

SUPREME COURT OF QUEENSLAND

CITATION: *Neray Holdings Pty Ltd v Spina* [2009] QSC 40

PARTIES: **NERAY HOLDINGS PTY LTD ACN 009 706 245**
(applicant)
v
**ALBA MARIA SPINA, JENNIFER FORBES,
GEOFFREY ULLMAN**
(respondents)

FILE NO: 12725/2008

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 2 March 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 18 December 2008

JUDGE: Wilson J

ORDER: **1. The court declares that the rent payable during the first year of the renewed term of the lease between the applicant and the respondents is to be determined by an independent valuer to be agreed by the parties or failing agreement within seven (7) days of the date of this order, to be appointed by the President for the time being of the Queensland Division of the Australian Property Institute.**

2. Costs reserved

CATCHWORDS: LANDLORD AND TENANT – RENEWALS AND OPTIONS – RENT PAYABLE FOR RENEWED TERM – where applicant is a lessor of commercial building – where respondents are lessees of part of the building – where respondents exercised option to renew lease for three years – whether rent payable for first year of renewed term should be determined by an independent valuer in accordance with clause 14 of lease

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600, cited
Gollin & Co Ltd v Karenlee Nominees Pty Ltd (1983) 153 CLR 455, cited
GR Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd (1991) 24 NSWLR 80, cited
Trustees of Henry Smith v A.W.A.D.A. Trading and Promotion Services Ltd (1984) 47 P & CR 607, cited
United Scientific Holdings Ltd v Burnley Borough

Council [1978] AC 904, cited
Wing Crawford Holdings Ltd v Lion Corporation Ltd (1989)
 1 NZLR 572, cited

COUNSEL: LD Bowden for the applicant
 DJ Campbell SC for the respondents

SOLICITORS: James Byrne & Rudz for the applicant
 Byrne Legal Group for the respondents

- [1] **Wilson J:** The applicant is the lessor of a commercial building in Holland Park, Brisbane. The respondents, who are medical practitioners, are lessees of part of the ground floor. The original lease was for three years from 14 February 2005 to 13 February 2008. The respondents exercised their option to renew the lease for three years commencing 14 February 2008. There is a dispute between the parties about the rent payable for the first year of the renewed term.
- [2] Clause 14 of the lease contains the option for renewal and continues -
- “(a) ... The rent for the first year of the renewed term will be such sum as may be mutually agreed upon between the Lessor and the Lessee but if they are unable to reach agreement within fourteen (14) days prior to the commencement of the renewed term, then the rent for the first year of the renewed term will be determined under Clause 14(b), but will not be less than the rent which would be payable under clause 2(a)(ii) and (iii) as if the first year of the renewed term were a further year of the initial term. The rent so determined (plus GST) shall be payable in advance by equal calendar monthly payments on and from the commencement of the renewed term. If the rent for the first year of the renewed term has not been determined by the commencement date of such term, the Lessee will continue to pay the monthly payment payable during the last month of the preceding year, until determination, and within seven (7) days after determination, the Lessee will make up the shortfall.
- (b) In the event that the parties fail to agree upon rent in accordance with Clause 14(a) the rent will be determined by a registered valuer agreed upon by the parties or failing agreement within seven (7) days after the date of expiration of the time referred to in that clause then by an independent registered valuer to be appointed by the President for the time being of the Queensland Division of the Australian Property Institute and such determination shall be made by him as an expert and not as an arbitrator. The valuer's costs will be borne by the parties equally. The rent so determined shall not be less than the rent which would be payable under Clause 2(a)(ii) and (iii) as if the first year of the renewed term were a further year of the initial term.

(c) The rent for the second and each subsequent year of the renewed term will be adjusted and paid in the manner prescribed in Clause 2(a)(ii)-(iv) inclusive.”

[3] The initial term ended and the renewed term commenced without the parties discussing the rent payable during the renewed term. The respondents continued to pay rent at the same rate as they had been paying under the original lease. Then on 4 June 2008, approximately five months after the commencement of the renewed term, the applicant wrote to the respondents referring to the exercise of the option and seeking a meeting "to discuss the rent for a market review". Correspondence ensued, in which the battle lines were clearly drawn, the applicant asserting that the rent is to be determined in accordance with clause 14(b) and the respondents asserting that that clause is inapplicable because the parties agreed upon the rent.

[4] By clause 2 of the original lease the rent for the first year of the three year term was \$57,600 (excluding GST) and on each anniversary of the commencement date it was to be adjusted to the greater of -

"A. the annual rent immediately before such anniversary multiplied by the Current CPI and divided by the Previous CPI;

and

B. the annual rent immediately before such anniversary increased by TWO PERCENT (2%)".

Such an adjustment was to take effect from the anniversary of the commencement date of the term. In other words, the lease contained a mechanism for an annual rent review, which might benefit either the lessor or the lessee. Recognising that the adjustment might not have been actually made by the anniversary date, the parties went to on to provide that in those circumstances -

"... the lessee will continue to pay the monthly payments of the previous year until adjustment and within seven (7) days after adjustment the lessee will make up the shortfall or the Lessor will repay the Lessee any overpayment, as the case may be."¹

That provision is consistent with the rebuttable presumption that time is not of the essence of the exercise of a right given by provision for rent review during a subsisting term.²

¹ Clause 2(a)(iv).

² See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904; *GR Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80; *Trustees of Henry Smith v A.W.A.D.A. Trading and Promotion Services Ltd* (1984) 47 P & CR 607; *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455.

- [5] Upon the exercise of an option to renew, a new contract comes into existence; there has to be agreement as to rent for the renewed term, or an agreed mechanism for arriving at it.
- [6] In this case the notice of exercise of option had to be given at least three and not more than six months before the expiry of the original term. The parties had until 14 days before the commencement of the renewed term to agree upon the rent. In the absence of agreement within that time, clause 14(b) came into play. The rent was to be determined by a registered valuer, and the parties were allowed seven days "after the expiration of the time referred to in .. clause [14(a)]", ie seven days after the commencement of the renewed term, to agree upon a registered valuer. In the absence of agreement upon a registered valuer in that time, he or she was to be appointed by the President of the Queensland Division of the Australian Property Institute.
- [7] Senior counsel for the respondents submitted that at the time of renewal the parties agreed that the rent for the renewed term should be the same as that paid in the original term. He submitted that the agreement was evidenced by the acceptance of rent at the old rate and the non-invocation of the mechanism in clause 14.³
- [8] I am unpersuaded that the parties reached such an agreement.
- [9] The absence of agreement on the quantum of the rent within 14 days before the commencement of the renewed term is expressly contemplated in clause 14 (a), which directs the parties to clause 14(b). The latter provides for the rent to be determined by an independent registered valuer, and deals expressly with what should happen in the absence of agreement upon a valuer within seven days of the commencement of the renewed term. The only inaction not expressly contemplated is not having the President of the Queensland Division of the Australian Property Institute nominate a valuer. The lease does not cast expressly an obligation on either party to approach the President, and in the circumstances there is an implied obligation on both parties to do so, as part of their implied obligation to do all that is necessary to give efficacy to the terms of the clause.⁴
- [10] Further, it is expressly provided in clause 14(a) that if the rent for the first year of the renewed term is not determined by the commencement date, then until it is determined the respondents are to continue to pay at the rate applicable during the last month of the preceding year, and within 7 days of its being determined, they are to make up the shortfall. Thus the payment and receipt of rent at the same rate as had been paid under the original term is consistent with the scheme of clause 14.

³ Transcript of proceedings on 18 December 2008, p 1.16 Cf. Submissions of the Respondents, para 20.

⁴ *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600. See also, in the context of a rent review clause, *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 467.

- [11] Counsel for the applicant submitted that "time is not of the essence of the rent review procedure set out in clause 14".⁵ Clause 14 is conceptually different from a rent review clause. Clause 14(a) grants the respondents an option to renew and goes on to provide that the rent during the renewed term shall be as agreed or in default of agreement as determined under clause 14(b). Clause 14(b) is a default mechanism applicable where the parties fail to reach agreement on the rent within 14 days prior to the commencement of the renewed term. Unlike a rent review clause, which provides for adjustment of the rent during an existing term and sets a timetable of steps to be taken to that end, clause 14 does not give either party a right for its benefit or protection during a subsisting term. There is a rebuttable presumption that time is not of the essence of the exercise of a right given by a rent review clause,⁶ but that presumption has no application to clause 14.
- [12] Counsel for the respondents submitted that the words and tenor of clause 14 are to be construed strictly, and that on their proper construction any dispute regarding the quantum of rent is to be raised by the applicant (or the respondents) within 14 days prior to the commencement of the renewed term. He submitted that any other construction would not give effect to clause 14(b), which requires the appointment of an independent valuer within seven days "after the expiration of the time referred to in that clause" - a reference to the 14 day period mentioned in clause 14(a).⁷
- [13] Time is expressly of the essence of all obligations of the respondents.⁸ Counsel for the respondents submitted -

“18. The time periods set out in clause 14 amount to time stipulations which are binding on all parties. To this extent they are time periods binding on the lessor despite clause 17. Clause 17 does not exempt the lessor from compliance with properly set time limits under the lease.

19. To find otherwise:

- (a) gives no effect to clause 2 which sets out a mechanism for an increase in rent;
- (b) would mean that a lessor could wait until effectively the end of a lease period (or after it have expired) before deciding to have a rent review which would affect the rent paid for the whole of the leased period. That does not give commercial efficacy or certainty to an agreement and should not be implied.”

⁵ Outline of Submissions on behalf of the Applicant, para 17.

⁶ See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 930 per Lord Diplock, at 950 per Lord Salmon; *GR Mailman & Associates Pty Ltd v Wormwald (Aust) Pty Ltd* (1991) 24 NSW LR 80; *Trustees of Henry Smith v A.W.A.D.A. Trading and Promotion Services Ltd* (1984) 47 P & CR 607 at 619 per Slade LJ; *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 468-469, 472-473 per Mason, Murphy, Brennan, Deane and Dawson JJ. See also *Wing Crawford Holdings Ltd v Lion Corporation Ltd* (1989) 1 NZLR 572.

⁷ Submissions of the Respondents, para 17.

⁸ Lease, clause 17.

- [14] I do not accept these submissions.
- [15] There is no obligation to agree on the rent, either within 14 days of the commencement of the new term or at any time, and the continuation of rent at the old rate is clearly intended as an interim measure, the respondents being liable for any shortfall once a determination under clause 14(b) has been made. Similarly, there is no obligation to agree on the identity of the valuer who is to determine the rent, either within seven days of the commencement of the renewed term or at any time.
- [16] As I have already explained, clause 2 is concerned with rent adjustment during the subsistence of a term. Because clauses 2 and 14 have quite different operations, rejection of the respondents' argument as to the essentiality of time in clause 14 would not deprive clause 2 of any effect. There is no question of the applicant's being able to delay unduly "before deciding to have a rent review". The parties have agreed that the rent should be determined by an independent valuer, the only restriction being that the rent so determined shall not be less than what would be payable under the rent adjustment provisions in clause 2 if the first year of the renewed term were a further year of the original term. In a case involving competing contentions as to the time for the exercise of a right or the fulfilment of an obligation, the commercial implications of that happening well into a renewed term may be a relevant consideration in ascertaining the contractual intention of the parties - although there may be other countervailing considerations. But this is not such a case.
- [17] There is no question of waiver or estoppel on the facts, and none was argued.
- [18] I have concluded that the rent payable during the first year of the renewed term is to be determined by an independent valuer to be appointed by the President for the time being of the Queensland Division of the Australian Property Institute. I will hear the parties on the form of the order and on costs.

Addendum

- [19] The parties agreed on the form of the order, but not on costs. They will provide written submissions on costs.
- [20] Therefore, the Court should order as follows –
1. The court declares that the rent payable during the first year of the renewed term of the lease between the applicant and the respondents is to be determined by an independent valuer to be agreed by the parties or failing agreement within seven (7) days of the date of this order, to be appointed by the President for the time being of the Queensland Division of the Australian Property Institute.

2. Costs reserved.