document above his name. It bears a date stamp, 'Received 19 June 2003'.

[14] On 24 June 2003 Mr Sinclair and Mrs Burling again spoke on the telephone. Mrs Burling made a note of their conversation immediately afterwards. This is the conversation after which Mr Sinclair made a note of their earlier conversation. According to Mrs Burling's note:

> 'After a lengthy pause he said "Why would I bring a cheque in on the 28 or whenever if I wasn't staying?" And I said "Because the amount was outstanding and required to be paid." (This particular conversation was repeated twice.) I repeated again that the amount was outstanding and that I wasn't a mind reader and that I had no idea of what he was thinking. (Mr Sinclair) … started to ramble … I said we did not receive any letter and that the debt was outstanding. He then said when we spoke on the 18th … I was very precise when I said we had not received any letter, which I agreed that was right, as I would in any case a tenant had said they had left a letter and we had not received it. He then changed his story and said I said on the phone that it was okay to drop a copy of the letter the next day … which I replied I said no such thing and that I had made a file note of our conversation … (Mr Sinclair) asked if Ric Cameron was in the office the Thursday he dropped in the cheque … I said no …'

[15] On 15 August 2003 Mrs Doody was engaged in a task that required her, from time to time, to work in an inner office and to leave the reception desk, at which she

normally sat, unattended. During the afternoon the doorbell to the reception area rang several times but when Mrs Doody went to respond to whomever had come no-one was there. It was not unusual for the bell to be set off by people walking in and then out of the reception area. 16 August 2003 was a Saturday. Mrs Doody went to her office 'to catch up on some work'. While she was there she was either at her desk or the front door was locked. At the end of the day she tidied her desk. In so doing she found an unmarked envelope behind her computer monitor. She opened it and found an original letter dated 27 May 2003 signed by Mr Sinclair. It was identical in terms to the notice given to the respondent by Mr Sinclair on 19 June.

[16] Mrs Doody tidied her desk at the end of every working day. Her computer monitor is a small flat screen so it was 'relatively easy to see if there (was) anything behind it.' Significantly her desk was equipped with that computer monitor only on 13 June 2003. Prior to that her monitor was of the older, bulkier type which occupied more of her desk top and behind which a letter may have remained unobserved. The envelope, found on 16 August, was not on the desk when the old computer was removed and the new one installed on 13 June.

[17] The trial judge's findings of fact in relation to this incident were:

> 'It is possible, although not probable, that an envelope which fell behind the original computer monitor might not be noticed for some days. It is highly improbable that an envelope which fell behind the new computer monitor would not have been discovered by Mrs Doody within a few days of that happening. It is even less probable that if the envelope had been behind or under the old computer monitor it would not have been discovered when that monitor was removed and the new one installed.
>
> … The placing of the notice … behind the computer by Mr Sinclair or someone at his request is … rather odd. From an evidentiary viewpoint, it would have been preferable for the defendant to assert delivery of the notice on 28 May and contend that it had been mislaid by the plaintiff. There was also the difficulty of finding a location for the bogus notice in which it would be possible for it to be undetected for days, but where it would nevertheless be found within the space of a few weeks.
>
> In this regard, the plaintiff is assisted by the fact that the replacement of the computer was unknown to Mr Sinclair but (known) to Mrs Burling, Mrs Doody and Mr Purchase …
>
> I find also that the purported notice of exercise of option found behind the computer monitor … on 16 August … was not placed there by an employee of the (respondent) and that it was not in the … office prior to the installation of the computer monitor …'

[18] The appellant had argued before the trial judge that the notice was given to the respondent as Mr Sinclair asserted and then given by Mrs Doody to Mrs Burling who kept it until 16 August when she arranged for it to be 'found'. The trial judge rejected the submission. His Honour thought that Mrs Burling 'had little to gain personally from taking such an extreme and risky measure', and that 'despite

hoping that the (appellant) would not exercise its option there is no evidence that Mrs Burling cast about for ways of justifying the eviction of the defendant.'

[19] The appellant's evidence was that the original notice dated 27 May 2003 was prepared by Mr Sinclair's son, James on a home computer which Mr Sinclair had bought for the use of his two teenage sons, James' younger brothers. Mr Sinclair himself was said to be completely unskilled in the use of computers. Mr James Sinclair gave evidence that in May 2003 he had paid a visit to his father at the Gold Coast. During his stay he was asked to prepare a document giving notice of the exercise of option of the lease. He made a note of what the document should contain and prepared a draft on the computer using the word processing program. He printed a copy which he showed to his father who suggested some changes to layout though not to the content. He returned to the computer where he made the requested changes and then printed a number of copies. In cross-examination he confirmed that he left the computer on, and the draft document on the screen while he took the printed draft to his father, waited for him to finish a telephone call and then returned to the computer to make the changes and print the documents in final form. He estimated the task took him about 20 to 25 minutes.

[20] The computer on which the notice was prepared was examined by experts for both sides. His Honour found:

> 'On 18 October 2003, well after the solicitors for the (respondent) gave notice … that they wished to inspect the computer …
>
> - A new software program was installed on the computer;
> - A document precisely in the form of the notice of exercise of option was created, probably by transferral from a disc onto the computer;
> - The clock on the computer was wound back to 27 May so that that date would appear as the date of creation of the notice; and
> - Something was done to the computer which erased any trace, with a few minor exceptions, of any prior use of the computer.
>
> Additionally, the uncontested evidence is that the computer's system log indicates that the computer was not used between 30 January 2003 and 1:09 pm on 27 May 2003 despite the evidence of frequent use during this period.'

[21] There is ample evidence to support these findings which were not contested by the appellant. The explanation advanced was that one of Mr Sinclair's younger sons and a friend activated the computer after they knew it was to be examined in order to erase recordings of music which they had downloaded from the internet, in breach of copyright. Neither of the young men was called to give evidence. Mr Sinclair said that his son suffered from a medical condition but no corroboration was provided and it was not shown that the condition would have prevented his testifying. The friend's absence was explained on the basis only that it would have been 'embarrassing' to call him.

[22] The evidence of the experts was that the document dated 27 May 2003 was prepared in a short space of time, about three minutes.

[23] It was possible for the recorded music to have been deleted from the computer files without affecting any other of its records. The examination by the experts, the details of which do not matter, show that the document dated by the computer at 27 May 2003 was created on the computer some time between 7.10 and 8.41 pm on 18 October 2003. It should also be noted that there was some initial reluctance by the appellant to make the computer available for inspection.

[24] This evidence went only to Mr Sinclair's credit. It did not prove that a notice of exercise of option was not created on the computer on 27 May 2003. It said nothing about whether a notice was delivered to the respondent on 28 May. It is, with respect, clearly right to describe the evidence as 'curious'. Counsel for the respondent was right to describe the evidence as important. On 18 October 2003 the computer was used to create a notice identical to that served on 19 June but made to appear as if it had been created on 27 May 2003. There was no need for that to have occurred if all that was desired was the deletion of files of illicitly recorded music. The two persons said to be responsible for the operation of the computer on 18 August were not called as witnesses and no convincing explanation for their absence was advanced.

[25] Finally it is appropriate to record some of his Honour's impressions of the significant witnesses. His Honour said:

> 'Mrs Doody and Mr Purchase were both careful witnesses and I find their evidence to be generally reliable.
>
> I did not find Mr Sinclair to be a credible witness generally. In particular, I do not accept his explanations concerning the computer and the failure to call witnesses who could explain what was done in that regard.
>
> The curious conduct surrounding the computer casts doubt on the accuracy of Mr James Sinclair's evidence. …
>
> Mrs Burling was subjected to a skilful and lengthy cross-examination. Although the cross-examination persuaded me that some aspects of Mrs Burling's evidence needed to be approached with caution, she was not shown to be duplicitous or dishonest. On the contrary, I concluded that Mrs Burling was attempting to give an honest account of events and that it was highly unlikely that she would engage in conduct of the nature of that attributed to her by the defendant.
>
> Mrs Burling … was reluctant to make concessions and was somewhat combative in her approach but these matters do not necessitate the conclusion that her evidence was generally reliable. I am satisfied that her diary notes of 18 June and 24 June … are substantially accurate.'

[26] The case presented for decision by the trial judge was a simple one. It turned upon one question of fact, the ascertainment of which involved to a large extent an assessment of credit.

Despite the difficulties which such a case has traditionally been thought to give rise, the appellant contended, in considerable detail, that the findings of the trial judge should be set aside and the judgment should be entered for the appellant in the form of a declaration that notice was given in time. Alternatively it is argued that there should be a retrial at which the appellant would seek to present a supplementary case that the court should relieve the appellant from the consequences of its failure to give notice, should that finding be repeated, on the ground that the respondent had acted unconscionably.

[27] The thrust of the argument in support of the primary relief sought by the appellant is that the findings of fact and credit made by the trial judge are demonstrated to be wrong by a considerable amount of what was said to be 'incontrovertible evidence'. Alternatively it was argued that the findings of fact were not made by reference to an assessment of the credibility of the witnesses and the Court of Appeal should itself rehear the action on the recorded evidence. Detailed submissions were advance as to why, in that event, there should be a finding that the notice was given on 28 May.

[28] The submission in support of the alternative relief, that there be a retrial, was that the trial judge failed to give sufficient reasons for his findings of fact so that the trial process had miscarried. It was submitted that the trial judge omitted from consideration significant part of the evidence pointing to dishonesty on the part of Mrs Burling.

[29] The appellant's first contention will fail if it does not make good its point that the trial judge ignored incontrovertible or uncontested evidence which convincingly indicated that Mr Sinclair did give the notice on 28 May.

[30] Before dealing with the submissions on fact it is appropriate to recall the applicable principles. They were recently restated by the High Court in *Fox v Percy* (2003) 77 ALJR 989. In their joint judgments Gleeson CJ, Gummow J and Kirby JJ said:

> '23. … On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share.
>
> 25. Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing (their) own inferences and conclusions, though (they) should always bear in mind that (they have) neither seen nor heard the witnesses, and should make due allowance in this respect". …

> 26. … a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not. The three important decisions in this regard were *Jones v Hyde*, *Abalos v Australian Postal Commission* and *Devries v Australian National Railways Commission*. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.
>
> 28. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
>
> 29. That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached if the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case …'

[31] McHugh J made the same point with greater firmness. His Honour said:

> '87. There is nothing in *Warren v Coombes* that is inconsistent with *Abalos* or *Devries* …
>
> 88. Thus, *Warren* was concerned with the approach of an appellate court in drawing inferences from facts admitted or found by the trial judge. *Abalos* and *Devries* were concerned with the approach of an appellate court where the trial judge had made a finding as the result of accepting the oral evidence of a witness that other evidence contradicted. The distinction between the two classes of case is fundamental and almost always decisive. It was recognised by this Court …
>
> "The authorities have made clear the distinction which exists between an appeal on a question of fact which depends upon a view taken of conflicting testimony, and an appeal which depends on inferences from uncontroverted facts." …
>
> 90. It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise … that it may be done. But there must be something that points

> decisively and not merely persuasively to error on the part of the trial judge in acting on his … impressions of the witness …'

[32] This case is of the first kind described by McHugh J. It was said, of such cases, in *Devries* (which it should not be necessary to point out was approved in *Fox v Percy*) by Brennan Gaudron and McHugh JJ (479)

> '... a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".

[33] The appellant tries to put its case in the category of those in which undeniable, objective, facts conflict with the findings of a trial judge based upon assessments of credibility. The 'incontrovertible facts' occupy seven pages of written submissions. An examination of those pages shows the facts to be lacking in 'incontrovertibility', and not to be inconsistent with the findings. The points come down to these:

(a) The respondent had a financial interest in the appellant not extending the term of its lease. For a reason which will be mentioned in more detail later the respondent was receiving inadequate returns from the areas let to the appellant.

(b) The appellant was an unsatisfactory tenant. He consistently failed to pay outgoings due under the lease. There was personal antipathy between Mr Sinclair and Mrs Burling.

(c) The respondent and, in particular Mrs Burling, therefore had a motive to bring the appellant's tenancy to an end.

(d) The appellant had a strong financial incentive to renew the tenancy and to remain in occupation.

(e) The respondent's filing system in the Centre manager's office had a number of deficiencies. There was no consistent practice for filing correspondence. There was no uniform order in the manner in which files were kept and no index of what documents were in each file. There was no system of recording the receipt of correspondence or renewal notices.

(f) Mrs Burling was aware immediately after 31 May that the appellant had not renewed its lease. On 3 June she made an entry in her diary of tenancies that were or would become vacant in the near future. The appellant's area was not included, indicating that Mrs Burling appreciated the appellant would continue to occupy it.

[34] None of the matters summarised from the appellant's list is inconsistent with the findings of fact made by the trial judge. They are matters that bear upon the findings his Honour ultimately made but, save for the last, they were all considered and evaluated in the reasons for judgment. His Honour accepted that Mr Sinclair intended to exercise the option in time. He accepted that the respondent would have preferred him not to. His Honour approached the single issue of fact on the basis that there was no corroborating documentary evidence about whether the notice was given on 28 May or not. That is, he had regard to the evidence concerning the state of the respondent's files. The trial judge concluded that the respondent's desire not to have the appellant as a tenant did not cause Mrs Burling to conceal or destroy the notice and to lie about what she had done.

[35] None of these 'facts' unequivocally postulates that the notice was given on 28 May. What is meant by the term "incontrovertible facts" may be seen from *Fox v Percy* itself. There was a collision between a horse and its rider and a motor vehicle. The rider was injured. Both she and the driver contended that she was on the correct, left hand side of the road at impact. The plaintiff's companion, who was also riding, corroborated her testimony. The case was one of word against word except that, after the collision the motor vehicle was on its correct side of the road and a lengthy skid mark it left was entirely on its correct side of the road. This fact was ignored by the trial judge who preferred the testimony of the riders. The uncontroverted facts advanced are not of that character. They do not prove, or tend to prove, the fact in issue. They go only (i) to suggest a motive for a course of action; (ii) to explain why the notice might have been overlooked; and (iii) to provide a basis for disbelief in Mrs Burling.

[36] The last fact in the list, the diary entry, is of the same character as the document in issue in *Devries* in which an accident compensation form completed by the plaintiff gave a version of events inconsistent with the plaintiff's testimony at trial. The statement in the claim form was said not to be an "established fact" (see 477) rather it was an admission which could be used to discredit the testimony of the person who made the statement. According to the High Court:

> "The question for the judge was whether he should accept the plaintiff's oral evidence or whether the accounts in the claim form ... threw such doubt on the ... evidence that it should not be accepted."

It must also be remembered that the diary entry was made by Mrs Burling who was not directly involved in the factual dispute arising from the events of 28 May. The critical witnesses were Mr Sinclair, Mr Purchase and Mrs Doody. Mrs Burling's testimony was peripheral. If a diary entry were taken to be conclusive proof that Mrs Burling knew that notice had been given prior to 31 May then Mrs Doody must have given it to her and must have lied or been mistaken when she swore that she did not receive it. The trial judge accepted her evidence.

[37] At best for the appellant Mrs Burling's diary entry is an admission by her that she did not anticipate that the appellant's area would be available for letting at the expiry of the term on 30 November 2003. It would follow that she knew or believed that the option had been exercised. Mrs Burling gave an explanation. She said that she had made a list in her diary of the tenancies which had become vacant or which she anticipated would soon become vacant, and in respect of which she was actively working to secure replacement tenants. Three days after the expiration of the period in which the appellant had to exercise his option, and six months

before it would have to vacate the premises, she was not 'actually currently working' on finding a replacement tenant for the food court. She explained that she was not prepared to conclude that the appellant's area would become vacant until she had spoken to the respondent's solicitor. She said that she 'had no intentions of acting on anything to do with Eat Street (the appellant's area) until … he was well and truly out of his option period …'

[38] The trial judge did not deal with this part of the evidence in his reasons. Given his opinion of Mrs Burling's testimony, that she attempted to give an honest account of events, we should conclude that her explanation should be accepted. It is not, on its face, implausible.

[39] The case is not one in which the findings of facts are inconsistent with facts incontrovertibly established or are glaringly improbable. That is enough to dispose of the appellant's primary submission but, in my opinion, the appellant has not shown that the findings are 'against the probabilities of the case.' The findings conform to those probabilities.

[40] The appellant complains that the trial judge described Mr Purchase and Mrs Doody as careful witnesses. It accepts that they were honest but cavils at the finding that they were reliable. The real attack was upon Mrs Doody. She gave evidence that she had a reason for remembering that Mr Sinclair had not given her a notice of renewal. The reason was that she had been advised that he might deliver such a notice and she was to look out for it. The trial judge remarked upon this evidence. The criticism is that Mrs Doody gave 'no less than three written and signed statements without referring to that event …', so that she 'could not in any circumstances be described as 'careful.' Really there were only two statements. The first was dated 19 June 2003, the day Mr Sinclair gave the 'second' notice. In an 11 line statement Mrs Doody recounted Mr Sinclair's attendance at her office on 28 May. Her statement concluded 'I did not accept anything from Mr Sinclair.' The next statement is dated 17 July 2003. It, too, is short and is almost identical in content. It contains a further sentence 'I have never seen a notice from Brellen Pty Ltd exercising an option under its lease.' The third statement consists of the second statement to which is added an account of the events of 16 August.

[41] The appellant's point is one that had to be weighed in assessing whether Mrs Doody's evidence should be accepted. There is no reason to think the trial judge did not give it consideration. The point does not demand that the evidence be rejected. It was a matter to be weighed, having regard to all the other evidence which the trial judge heard and observed. It was for the trial judge to determine in light of all the evidence whether to accept Mrs Doody's testimony. It is the very sort of finding an appellate court should not disturb unless it can be convincingly demonstrated that it was wrong. Casting some doubt upon Mrs Doody's explanation for remembering a fact, about which she was adamant, is not to disprove the fact or to demonstrate convincingly that the trial judge was wrong to accept the fact.

[42] It is, as the trial judge pointed out, inconceivable that Mr Sinclair would not have taken particular care with respect to the delivery of the notice, if in fact he gave it on 28 May. He would have handed it to Mr Purchase when he gave him the cheque. He would have mentioned that what he was handing over was a notice of exercise of

the option. He would probably have asked for a receipt. He would not have left an unaddressed envelope on the receptionist's desk top where it might be overlooked.

[43] The notice put on Mrs Doody's desk between 13 June and 16 August 2003 is tantamount to an admission by the appellant that he did not give notice on time. The trial judge found the notice was not put on the desk by any of the respondent's employees. Although his Honour refrained from so finding it must be the case that it was put there by Mr Sinclair, or at his instigation. It was clearly meant to corroborate his account that he had left the notice in an unaddressed envelope on 28 May. It was an act of deception by Mr Sinclair which the trial judge could take into account when deciding who to believe between Mr Sinclair, Mrs Doody and Mr Purchase.

[44] If Mrs Burling were as determined in her dishonesty as the appellant's submissions describe, she would have destroyed the notice, not put it where it appeared to add corroboration to Mr Sinclair's account of delivering it. There was no record of it ever having been delivered. Moreover the trial judge reasoned that Mr Sinclair's conduct subsequent to 31 May was inconsistent with his having given notice on 28 May. His Honour noted that in their conversation of 18 June Mr Sinclair first asserted that he had given the notice to Mr Purchase but, when faced with a firm challenge 'he put forward the receptionist' as the recipient. As well the second conversation of 24 June was 'more consistent with the conclusion that Mr Sinclair was seeking a way around failing to exercise the option than with reliance on a duly given notice. If Mr Sinclair had given … notice … within time … he would have aggressively and forcefully asserted his rights without the peripheral argument about payment of arrears and production of a copy of the notice …'

[45] Another probability is that mentioned by the trial judge. It is extremely unlikely that Mr Sinclair would have forgotten how he delivered the notice to the respondent on 28 May, given the importance he attached to it. Yet, three weeks later, on 18 June, when he spoke to Mrs Burling he equivocated, saying initially he gave it to Mr Purchase, and then to the receptionist. There can be no doubt about this. It is recorded in both Mr Sinclair's and Mrs Burling's notes of the conversation.

[46] The evidence that the appellant's computer had been tampered with was convincing evidence, as the trial judge found, damaging to Mr Sinclair's credibility.

[47] The only probability in favour of the appellant was that Mr Sinclair intended to exercise the option before the end of May and paid the arrears of outgoings so as to be entitled to exercise the option. It is, therefore, puzzling why he did not do so. In April 2003 Mr Sinclair engaged the services of Mr Chapman, an experienced shopping centre manager, for advice about managing the appellant's tenancy from the respondent and the sub-tenancies it had granted. Mr Chapman met Mr Sinclair on 21 May 2003. He was shown a copy of the appellant's lease which he reviewed 'there and then' and advised Mr Sinclair 'he had to exercise his option to renew the lease … by 30 May 2003 …' Mr Chapman advised Mr Sinclair that he 'would have to notify the lessor in writing that he would be exercising the option.' Mr Chapman offered to attend to the matter himself but Mr Sinclair said he would attend to it. Mr Chapman drew Mr Sinclair's attention specifically to the terms of Clause 18(2)(b) of the lease which, it will be recalled, required notice to be given to the respondent at its address in Brisbane. Mr Sinclair would have acted inconsistently with Mr Chapman's advice if he had delivered the notice to the respondent's office at Marina

Mirage. It is possible that he intended to post or fax the notice to the respondent in Brisbane, but overlooked doing so.

[48] The appellant's subsidiary argument was that there should be a retrial because the trial judge had not given sufficient reasons for his decision. This came down to a complaint that the reasons for judgment do not deal with two aspects of Mrs Burling's evidence which it was submitted showed her to be dishonest. I have dealt with one already. It is the evidence concerning her diary entry for 3 June.

[49] The second aspect concerned a schedule of the tenancies in the Marina Mirage Centre. It was prepared on a computer spreadsheet by Mr Purchase but from information given him by Mrs Burling. Relevantly entries for the appellant's tenancy were wrong. It showed the lease was for a period from 1 December 1998 to 30 November 2003, a five year term with three options to extend, each of five years. The original base rent under the lease was said to be $211,326 per annum. The schedule showed that no rent was currently being paid but that there would be a rent review on 1 December 2000 and that the rent was to be increased by five per cent. It is correct that when the schedule was prepared the appellant was not obliged to pay rent, as it showed. Every other item in the schedule concerning the appellant was wrong. The information related to a previous lease made between appellant and respondent during the course of which there had been litigation between them. That resulted in a compromise pursuant to which the lease commencing on 1 December 1998 was terminated and the lease in question was entered into. It provided for the moratorium on rent which I mentioned when summarising the terms of the lease.

[50] The point of all this is that the tenancy schedule was provided by the respondent to its valuers. They may have concluded from the erroneous entries that the appellant's tenancy was yielding, and would yield in the future, greater returns than the lease in fact provided for. This would, perhaps, if the valuers did not confirm the information from other sources, bring about an inflated valuation of the shopping centre. This in turn is said to prove that Mrs Burling deliberately falsified the information in order to mislead the valuers. The consequence is, so it is said, that Mrs Burling was convincingly shown to have been dishonest and that her testimony should have been rejected. Because the trial judge did not deal with this argument the reasons are deficient.

[51] The appellant's submissions should not be accepted for a number of reasons. The first is that the evidence goes only to Mrs Burling's credit. Her testimony was peripheral to the single issue in the case. The point has already been rehearsed. Mr Sinclair said he left the notice on Mrs Doody's desk. He did not say he gave it to Mrs Burling. The conflict, which the judge resolved, was between Mr Sinclair and Mrs Doody. It was not between Mrs Burling and Mr Sinclair. Even if the trial judge were satisfied that Mrs Burling was thoroughly dishonest (and his Honour was not so satisfied) it would not assist the appellant's case. The witness whom the appellant had to discredit was Mrs Doody, and it accepted that she was honest (though it said she was mistaken).

[52] The evidence, which the trial judge was said to have overlooked, was neither central nor critical to the case. It concerned the credit of an incidental witness.

[53] Moreover it is by no means clear that the tenancy schedule was prepared by Mrs Burling in order to deceive the valuers. For it to achieve that purpose the valuers would have had to rely upon the schedule to the exclusion of the lease documents themselves. If regard were had to those primary source documents the error in the schedule would be discovered. We were given an extract from the valuation said to be tainted by the schedule. It is apparent from the page supplied that the valuer knew of the litigation and knew that the rent was to be increased in line with inflation, as the lease provides. The schedule suggested there would be a fixed increase of five per cent. This suggests that the valuers had the leases, which may suggest that the schedule was not meant to deceive them.

[54] The evidence is inconclusive. It is insufficient to support a finding of attempted deception. In any event it went only to an attempt to discredit Mrs Burling. Her evidence went only to surrounding circumstances, and not to the central issue of fact. The reasons for judgment cannot fairly be criticised for omitting reference to this evidence.

[55] The relevant legal principles are clear enough. In *Mifsud v Campbell* (1991) 21 NSWLR 725 Samuels JA said (728):

> '… it is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case.'

[56] In *Beale v Government Insurance of NSW* (1997) 48 NSWLR 430 Meagher JA said (443):

> '… reasons need not necessarily be lengthy or elaborate … The scope of the reasons to be given is … related "… to the function to be served by the giving of reasons". Accordingly, the content of the obligation is not the same for every judicial decision. No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it …'

[57] In *Kiama Constructions Pty Ltd v Davey* (1986) 40 NSWLR 639 it was held that the judicial duty to give reasons does not extend to evidence which is supplementary or ancillary in nature and is not critical to an issue in the case.

The real point is, as Meagher JA pointed out in *Beale*, that a failure to give sufficient reasons leads to a real sense of grievance in the losing party who does not know or understand why the decision was made and why it lost. The obligation to give reasons which can be subjected to appellate criticism promotes rationality in decision making and reduces any tendency towards impulsiveness.

[58] The application of these principles to the present shows that any complaint of inadequacy in the reasons is without foundation. The trial judge explained carefully why he did not believe Mr Sinclair's account of delivering the notice. He dealt with all of the evidence relevant to that issue, which was the only issue in the case. His Honour cannot be criticised for not dealing with all the evidence going only to the credit of the witness whose testimony was not critical to the outcome.

[59] There remains only the appellant's submission that there should be a new trial so that it can argue it is entitled to be relieved against the forfeiture of its estate in the land. The obstacles facing the appellant on this front are insurmountable. *First* it did not seek such relief at the trial. It was the defendant in an action for declaration that the lease had not been renewed. It brought no action of its own for relief from forfeiture nor did it counter-claim in the respondent's action. Any entitlement to relief must have a factual basis but no such basis was identified in any pleading or investigated at a trial to determine whether, the law permitting, the appellant should be relieved from the consequences of its inaction. *Res judicata* and/or *Anshun* estoppel stand in the appellant's way.

[60] *Secondly* the law is against the appellant. It calls in aid s 128 of the *Property Law Act* 1974 but that section, by its terms, has no application to a case where a lessee omits to give notice. If the words of the section were not sufficiently clear there is a decision of this court, *Rock Bottom Fashion Market Pty Ltd v HR & CE Griffiths Pty Ltd* [1998] Q Conv R 54-505 affirming the judgment of Williams J in 1997 ANZ Conveyancing Report 374 at 381 that:

> 'The section clearly does not operate where the option has not been exercised in accordance with the provisions of the option clause relating to time and manner of exercise.'

The appellant indicated that it wished to change the correctness of those decisions but it cannot do so where it has not litigated any facts relevant to the exercise of any power to give relief. In any event I would respectfully agree with the decision in *Rock Bottom*. The terms of s 128(4) plainly exclude a case where a lessee simply does not purport to exercise the option within the time specified in the lease.

[61] *Thirdly* the only factual basis identified by the appellant as indicating unconscionability in the respondent's conduct is that if the appellant is not allowed to renew its lease the respondent will gain the economic benefit of the improvements which the appellant made to the demised premises during the term of the lease. The value is said to be considerable and would give the respondent a 'wind fall'. The recent decisions of the High Court, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 77 ALJR 1853 and *Romanos v Pentagold Investments Pty Ltd* (2003) 77 ALJR 1882 suggest that the receipt of a wind fall by a contracting party consequent upon the strict performance of the terms of the contract do not, by itself, make insistence on the contract unconscionable.

[62] I would dismiss the appeal with costs to be assessed.

[63] **McMURDO J:** The ultimate issue for determination by the trial judge was the factual one of whether a notice of exercise of the option was left at the respondent's Gold Coast office on 28 May 2003. Mr Sinclair said that he left such a notice within an envelope which he put on the counter above the receptionist's desk as he said, "Can you give this to Amanda?" Amanda is Mrs Burling, who said that she

did not receive it. The receptionist is Mrs Doody, who said that it was not left with her. There was no suggested hypothesis that the notice was given to Mrs Doody but not passed on to Mrs Burling. Accordingly, there was a conflict between the evidence of Mr Sinclair and the evidence of Mrs Doody and Mrs Burling. The trial judge resolved this conflict against the appellant. This was a finding of fact substantially depending upon an assessment of the credibility of Mr Sinclair and Mrs Burling, as well as the reliability of the evidence of Mrs Doody whose credibility was not challenged.

[64] This rehearing of the case must then be according to the principles discussed in the reasons of Chesterman J, and in particular according to what was said by Brennan, Gaudron and McHugh JJ in *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479. In this case, the appellant submitted, in effect, that the ultimate result is "glaringly improbable" or as it was put in its written argument, the result is "entirely at odds with common sense and the ordinary course of human affairs". Further, the appellant made a number of submissions to the effect that the trial judge failed to use or misused his advantage by overlooking the significance of the evidence in several suggested respects.

[65] Contrary to the appellant's submission, the probabilities of the case are not at all against the ultimate result. The evidence shows a plausible explanation as to why Mr Sinclair, whilst intending to exercise the option on 28 May, would not have delivered the required notice whilst at the respondent's Gold Coast office on that day. The reason is that Mr Sinclair had been clearly advised that the notice was not to be delivered at that place, but was to be sent to another address in Brisbane. In the appellant's case, evidence was given by Mr Chapman, who was a professional consultant to the appellant in relation to this lease and its sub-tenancies. In April 2003, Mr Chapman advised Mr Sinclair that to exercise the option, the appellant needed to do two things. The first was to bring its account up to date with its landlord, the respondent. The second was to give a notice specifically according to cl 18.2(b) of the lease, the terms of which Mr Chapman recalled discussing with Mr Sinclair. By cl 18.2, the tenant could give a notice to the landlord by delivering, posting or faxing it "to the landlord's address in the Particulars or any other address notified by the landlord to the tenant". The address in the Particulars is not where Mr Sinclair said he left the notice, but is a Brisbane address. When Mr Sinclair called upon Mr Purchase at the respondent's Gold Coast office, obtained confirmation from him of the amount outstanding and gave Mr Purchase a cheque for that sum, he was acting in accordance with Mr Chapman's advice. But had he left the notice at that address, he would have been acting inconsistently with the advice. At this point he had until the end of that week in which to give the notice as he had been advised. There is a real likelihood that he then neglected to do so, and this is no less likely than Mr Sinclair's version that he left the notice with Mrs Doody, saying nothing about it to Mrs Doody or to Mr Purchase during his discussion with him and without asking for some acknowledgment of receipt of the notice. The inherent likelihood of Mr Sinclair's having delivered the notice to the Gold Coast address has to be understood in the context of his having been advised that it was required to be sent elsewhere.

[66] The other matter which to my mind is of particular significance in assessing whether the ultimate finding was so improbable is the appearance of the notice behind the computer behind the computer on Mrs Doody's desk on 16 August. The evidence of the installation of this computer well after 28 May, the evidence from

the photographs of that desk and Mrs Doody's evidence that she kept this desk tidy at all times excluded any reasonable prospect that the notice found on 16 August had been there from 28 May. It was not suggested that Mrs Doody had herself misplaced the envelope and not given it to Mrs Burling, but when realising her mistake, had pretended to discover it on 16 August. Nor was there a reasonable hypothesis that some unidentified person had come into possession of the envelope, after its alleged delivery on 28 May, and had seen fit on 16 August to put it where Mrs Doody then found it. The only suggested possibilities were that Mr Sinclair put it or caused it to be put there on or about 16 August, or that, as the appellant suggested, Mrs Burling then put it there. Neither suggestion attributes any good sense to the person involved, but whilst the respondent's suggestion is credible, the appellant's suggestion is not. In Mr Sinclair's position by 16 August, to leave the notice where he had claimed to have left it on 28 May is explicable by a certain level of desperation and self-justification. However, it seems inconceivable that Mrs Burling, who was strongly disputing receipt of the notice and keen to be rid of the appellant as a tenant, would do something in the nature of creating some evidence to support Mr Sinclair's assertion. Once the possibility that Mrs Burling surreptitiously left the notice to be found by her receptionist is excluded, the only remaining possibility is that Mr Sinclair put it there. Strictly speaking of course, that is not to say that he had not left a notice already on 28 May but it is highly unlikely, given his actions of 16 August, that he had done so.

[67] The extensive submissions for the appellant that the trial judge misused his advantage and acted inconsistently with the evidence are thoroughly assessed in the reasons of Chesterman J and I agree with his Honour's reasons for rejecting them. I wish to add to that analysis two things in relation to the appellant's criticism that the trial judge failed to give adequate reasons. The first is that the giving of reasons must be weighed against other considerations of the kind which Meagher JA described in *Beale v GIO of New South Wales* (1999) 48 NSWLR 430 at 444, where his Honour said:

> "On the one hand, the provision of inadequate reasons can lead to a sense of injustice and a reduced appreciation or understanding of legal rights and obligations. On the other hand, an overly onerous duty to provide reasons increases costs and delay in the judicial system which has the effect of undermining public confidence in the judicial system. … In the end, the balancing act which needs to be undertaken in considering the sufficiency of a statement of reasons involves the adoption of, at the least, a minimum standard which places the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal."

The relevance of delay in the giving of a judgment was particularly significant in the present case, where the case received an expedited hearing as a commercial cause, and was tried in November ahead of the expiry of the original term of the lease at the end of that month. This judgment was delivered on the day after the completion of a five day trial. In my view, there would be no basis for criticism of the extent of those reasons even in a case requiring less expedition, but in the circumstances of this case, the appellant's criticism is even more difficult to accept.

[68] The second point in relation to the extent of the reasons concerns the submission that any matter not specifically addressed in the trial judge's reasons should be regarded as a matter which his Honour overlooked. An example is Mrs Burling's

diary entry of 3 June. Taken alone, this was not some unequivocal admission that the appellant had exercised its option. It was a document which had the potential to advance the appellant's case, and it certainly provided a reasonable basis for testing Mrs Burling's evidence by cross-examination. But Mrs Burling explained why there was no reference to the appellant's tenancy in her note, an explanation which is discussed by Chesterman J and which is inherently credible. The document had to be considered by his Honour, but it did not require Mrs Burling's evidence to be rejected, and nor would it have cast substantial doubt upon her evidence. The suggestion that it should be inferred that his Honour overlooked the evidence of this diary note lacks force when the relative importance of the document in the context of all of the other evidence is understood. Although in a particular case the absence of a reference to some evidence might give rise to an inference that it was overlooked, that is an inference which will or will not be drawn according to the particular case.

[69] Upon this appeal, the appellant argued two further matters which were not advanced at the trial. The first is that the appellant should be given relief under s 128 of the *Property Law Act* 1974 (Qld). The second is that the appellant has an equitable entitlement to be relieved against the consequence of its failure to exercise the option.

[70] The case in reliance upon s 128 challenges the correctness of this Court's decision in *Rock Bottom Fashion Market Pty Ltd & Ors v H R & C E Griffiths Pty Ltd* (1998) Q Conv R ¶54-505, where it was unanimously held that s 128 does not provide a power to relieve a lessee against the consequence of its failure to exercise an option to purchase or renew the lease in accordance with the terms of the option. In that case, a lease was granted for a term expiring on 31 October 1996 with three options to renew. The lease provided for the first of those options to be exercised by a written notice given not more than six months nor less than three months prior to the expiry of the original term. The lessee relied upon three events, each being said to constitute an exercise of the option, but none of which occurred within the three month period allowed. That was enough to conclude that the option was not duly exercised, although there were other difficulties in the lessee's case from the fact that one of the events did not involve writing and another was not by its terms an exercise of the option. The principal judgment was given by Dowsett J with whom Pincus JA and Helman J relevantly agreed. At p 60,065, Dowsett J said:

> "… Section 128(1)(b) appears expressly to exclude from the benefit of the section a breach of the option provision in question. That sub-section provides:
>
> 'A reference to a breach by a lessee of the lessee's obligations under a lease containing an option is a reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of this Act insofar as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.'
>
> Thus, a breach of the lessee's obligations under a lease for the purposes of the section must consist of conduct which would constitute a breach if there were no option provision in the lease. In other words, for the purposes of the section, one must exclude the option provision in determining whether or not there has been a breach. There can therefore be no relief from the consequences of failing to comply with the provisions of the option."

[71] The appellant's submission criticised this passage as involving "an unduly wide construction of s 128(1)(b)" and as being "contrary to the policy of the legislation". As to its policy, the appellant emphasised that s 128 is a remedial provision and was not to be interpreted narrowly. Accepting that is so however, the terms of s 128, and in particular of s 128(1)(b), are unambiguous and I respectfully agree with the decision in *Rock Bottom* that they provide no power to relieve the lessee against its own failure to exercise its option.

[72] The appellant made a further submission to the effect that its default in the exercise of the option was one of form. It says that it purported to exercise the option, but failed to observe what it says was the formal requirement for a notice to be served according to cl 18. In its submission, the non-observance of such a formal requirement is "a breach by the lessee of the lessee's obligations under a lease", even if a failure to do anything in purported exercise of the option is not. That submission also must be rejected. In the present case, there was no purported exercise of the option, and Mr Sinclair's delivery of a cheque to Mr Purchase involved no more than the appellant paying what was due. In any case, the distinction between the requirement that the option be exercised by a certain date and what are said to be requirements of form is not at all suggested by the terms of s 128.

[73] A further submission is that there should be a retrial to consider whether the appellant should be given some equitable relief, to the ultimate end of being allowed to exercise the option outside the agreed time. The appellant suggests that this case is given "some additional force" by the decision in *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57. One of the reasons why that submission cannot be accepted is that the factual basis for this claim for equitable relief has not been pleaded or sought to be established at the trial, and accordingly, is not the subject of findings by the trial judge. Insofar as the claim would be based upon mistake or accident, it would be a case which is inconsistent with the factual case advanced at trial and upon this appeal, which is that in truth appellant did give a notice by delivering it on 28 May. In the absence of a factual basis for the claim, it is unnecessary and inappropriate to explore the basis in principle for such a claim and in particular whether it could be characterised as a claim for relief against forfeiture.

[74] I would dismiss the appeal with costs to be assessed.