

SUPREME COURT OF QUEENSLAND

CITATION: *Ace Property Holdings P/L v Australian Postal Corp* [2010] QCA 55

PARTIES: **ACE PROPERTY HOLDINGS PTY LTD**
ACN 076 383 410
(appellant)
v
AUSTRALIAN POSTAL CORPORATION
(respondent)

FILE NO/S: Appeal No 9383 of 2009
SC No 9691 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 18 November 2009

JUDGES: Keane JA and Fryberg and Douglas JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal allowed**
2. The declaration and order made at first instance be set aside and in lieu thereof, it be ordered that the application be dismissed
3. Australia Post pay Ace's costs of the proceedings, at first instance and on appeal, to be assessed on the standard basis

CATCHWORDS: LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – WHAT CONSTITUTES ASSIGNMENT, SUBLETTING, ETC – where the appellant was the lessor of a property leased by the respondent – where the respondent had agreed under the lease to "only sublet or licence or otherwise part with possession of the Premises with the consent" of the lessor – where the respondent allowed a wholly owned subsidiary to carry on business on the property – where the wholly owned subsidiary contracted on its own behalf, employed its own employees, and had factual possession of the property – where the appellant was not fully aware of the circumstances of possession by the wholly owned subsidiary until trial – whether the respondent had breached the agreement not to part with possession of the Premises without the consent

of the appellant – whether the respondent had breached the agreement not to sublet the property without the consent of the appellant – whether the respondent had breached the agreement not to licence the property without the consent of the appellant

LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – LESSOR'S CONSENT – OTHER MATTERS – where the respondent argued that the appellant could not unreasonably withhold consent – where the appellant was unaware of the circumstances of the alleged parting of possession – whether the appellant had consented to the respondent's actions

LANDLORD AND TENANT – AGREEMENTS FOR LEASE – BREACH – where respondent had agreed under the lease to "not carry out work to the Premises without" the lessor's approval – where the respondent allowed its wholly owned subsidiary to carry out substantial renovation works – where the appellant had some knowledge of the renovation works that were to take place – where the appellant did not object to the works taking place – whether the respondent breached the lease – whether the appellant was estopped from terminating the lease for breach of the agreement not to undertake renovations without consent – whether the appellant was estopped from terminating the lease for breach of the agreement not to sublet, licence or part with possession of the Premises – whether the appellant had waived the right to terminate the lease

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – RELIEF AGAINST FORFEITURE – RELIEF UNDER STATUTE – GENERALLY – where the respondent claimed relief against forfeiture under s 124(2) of the *Property Law Act* 1974 (Qld) – whether the respondent should be granted relief against forfeiture

Property Law Act 1974 (Qld), s 124, s 124(1), s 124(2)

Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, applied

Akici v LR Butlin Ltd [2006] 1 WLR 201; [2005] EWCA Civ 1296, distinguished

Austotel Pty Ltd v Franklins Self-Serve Pty Ltd (1989) 16NSWL 582, considered

Callaghan v Callaghan (1995) 64 SASR 396; SASC 5064, cited
Chaplin v Smith [1926] 1 KB 198, cited

Clarence House Ltd v National Westminster Bank PLC [2009] 1 WLR 1651; [2009] EWCA Civ 1311, cited

Federal Commissioner of Taxation v United Aircraft Corporation (1943) 68 CLR 525; [1943] HCA 50, cited

Freshmark Limited v Mercantile Mutual Insurance (Australia) Limited [1994] 2 Qd R 390; [\[1993\] QCA 222](#), applied

Friend v Brooker (2009) 239 CLR 129; [2009] HCA 21, cited

Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641; [1937] HCA 58, applied

Hendry v Chartsearch Ltd [1998] CLC 1382; [1998] EWCA Civ 1276, cited

Hotel Terrigal Pty Ltd (in liq) v Latec Investments Ltd (No 2) [1969] 1 NSW 676, cited

J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419; [2002] UKHL 30, cited

Lam Kee Ying Sdn Bhd v Lam Shes Tong [1975] AC 247, considered

Lee v Lee's Air Farming Ltd [1961] AC 12, cited

Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11, applied

Macaura v Northern Assurance Co Ltd [1925] AC 619, cited
Millenium Productions Ltd v Winter Garden Theatre (London) Ltd [1946] 1 All ER 678, cited

Nashvying P/L & Ors v Giacomi [\[2007\] QCA 454](#), applied

Radaich v Smith (1959) 101 CLR 209; [1959] HCA 45, cited

Salomon v A Salomon & Co Ltd [1897] AC 22, cited

Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, applied

Shiloh Spinners Ltd v Harding [1973] AC 691, cited

Smith, Stone & Knight Ltd v Birmingham Corporation [1939] 4 All ER 116, cited

State of Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28, cited

Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, cited

The Commonwealth v Verwayen (1990) 170 CLR 394; [1990] HCA 39, cited

United States v Milwaukee Refrigerator Transit Co, 142 Fd 247, 255 (1905), cited

Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387; [1988] HCA 7, cited

COUNSEL: R A Perry SC for the appellant
J C Bell SC, with M D Martin, for the respondent

SOLICITORS: Herbert Geer for the appellant
ClarkeKann Lawyers for the respondent

- [1] **KEANE JA:** The appellant, Ace Property Holdings Pty Ltd ("Ace"), is the lessor, and the respondent, the Australian Postal Corporation ("Australia Post"), is the lessee, of the whole of the land and buildings at 100 Victoria Street, West End ("the Premises"). The lease commenced in October 1998, and the term of the lease was extended in late 2001 until February 2007 with an option in Australia Post for a further term of five years. This option was exercised by Australia Post in October 2006.
- [2] In February 2003 Decipha Pty Ltd ("Decipha") became involved in the occupation of the Premises. Since December 2003 Decipha has been a wholly-owned subsidiary of Australia Post.

- [3] From late 2004 until October 2006 Ace and Decipha and Australia Post engaged in negotiations regarding proposed renovations to the Premises. The renovations were necessary to accommodate an expansion of the activities to be carried out in the Premises by Decipha. The renovation works commenced in September 2006 and were completed by January 2007.
- [4] On 27 August 2008 Ace gave Australia Post a notice to remedy breaches of covenant pursuant to s 124 of the *Property Law Act* 1974 (Qld). The breaches of the lease asserted by the notice related to the use and occupation of the Premises by Decipha, the carrying out of renovations to the Premises without Ace's approval, and the non-payment of legal costs incurred by Ace in connection with the lease.
- [5] Australia Post brought an application in the Trial Division of the Supreme Court in defence of its continued entitlement as lessee of the Premises. The application proceeded as if it had been commenced by a claim.¹ It came to trial in April 2009. The principal issues at trial were whether:
- (a) the current use of the Premises was not permitted by the lease;
 - (b) the circumstances of Decipha's occupation of the Premises were such that Australia Post had parted with possession of the Premises without Ace's consent; and
 - (c) the renovations were carried out without Ace's approval.

Australia Post contended that it was not in breach of the lease in any respect and, if it was, Ace was estopped from relying upon those breaches or had waived them. Alternatively, Australia Post claimed relief from forfeiture under s 124(2) of the *Property Law Act*.

- [6] On 30 July 2009 the learned trial judge declared that Australia Post had not breached the lease save in relation to the carrying out of the renovations without Ace's approval. In this regard, her Honour declared that Ace was estopped from asserting that Australia Post had breached the lease.
- [7] Her Honour held that the circumstances of Decipha's occupation of the Premises did not involve a breach of covenant by Australia Post. The circumstance that Decipha was the wholly-owned subsidiary of Australia Post was of central importance in relation to this issue.
- [8] On appeal to this Court Ace challenges the learned trial judge's conclusions, arguing that the current use of the Premises was not permitted by the lease, that Decipha's occupation of the Premises, the full circumstances of which were not known to Ace until the trial of the action, involved a breach of the lease, and that Ace is not estopped from relying on the carrying out of the renovations in 2006 to 2007 without the approval required by the lease as a ground for terminating the lease.
- [9] Australia Post supports the decision of the learned trial judge and seeks, in the alternative, to sustain the judgment on grounds advanced in a notice of contention to the effect that:
- (a) if Australia Post parted with possession of the Premises to Decipha;
 - (i) it did so with the consent of Ace; or
 - (ii) Ace unreasonably withheld its consent; or
 - (iii) Ace is estopped from relying upon such breach to forfeit the lease;

¹ *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [9].

- (b) if Australia Post used the Premises contrary to the permitted uses in the lease;
 - (i) Ace consented to that use; or
 - (ii) Ace unreasonably withheld its consent; or
 - (iii) Ace is estopped from relying upon such breach to forfeit the lease;
- (c) if Ace is otherwise entitled to forfeit the lease, Australia Post should be granted relief from forfeiture.

[10] Before there can be any meaningful discussion of the arguments which were agitated in this Court it is necessary to have an understanding of the terms of the lease and of the material aspects of the somewhat complicated dealings between the parties which culminated in the issue by Ace of the notice to remedy breach of covenants. The findings and conclusions of the learned trial judge can then be considered in light of the arguments which were developed by the parties on the hearing of the appeal.

The lease

[11] The lease commenced on 1 October 1998. It was initially for a term of four years.

[12] The purpose for which the Premises could be used was originally specified in cl 6.1 as follows:

"[Australia Post] must use the Premises only for the purpose of conducting the business of warehousing, storage, equipment testing, research and development of mail sorting equipment or such other use as approved by [Ace] which approval will not be unreasonably withheld."

[13] In late 2001 the parties agreed to the extension of the term of the lease until 28 February 2007, with an option in Australia Post for a further term of five years. In these negotiations, Ace was represented by its managing director, Mr Homewood. Australia Post was represented by Mr Allan. The option was exercisable no later than 28 November 2006.

[14] The agreement for an extension of the lease was struck in conjunction with an agreement in an exchange of correspondence in October and November 2001 which included Ace's consent to the use of the Premises for "warehousing, storage, equipment testing, research and development of mail sorting equipment and mailroom solutions operations".

[15] In early 2002 Ace caused the renovations which had been agreed to be carried out. A business unit of Australia Post described as Post Mailroom Solutions occupied the half of the Premises which were renovated. The other half of the Premises was occupied by the engineering and research unit of Australia Post.²

[16] The subject of dealings with the Premises by Australia Post was regulated by cl 7 of the lease:

"7.1 [Australia Post] may only sublet or licence or otherwise part with possession of the Premises with the consent of [Ace].

7.2 [Australia Post] may only transfer this Lease if, before it transfers:

² [2009] QSC 199 at [3] – [4].

- 7.2.1 [Australia Post] satisfies [Ace] who must act reasonably, that the proposed new lessee is respectable and financially sound;
- 7.2.2 the proposed new lessee signs a deed (in a form reasonably required by [Ace]) in which the new lessee:
- 7.2.2.1 agrees to be bound by this Lease as if it were [Australia Post];
- 7.2.2.2 acknowledges that it must comply with the obligations of [Australia Post] under this Lease, even if those obligations relate to a period before the proposed transfer takes effect;
- 7.2.3 a guarantee or guarantee and indemnity as reasonably required by [Ace], is provided by the directors of the transferee company;
- 7.2.4 [Australia Post] has obtained the consents it has agreed to obtain;
- 7.2.5 all defaults by [Australia Post] have been remedied by [Australia Post] or waived by [Ace];
- 7.2.6 [Australia Post] and the proposed new lessee comply with all [Ace's] reasonable requirements;
- 7.2.7 [Australia Post] pays [Ace's] reasonable legal costs of and incidental to the transfer and the giving of its consent to the transfer and any investigations carried out by [Ace] in relation thereto.

..."

- [17] The subject of works by Australia Post on the Premises was regulated by cl 9 of the lease:

"9.1 [Australia Post] must not carry out work to the Premises without [Ace's] approval.

If [Ace] gives approval it may, when giving it, impose conditions to apply when [Australia Post] vacates the Premises, including specifying:

9.1.1 which parts of the Premises need not be reinstated and which parts must be;

9.1.2 which items of [Australia Post's] Property installed as part of the work may not be removed.

9.2 [Australia Post] must ensure that any work it does, including work under clause 9.3, are done:

- 9.2.1 by contractors reasonably approved by [Ace];
- 9.2.2 in a proper and workmanlike manner;
- 9.2.3 in accordance with plans, specifications and schedule of finishes required and approved by [Ace];
- 9.2.4 in accordance with the law and the requirements of Relevant Authorities;
- 9.2.5 in accordance with [Ace's] reasonable requirements and directions.

...

- 9.4 Subject to the provisions of clause 9.5, [Australia Post] must keep the Premises in good and tenantable repair and condition throughout the term.
- 9.5 [Australia Post] need not carry out structural work unless it is required because of use of the Premises or as a result of the act, neglect or default of [Australia Post] or of [Australia Post]'s agents. The obligations of [Australia Post] as set out in clause 9.4 do not apply to damages as a result of fair wear and tear, war, civil commotion or Act of God. When determining whether the Premises or part of the Premises require repair or replacement regard must be made to the condition of the Premises at the Commencement Date."

- [18] Clause 13.3 of the lease permitted Ace to terminate the lease:
"by giving [Australia Post] notice or by re-entry if [Australia Post] does not comply with an obligation under this Lease and [Australia Post] does not remedy the non-compliance within a reasonable time after [Ace] gives [Australia Post] a notice under section 124 of the *Property Law Act 1974*."
- [19] It is convenient here to note the relevant terms of s 124 of the *Property Law Act 1974* (Qld):
 - "Restriction on and relief against forfeiture**
 - (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice—
 - (a) specifying the particular breach complained of; and
 - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
 - (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same;

and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay reasonable compensation to the satisfaction of the lessor for the breach.

- (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action (if any) or in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit.
- (3) The making of an application under this section shall not of itself be construed as an admission on the part of the lessee—
- (a) that any such notice as is mentioned in subsection (1) has been served by the lessor; or
 - (b) that any such breach as is mentioned in subsection (1) has occurred or that any right of or cause for re-entry or forfeiture has accrued or arisen;

and the court may, if it thinks fit, grant relief without making a finding that, or arriving at a final determination whether, any such notice has been served, or any such breach has occurred, or that any such right has accrued or cause arisen."

[20] Clause 17 of the lease provided for the payment by Australia Post of various costs associated with the lease. Of relevance in this case were:

"· [Ace's] legal costs incurred by [Ace] as a consequence of any default or breach of the provisions of this Lease by [Australia Post]".

[21] Clause 18 of the lease provided:
"CONSENT

In all cases where, pursuant to this Lease, the doing or executing of any act, matter or thing by [Australia Post] is dependent upon the consent or approval of [Ace], such consent or approval shall not be unreasonably or capriciously withheld."

[22] Clause 22 of the lease provided relevantly as follows:

"22.1 A notice or approval must be:

22.1.1 in writing;

22.1.2 left at or posted to the address of the party to whom the notice or approval is to be given or sent by facsimile."

- [23] It may be noted here that "approvals", as in cl 6.1 or cl 9.1, were expressly required to be in writing whereas no such requirement related to the "consent" required by cl 7 of the lease.

The history of the parties' dealings with each other

- [24] Decipha was incorporated in April 2002 as a joint venture company in which Australia Post was a shareholder. From about February 2003, that part of Australia Post's business concerned with Post Mailroom Solutions was taken over by Decipha.³
- [25] In December 2003 Decipha became, and has since remained, a wholly owned subsidiary of Australia Post. Decipha's relationships with its employees are, in the main, outside the industrial relations regime which governs relations between the Australian Postal Commission and its employees. Any employees of Australia Post who were working at the Premises were in a state of "transition" to employment by Decipha. Decipha makes contracts with suppliers and customers on its own account although it is frequently referred to as a business unit of Australia Post.
- [26] Officers of Decipha who gave evidence at trial were Mr Miller and Mr Rosano. I will refer to their evidence insofar as it is material to the issues on appeal in due course.
- [27] Mr Homewood was a director of Ace and its guiding mind and will. An issue at trial concerned the extent to which Ace, through Mr Homewood, knew of the circumstances of Decipha's occupation of the Premises. In this regard, there were some clear indications that Decipha was conducting some activities at the Premises: since late 2005 there was outside the rear entrance of the Premises a large sign "Decipha A Business of Australia Post". Further, email correspondence to Ace from Mr Miller was subscribed "Decipha Pty Ltd". At trial Mr Homewood was taxed in cross-examination with these matters; which were said to have made him aware of Decipha's separate identity and its occupation of the Premises. Mr Homewood's response was that he did not appreciate that Decipha was a separate legal entity carrying on its own business on the Premises and enjoying full control or sole possession of the Premises.
- [28] In late 2004 the parties commenced negotiations in relation to a proposal by Australia Post for renovations to the then unrenovated part of the Premises to allow for the expansion of the operations then being carried on in the renovated part by Decipha in order to accommodate two large x-ray machines.⁴
- [29] In April 2006 Australia Post engaged Five D Holdings Pty Ltd ("Five D"), an unrelated company, to provide property and facilities management services for Australia Post's leasehold and freehold property portfolio. Ace was advised that, as from 3 April 2006, all future communications and notices under the lease should be directed to Australia Post via Five D.⁵ Mr Morley, an officer of Five D, gave

³ [2009] QSC 199 at [5].

⁴ [2009] QSC 199 at [7].

⁵ [2009] QSC 199 at [6].

evidence at trial. His evidence, insofar as it is material to the issues in the appeal, is dealt with in the reasons of the learned trial judge to which I will refer in due course.

- [30] The negotiations proceeded through 2005 and 2006. The negotiations took place, as the learned trial judge found, against the commercial background that each side appreciated that the level of the rent payable under the lease was distinctly favourable to Australia Post. The learned trial judge noted that Australia Post negotiated with a view to preserving the favourable terms as to rent, whereas Ace sought an opportunity to reopen the quantum of rent payable under the lease.⁶
- [31] Decipha's initial preference was to negotiate its own lease or sub-lease of the Premises, but pursuit of that course would have opened up the rent for renegotiation. Accordingly, Australia Post sought to negotiate terms on which Ace would agree to the renovations necessary to accommodate the expansion of Decipha's operations on the Premises. These negotiations progressed in a desultory fashion. It is sufficient to note here that the starting point for the negotiations involved the notion that, as with the earlier renovations, Ace would pay for the work and would earn a return on its outlay by way of an interest component in the rent.⁷ Such an arrangement would allow Ace to supplement the below market rent which it was receiving for the Premises.
- [32] By mid-2006 the deadline of 28 November 2006 was looming for the exercise of the option to extend the lease of the Premises by a new five year term and the negotiations became more intensive and urgent. The learned trial judge found that by 28 June 2006 the parties had agreed upon the scope of the renovation work which needed to be done to accommodate the expansion of Decipha's use of the Premises (the approximate cost of which work had been ascertained), and that Ace would meet the capital outlay required. Her Honour found that Ace was reluctant to conclude the negotiations in relation to the renovations until Australia Post had exercised the extension option and the parties had agreed an interest rate for Ace's expenditure on the renovations and the parties had included the amortisation payments in the rent.⁸
- [33] On 28 June 2006 Australia Post wrote to Ace advising that "Australia Post, on behalf of Decipha wish to continue with the project as originally intended", ie that Ace meet the capital outlay required for the renovations with Australia Post amortising the debt with interest over the term of the lease.
- [34] On 7 July 2006 Ace wrote to Australia Post via Five D:
 "Your client is aware of our client's reservations concerning further expenditure by the landlord as a condition of exercise of option.
 At present, the terms of the lease are highly advantageous to [Australia Post]. As such, the landlord is not prepared to commit to any expenditure which might be a condition of your client's exercise of option unless the provisions for increase in rental on annual review are amended.
 If our client is to outlay funds as currently contemplated, it requires there to be an increase in rent on annual review."⁹

⁶ [2009] QSC 199 at [14]. See also [17] – [18] and [34].

⁷ [2009] QSC 199 at [18].

⁸ [2009] QSC 199 at [26], [28], [30], [38].

⁹ [2009] QSC 199 at [32], [35].

- [35] On 26 July 2006 Australia Post, through Five D, wrote to Ace:
 "[It is Australia Post's] position that they do not wish to lose the current favourable lease terms available to them. Accordingly, it has now been decided that we fund these capital cost improvements, rather than seek the funding through you."
- Five D also suggested a meeting of representatives of Ace and Australia Post to discuss matters such as Ace's consent to the proposed works.¹⁰
- [36] On 28 July 2006 Ace responded that it had "No problem with your request and I understand the position. Happy to catch up next week". No meeting of the kind foreshadowed by Five D occurred.¹¹
- [37] Thereafter, without further notice to Ace, Decipha entered into a contract with a builder for the carrying out of the renovations at a cost of \$396,500.¹² The contractual date for commencement of work was 25 September 2006 and work commenced on or about that date. It may be noted that the contract obliged Decipha to make possession of the Premises available to the builder. Decipha paid the builder for the renovations. It may also be noted here that although Australia Post paid rent for the Premises to Ace, Decipha paid the amount of these rent payments to Australia Post.
- [38] On 27 September 2006 Five D sent an email to Ace attaching plans showing works "to be undertaken at your property by Australia Post at their cost" and requesting Ace's written approval to these works.¹³ From 27 September 2006 Australia Post persistently sought Ace's approval to the carrying out of the renovations. No approval was forthcoming before Decipha proceeded with the renovations.¹⁴ The anxiety of Australia Post and Decipha to proceed with the renovations is understandable; but it is difficult not to regard their conduct as somewhat high-handed.
- [39] I pause here to note that Mr Homewood's evidence at trial was that he did not appreciate that the sole purpose of the renovation was to enable Decipha to expand its business operations to use the whole of the Premises. Mr Homewood was challenged on this in cross-examination. When it was suggested to him that he fully appreciated that the reason for the renovation work was "to enable Decipha to expand its business to use the whole premises", he responded: "Well, it was for Australia Post. I was told in April '05 that it was Australia Post [sic] works." It was then put to him:
 "... I am suggesting to you that the correspondence ... makes it absolutely plain that you fully appreciated that Australia Post would carry on the business of Decipha Pty Ltd as its wholly owned subsidiary, at your premises over the whole of the leased area in the future for the option period."
- Mr Homewood responded: "I didn't know that. They hadn't shared that with me."
- [40] At trial and on appeal, Australia Post were highly critical of Mr Homewood's claim that he "was not privy to [Australia Post's] plans for the use and occupation of the

¹⁰ [2009] QSC 199 at [37].

¹¹ [2009] QSC 199 at [37].

¹² [2009] QSC 199 at [42].

¹³ [2009] QSC 199 at [44].

¹⁴ [2009] QSC 199 at [44], [47], [50], [51].

premises, including to change the role of Decipha from a part use or sharing arrangement with the Applicant, to the sole occupier." As will be seen in due course, the learned trial judge did not consider that Australia Post's attack on Mr Homewood's honesty was warranted.

- [41] It is convenient to make the point here that it is apparent, even from the terms of the questions put to Mr Homewood by Counsel for Australia Post, that the distinction between Australia Post and Decipha was not crystal clear in terms of Australia Post's own case at trial. Thus the cross-examiner spoke of "Australia Post [carrying] on the business of Decipha Pty Ltd ... at your premises." The business which was being carried on at the Premises was indeed the business of Decipha; but, in hindsight, it is difficult to see a sensible basis on which it can be said that Australia Post was "carrying on the business of Decipha". Decipha's business was being carried on by individuals who were employed by Decipha. Those individuals were not employed by Australia Post.
- [42] Much of the difficulty in this case stems from the understandable tendency of the personnel employed by Australia Post and Decipha who gave evidence to pay little attention to the distinct legal status and separate commercial activities of these two entities when these matters were not relevant to the issue of immediate concern in terms of the commercial advantage of their respective employers. Thus, while Decipha's operations in the Premises were deliberately conducted separately from the business of Australia Post in order to take advantage of a different industrial relations regime, there was no advantage to Decipha or Australia Post in disclosing the details of the distinct legal status or business operations of the two entities in their negotiations with Ace and hence little reason to disclose those details. Indeed, it was in Australia Post's commercial interest not to tell Mr Homewood that Decipha had assumed exclusive control of the Premises: to do so might have opened up discussion of a lease to Decipha or of a possible breach of cl 7.1, either of which would have jeopardised Australia Post's beneficial rent. For these reasons, it became a central aspect of the case advanced by Australia Post at trial and on appeal that, insofar as Decipha was in possession of the Premises, it was acting only as the agent or alter ego of Australia Post. On this view of things, reflected in the cross-examination of Mr Homewood referred to above, Decipha did not occupy the Premises in Decipha's own right for the purpose of conducting its own business. That argument has its difficulties, as will be seen, but the point for present purposes is that Australia Post's argument that Mr Homewood knew and understood that Decipha did, in truth, occupy the Premises exclusively for the purposes of conducting its business in its own right is not supported by evidence that Mr Homewood was expressly informed of these matters, and that it is hardly surprising that there is no such evidence.
- [43] It does not test one's credulity unduly to be invited to conclude that Mr Homewood's understanding of the nature and extent of Decipha's occupation of the Premises was opaque. That understanding accorded with the picture which it suited the officers of Australia Post and Decipha to present in their dealings with him. Whether that understanding was accurate is, of course, a different issue; but if Australia Post was happy that the precise circumstances of the relationship between Decipha and Australia Post not be disclosed with crystal clarity, this Court should be slow to reject as unreliable Mr Homewood's evidence that his actual understanding of the true position was less than perfect. As will be seen, the learned trial judge was also not disposed to reject Mr Homewood's evidence on this point.

- [44] Returning to the narrative of the parties' dealings, I note that on 26 October 2006 Australia Post exercised its option for the extension of the lease. The learned trial judge found that, by 1 November 2006, Ace was aware that the renovations had commenced.¹⁵
- [45] Her Honour concluded that Australia Post had breached cl 9.1 of the lease by allowing the renovations to commence without Ace's prior approval. Her Honour went on, however, to hold that Ace's conduct from 1 November 2006, in allowing the renovations to continue at significant expense, estopped Ace from relying upon that breach to terminate the lease.¹⁶
- [46] Negotiations between the parties continued into 2007. Her Honour concluded that:¹⁷
- "... [Ace] was fully acquainted with the breach of the lease, when it negotiated a resolution with [Australia Post] between February and September 2007 as to how those works could be dealt with under the terms of the lease that came into existence on the exercise of the option. If it were necessary to consider waiver, [Ace] unequivocally waived its right to act on the breach of clause 9.1 of the lease".
- [47] On 23 January 2007, when the works had been completed, Ace informed Australia Post that it had engaged solicitors to draw up the amendment to the lease and that it had "inspected the Works and they appear to be fine".¹⁸ Negotiations in relation to the terms of the amendments to the lease ensued.
- [48] After the renovations, the use of the Premises by Decipha for its mail sorting business was more intensive than had previously been the case. It involved the collection by couriers of mail for delivery to government and large corporate customers. And Decipha's mail sorting operation changed to including security screening and scanning.¹⁹
- [49] On 6 September 2007 Ace's solicitors wrote to Five D confirming that "our respective clients have agreed" on all outstanding issues and sought Australia Post's execution of the amendment to the lease document consequent upon the exercise of the option.²⁰ Australia Post executed the document, returned it for execution by Ace and paid Ace's legal costs of the preparation of the amendment as requested.²¹
- [50] The new lease document was never executed by Ace. That was because Five D mistakenly sent to Ace a letter which stated, inter alia:
- "Five D is the Facilities Management provider for Australia Post. Your company currently provides services to Australia Post at the above premises. Australia Post has leased out the premises to Decipha Pty Ltd, a fully owned subsidiary of Australia Post and we would like you to arrange for Decipha Ltd to be responsible for the payment of your services."

¹⁵ [2009] QSC 199 at [55].

¹⁶ [2009] QSC 199 at [101].

¹⁷ [2009] QSC 199 at [101].

¹⁸ [2009] QSC 199 at [57].

¹⁹ [2009] QSC 199 at [81] – [83].

²⁰ [2009] QSC 199 at [62].

²¹ [2009] QSC 199 at [64].

- [51] The learned trial judge found that the lease between Australia Post and Decipha referred to in this letter had not, in fact, been implemented between Australia Post and Decipha and that it "does not amount to evidence that a sublease for the premises had been granted by the [Australia Post] to Decipha."²² Understandably however, Ace, having received that letter, wrote to Australia Post on 8 February 2008 requiring it to seek permission for Australia Post to enter into the sub-lease with Decipha in accordance with cl 7 of the lease.
- [52] On 20 March 2008 Ace's solicitors wrote to Australia Post's solicitors to advise that Ace had not signed the amendment to the lease because Ace was waiting for Australia Post to rectify the issue of sub-leasing the Premises without Ace's consent.²³
- [53] On 4 April 2008 Australia Post's solicitors advised Ace's solicitors that: "Our instructions are that there has been no sub-leasing of the Premises by Australia Post. Australia Post remains the Lessee."²⁴
- [54] By letter dated 23 April 2008 Australia Post's solicitors confirmed to Ace's solicitors that Australia Post, not Decipha, was the lessee of the Premises, that Decipha was a wholly-owned subsidiary of Australia Post which had occupied the Premises or part of the Premises "from the outset". This letter asserted that Ace was aware of Decipha's occupation of the Premises and had previously voiced no objection.²⁵
- [55] Ace's solicitors responded on 30 April 2008 to the effect that Ace's consent to a sub-lease to Decipha had never been sought. They advised that:
- "... our client was aware of the name Decipha Pty Ltd but our client denies that it was ever informed that Decipha's occupation was anything other than as a contractor of, or some other informal relationship with, the tenant, Australia Post."
- Ace's solicitors also asserted that it had come to Ace's attention that the current use of the Premises as a full scale mail sorting centre with increase in vehicular movement exceeded the use permitted under the lease and Ace's consent to the increased usage had not been sought.
- [56] On 29 May 2008 Australia Post's solicitors wrote back to Ace's solicitors in the following terms:
- " ...
3. The premises are used to store and screen Australia Post records and documents prior to their being archived. Mail of government and large corporate clients is also security screened and scanned at the premises. Once cleared, that mail is collected by either Messenger Post or private couriers such as Toll and TNT for distribution to government and corporates.
4. A tender receipt point is also provided for government and tenders received on behalf of government are security screened and scanned.
- ..."

²² [2009] QSC 199 at [66].

²³ [2009] QSC 199 at [68].

²⁴ [2009] QSC 199 at [68].

²⁵ [2009] QSC 199 at [70].

- [57] On 13 June 2008 Ace's solicitors informed Australia Post's solicitors that Ace considered that there had been a change of use of the Premises for which consent had not been sought and requesting Australia Post to seek that consent or to return the use of the Premises to that which was permitted under the lease. Ace also required Australia Post to obtain Ace's consent to Australia Post's parting with possession of the Premises to Decipha. It was proposed that a condition of Ace's consent would be that rent be reviewed to market from the date of the parting with possession.²⁶
- [58] Australia Post's solicitors responded by letter dated 20 June 2008 asserting that Ace had known since 2002 of the nature of the activities conducted by Decipha on the Premises and that there had been no parting with possession of the Premises by Australia Post because Australia Post had appointed Decipha to conduct the business on the Premises on Australia Post's behalf.²⁷
- [59] By letter dated 4 July 2008 Ace's solicitors advised Australia Post's solicitors that Ace was not aware of the details of the activities conducted on the Premises by Decipha, and that, as Decipha was a separate legal entity, Ace required that a deed of consent be executed relating to the possession of the Premises by Decipha.²⁸
- [60] Ace's notice to remedy breach of covenant alleged the following breaches of the lease by Australia Post:
- "1. by changing the use of the premises (as notified by your solicitors Clarke Kann by letter dated 29 May 2008) to the effect that the premises are now used to store and screen Australia Post records and documents prior to their being archived, security screening and scanning of government and large corporate client mail, collection of mail by messengers and couriers for distribution to government and corporate clients, in lieu of the use referred to in clause 6.1, and without the approval of [Ace] having been sought or given;
 2. by leasing, or sub-letting, transferring or parting with possession of the premises in favour of Decipha Pty Ltd without the consent of [Ace] pursuant to clause 7.1 of the Lease, or without satisfying [Ace] in relation to the matters set out in clause 7.2 of the Lease or by providing to [Ace] any deed as therein provided;
 3. by carrying out work to the premises in 2006 and 2007 without [Ace's] approval as provided for in clause 9.1 of the Lease and, contrary to clause 9.2 of the Lease, without ensuring the work was done by [Australia Post]:
 - (a) by contractors reasonably approved by [Ace];
 - (b) in accordance with the plans, specifications and schedule of finishes required and approved by [Ace];

²⁶ [2009] QSC 199 at [72].

²⁷ [2009] QSC 199 at [72].

²⁸ [2009] QSC 199 at [72].

- (c) in accordance with the law and requirements of the Relevant Authorities; and
 - (d) in accordance with [Ace's] reasonable requirements and directions; and
4. by refusing to pay [Ace's] costs of \$2,941.71 (per tax invoice dated 1 July 2008) in the time provided for under clause 13.2.1 of the Lease and having [Australia Post]'s solicitors Clarke Kann write to [Ace's] solicitors by letter dated 28 July 2008 denying any requirement to meet those costs and requesting that [Ace] withdraw the invoice."

[61] It is convenient to note here, in relation to the allegation of breach of cl 7.1 of the lease, that the allegation in Ace's notice to remedy breach of covenant was not cast in the language of cl 7.1 of the lease. In particular, there was no complaint that Australia Post had granted Decipha a licence in respect of its occupation of the Premises. In consequence of both s 124(1) of the *Property Law Act* and cl 13.3 of the lease Ace was not then (and is not now) in a position to terminate the lease by virtue of the granting of a licence by Australia Post to Decipha to occupy the Premises. Nevertheless, at trial the parties litigated the issue as to whether Australia Post had contravened cl 7.1 of the lease by granting a licence to Decipha in respect of the Premises. Ace asserted, and Australia Post denied, that Australia Post had granted Decipha a licence in respect of the Premises without Ace's consent. The learned trial judge did not decide this issue.

[62] On Ace's behalf it is said that, if Australia Post breached cl 7.1 of the lease by granting a licence to Decipha to occupy the Premises, then this Court should say so even though Ace may not be in a position immediately to terminate the lease on that ground because it has not yet complied with s 124(1) of the *Property Law Act* and cl 13.3 of the lease.

The conclusions of the learned trial judge

[63] The learned trial judge's conclusions in relation to the breaches of the lease alleged by Ace were that:

- (a) the use of the Premises notified by Australia Post's solicitors on 29 May 2008 was permitted by cl 6.1 of the lease as modified by the agreed addition of "mail sorting operations";²⁹
- (b) the occupation of the Premises by Decipha did not involve "sub-letting, licensing or otherwise parting with possession" of the Premises so as to contravene cl 7.1 of the lease;³⁰
- (c) the renovation works were carried out in breach of cl 9.1 of the lease, but Ace was estopped from relying upon this breach to determine the lease, and alternatively Ace had waived its rights in this regard;³¹
- (d) Australia Post was not obliged to pay Ace's legal costs claimed in the invoice of 1 July 2008 because it was not in breach of the lease or because Ace was estopped from contending to the contrary.³²

[64] In an attempt to present a coherent discussion of the arguments agitated on appeal, I propose now to consider those arguments separately by reference to the reasons

²⁹ [2009] QSC 199 at [84].

³⁰ [2009] QSC 199 at [93].

³¹ [2009] QSC 199 at [101].

³² [2009] QSC 199 at [103].

given by the learned trial judge for each of these conclusions. I propose in each case to set out the central aspect of the learned trial judge's reasons before addressing the parties' arguments. In discussing those arguments it will be necessary to refer to some parts of the evidence which were not discussed by her Honour.

Clause 6.1: Decipha's use of the Premises

[65] As to the issue concerning the use of the Premises in the context of the alleged breach of cl 6.1 of the lease, the focus of Ace's complaint was upon Decipha's use of the Premises to sort mail of government and large corporate clients. This activity involved security screening and scanning. The uses of warehousing and storage and research and development initially referred to in cl 6.1 of the lease gave way to these new activities, which Australia Post argued were encompassed by the phrase "mailroom solutions operations".

[66] The learned trial judge elaborated the arguments presented to her on this issue by reference to the history of the use of the Premises:³³

"The expression 'mailroom solutions operations' is not in common usage. It clearly took its form from [Australia Post's] description of its business unit that was operating from the premises at the time permission was obtained from [Ace] to add that use to the list of permitted uses. The contention of [Ace] is that the description 'mailroom solutions operations' applied to mail sorting at the time the permission for that use was given and the permission for mail sorting did not necessarily cover any activity that Decipha chose to expand into. [Australia Post] argues that the proper construction of 'mailroom solutions operations' is a wide one which covers the variety of activities associated with the receipt, sorting and delivery of mail. It was common ground in the proceeding that, at the least, the expression covered mail sorting which was the explanation given by [Australia Post] to [Ace] in 2001 for the activities covered by the expression. The meaning of the expression 'mailroom solutions operations' must be determined in the context of the lease and is not limited by what the parties may have contemplated as relevant activities at the time permission for that use was given by [Ace]. It suggests a service for processing and sorting mail.

The activities conducted by Decipha after the completion of the renovations include mail sorting of government and large corporate clients including security screening and scanning of the mail. After being processed, that mail is collected by messenger post or private couriers for distribution to the government and corporate clients. The collection of mail by couriers from the premises on completion of the mail sorting is incidental to the mail sorting. In addition, the premises are used as a tender receipt point for government tenders which are received on behalf of the government and security screened and scanned. The sign on the premises (which is shown in the photographs exhibited in Mr Miller's third affidavit) states: 'Qld Government Tender/Courier Lodgements'. The premises are also used to store and screen [Australia Post's] records and documents

³³ [2009] QSC 199 at [78] – [80].

prior to being archived. The last mentioned use falls under the description of warehousing or storage.

It is the security screening and scanning of mail and the tender and courier services that are primarily the subject of [Ace's] submission that those activities are outside the description of mailroom solutions operations."

- [67] Her Honour accepted Australia Post's argument that the operations carried out on the Premises by Decipha fell within the description "mailroom solutions operations":³⁴

"Prior to the renovations, Decipha did mail sorting for some government departments or agencies. The motivation for taking over the balance of the premises was that it was confident of obtaining a contract from the Queensland government to provide mail sorting and security screening services of all government mail. In considering Decipha's use of the premises prior to and after the renovations, a distinction must be drawn between intensity of use as a result of expansion of activities into the whole premises and the nature of the activities. The fact that Mr Miller [of Decipha] admitted in cross-examination that the operations of Decipha at the premises after the renovations were 'different' (at Transcript 1-64) does not resolve the issue of whether the use made of the premises after the renovations was permitted under the lease.

... [T]he security screening component was an additional service that Decipha provided to the Queensland government which was not provided prior to renovations (at Transcript 1-64). I infer that was the purpose of the construction of the two x-ray offices that were part of the renovations. The nature of this activity was not explored in any depth in the course of the evidence. From what can be gleaned of the description of the activity and the manner in which it is carried out at the premises, it is one stage of the processing and sorting of the mail addressed to the Queensland government. It therefore falls within the use described as 'mailroom solutions operations'.

The tender and courier services result in deliveries for the Queensland government of that nature to the premises. The tender services involve providing a system of recording the receipt of the tenders. Security screening applies to deliveries received as tenders or by courier. These deliveries are a special type of mail. There was no evidence about the quantity of them. What evidence there was suggests that these services are aspects of the processing and sorting of that type of mail addressed to the Queensland government. They also fall within the use described as 'mailroom solutions operations'."

- [68] It may be said immediately that there is no basis in the language of the lease for fixing some limit upon the "intensity" of the lessee's use of the Premises. I respectfully agree with the learned trial judge's conclusions in this regard.

- [69] Ace agreed to permit the Premises to be used for "mailroom solutions operations". This phrase is so open-textured that it is very difficult to say that it does not

³⁴ [2009] QSC 199 at [81] – [83].

comprehend Decipha's operations even though it may be accepted that the expansion which occurred was not expected by the lessor. The phrase is apt to encompass, as a matter of ordinary language, developments in mail sorting operations as technological progress throws up new "solutions". And mail sorting activities do not cease to be mail sorting activities because the exigencies of mail delivery to some customers require security scanning and screening; they are simply more sophisticated forms of mail sorting. The language which the parties adopted is sufficiently broad to encompass technological advances in mail sorting activities and alterations in technology necessitated as responses to new requirements for the safe sorting of mail.

[70] In my respectful opinion, this issue was correctly determined by the learned trial judge.

[71] I would note, however, that the intensification of the use of the Premises as accommodation for Decipha's expanding business has some bearing on whether this is an appropriate case for the grant of relief from forfeiture if that intensification occurred in breach of cl 7.1 of the lease. The stronger the indications that a lessee has pursued its interests deliberately to widen a perceived gap of commercial advantage between lessee and lessor, the weaker is the lessee's claim for relief from forfeiture if it be held that there has in truth been a breach of the lease by the lessee. He who deliberately chooses to give no quarter in business cannot fairly expect to receive it.

Clause 7.1: Decipha's occupation of the Premises

[72] In relation to the alleged breach of cl 7.1 of the lease, the learned trial judge concluded that, while Decipha occupied the Premises, Australia Post remained in possession. That conclusion was largely based on the control which Australia Post was able to exercise over Decipha because of the corporate relationship between them.

[73] Her Honour summarised the arguments of the parties on this issue:³⁵
 "... The issue of whether clause 7.1 has been breached arises in a substantial way only after [the] renovations were commenced [in late September 2006].

[Australia Post's] submissions as to its retention of possession of the premises, despite the activities of Decipha, apply to Decipha's occupation both before and after the renovations. [Australia Post] relies on the fact that there has never been any express agreement between [Australia Post] and Decipha with respect to the occupation by Decipha of the premises. The assertion is made by Mr Miller that [Australia Post] 'merely permits Decipha to occupy the leased premises on its behalf.' This has been facilitated since December 2003 by Decipha being a wholly owned subsidiary of [Australia Post]. [Australia Post] has unequivocally asserted in its negotiations with [Ace] during 2006 and 2007 that it remains the tenant of the premises. The activities undertaken by Decipha at the premises are related to [Australia Post's] postal service activities. There is nothing documentary that relates to the actual arrangement between

³⁵ [2009] QSC 199 at [89] – [91].

[Australia Post] and Decipha that has been disclosed in connection with this proceeding that undermines the position [Australia Post] has maintained as to its ultimate right of possession to the premises vis-a-vis Decipha. The payments of rent and outgoings under the lease have always been remitted to [Ace] by or on behalf of [Australia Post]. The fact that Decipha may have put [Australia Post] in funds to indemnify [Australia Post] in respect of all or part of these payments does not alter the fact that [Australia Post] takes responsibility for the payment of the rent and outgoings to [Ace] under the lease. Five D manages the premises on behalf of [Australia Post] and not Decipha. Maintenance issues in respect of the premises were raised by Five D on behalf of [Australia Post] with [Ace], such as the corrosion of the pipework under the floor slab that was brought to Mr Homewood's attention by Mr Morley on 15 September 2006 (doc 111) and damage to ceiling tiles caused by water leaks from rain which was raised by Mr Morley with Mr Homewood on 10 November 2006 (doc 139).

[Ace] argues that [Australia Post] has no interest in any practical or commercial sense in the premises after Decipha occupied the whole of the premises for the purpose of conducting Decipha's business. [Ace] relies on the reimbursement that Decipha has made to [Australia Post] for the 2002 renovations to the premises and the rent and outgoings paid by [Australia Post] attributable to the occupation by Decipha of the premises. In addition, [Ace] points to the fact that the renovations that were commenced in late 2006 were undertaken pursuant to a building contract entered into by Decipha with Mr Ryan and Decipha attended to the formalisation of Council approval for those works. [Ace] submits that the option under the lease for the further term of five years was exercised by [Australia Post] only at the instigation of Decipha. [Ace] also relies on the concessions made by Mr Miller and Mr Rosano of their preference for Decipha to have a lease of the premises from [Ace] or a sublease of the premises from [Australia Post]."

- [74] The learned trial judge accepted Australia Post's argument. Her Honour concluded:³⁶

"The fact that Mr Miller and Mr Rosano expressed that preference from their positions in Decipha cannot displace the arrangement that actually existed between [Australia Post] and Decipha that is supported by the evidence, as the arrangement must involve both [Australia Post] and Decipha. The fact that [Australia Post] is the holding company of Decipha has facilitated the control over the lease and the premises that [Australia Post] has been careful not to relinquish. Despite the indications in the evidence that suggest that the occupation of Decipha of the premises was consistent with exclusive possession of the premises, I am satisfied that [Australia Post] has shown that it retains the right to control the possession of the premises and there has not been any parting of possession of the premises by [Australia Post] to Decipha or sublease or licence in favour of Decipha in breach of clause 7.1 of the lease.

³⁶ [2009] QSC 199 at [92] – [93].

The basis of the occupation of the premises by Decipha, so that its possession remains under the control of [Australia Post], means the relationship between [Australia Post] and Decipha can be distinguished from that of the tenant and subtenant in *Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) Pty Ltd* [2006] NSWCA 224 which allowed for the observation to be made at [134] that the tenant's use was subletting the premises and the use made of the premises by the subtenant could not be characterised as the tenant's use of the premises. The control exercised by [Australia Post] over the possession of the premises by Decipha means that the use that [Australia Post] is making of the premises is that which it allows Decipha to conduct from the premises. In view of my conclusion that the activities of Decipha conducted from the premises fell within the uses permitted under the lease, it follows that [Australia Post's] use of the premises was permitted under the lease."

- [75] The learned trial judge reached the conclusion that there was no parting with possession of the Premises by Australia Post, "[d]espite the indications in the evidence that suggest that the occupation of Decipha of the premises was consistent with exclusive possession", because the corporate relationship between Australia Post and Decipha "facilitated the control over the lease and the premises".
- [76] That conclusion meant that it was unnecessary for her Honour to go on to consider whether Ace had consented to whatever arrangements subsisted between Australia Post and Decipha in relation to the occupation of the Premises. Nor did her Honour consider whether Australia Post had licensed Decipha to occupy the Premises.
- [77] The first issue on the appeal in relation to the alleged contravention of cl 7.1 of the lease is whether, in accordance with the findings of the learned trial judge, Australia Post did part with possession of the Premises to Decipha. A consideration of this issue requires further reference to the evidence adduced at trial. A second question is whether, in consenting to Decipha's use and occupation of the Premises, Australia Post has contravened cl 7.1 by "licensing" Decipha to use the Premises.
- [78] If either of these issues is resolved in favour of Ace, it will be necessary to consider whether Ace consented to the arrangements which were in place between Decipha and Australia Post in respect of the occupation of the Premises. And in this regard Mr Homewood's knowledge of those arrangements is the crucial factual issue. I turn now to discuss these issues.

Parting with possession: the authorities

- [79] A lessee may permit another to occupy the demised premises without the lessee being held to have parted with possession of the premises. In *Lam Kee Ying Sdn Bhd v Lam Shes Tong*,³⁷ the Judicial Committee of the Privy Council said that "[a] covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."
- [80] In *Akici v LR Butlin Ltd*,³⁸ Neuberger LJ, with whom Mummery LJ agreed, held that a covenant by a lessee against parting with possession is broken where there is

³⁷ [1975] AC 247 at 256.

³⁸ [2006] 1 WLR 201 at 209 [36].

a sharing of possession of the leased premises by the lessee and a third party, but not where there is merely a sharing of the occupation of the premises. Whether a lessee has parted with possession must depend on all the facts of the case. The fact that a lessee continues to pay the rent to the landlord is a fact which suggests that the lessee has not parted with possession. The fact that an occupant other than the lessee holds the keys to the premises, ie exercises physical control over the premises, is an indication to the contrary.

[81] In the present case Australia Post continued to pay the rent to Ace after Decipha had expanded its operations to occupy the whole of the Premises. That fact points in favour of the conclusion that Australia Post remained in possession of the Premises. Pointing to a contrary conclusion is the circumstance, accepted on behalf of Australia Post, that Decipha's employees, who were not employees of Australia Post, exercised physical control of the Premises.

[82] Other evidence suggested that possession of the Premises had passed from Australia Post to Decipha even though Australia Post had the corporate power to reverse that state of affairs. Decipha paid Australia Post for its occupation of the Premises. At trial Australia Post tendered a Decipha Board minute which described its arrangement with Australia Post as "a lease". More importantly, Mr Miller gave evidence which does not readily admit of any conclusion other than that Decipha enjoyed complete and exclusive control of the Premises for the purposes of conducting its own business operations.

[83] I will examine this evidence in due course, but for present purposes it is sufficient to say that the fact that Australia Post has allowed Decipha to exercise physical control of the Premises and the operations conducted there by Decipha's employees, invites the inference that Australia Post has parted with possession to Decipha. Such an inference is not defeated by the circumstance that Australia Post has the corporate power to change that state of affairs should it decide to do so. In order to explain why that is so, some further reference to authority is necessary.

[84] The Judicial Committee in *Lam Kee Ying v Lam Shes Tong* explained the various factual considerations which led it to conclude in that case that there had indeed been a parting with possession by the lessee in the following passage (in which the first respondent was the lessee and the second respondent its subsidiary):³⁹

"A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. It may be that the covenant, on this construction, will be of little value to a lessor in many cases and will admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result: *Crusoe d Blencowe v Bugby* (1771) 2 WmB1 766, 767 and *Chaplin v Smith* [1926] 1 KB 198, 210.

... [T]he question whether the first respondent has parted with possession must depend upon all the facts and circumstances of the present case which in their Lordships' opinion are distinguishable from those of the cases cited. Some of the evidence—as to the erection of the signboard, the transfer of the electricity, water supply

³⁹ [1975] AC 247 at 256 – 257.

and telephone, and the issue of receipts, bills and invoices in the name of the second respondent—is equivocal and is quite consistent with a conclusion that although the second respondent occupied the premises the first respondent retained possession. However the fact that the second respondent tendered its own cheque in payment of the rent is some evidence that the second respondent regarded itself, and was regarded by the first respondent, as having possession of the premises. Even more significant in their Lordships' opinion is the fact that at no time before the trial or in evidence did the respondents give an unqualified denial that the first respondent had parted with possession to the second respondent. In their solicitors' letter of November 13, 1969, in their defence and in evidence the reply given by the respondents to the claim that they had broken the covenant was not that there had in fact been no parting with possession, but that there had been no parting with possession because the first respondent was a major shareholder in the second respondent. If in truth the second respondent had merely been given a licence to occupy the premises, and the first respondent had retained possession, it would have been easy for someone to say so. The other evidence that is in itself equivocal is to be understood in the light of the fact that the respondents, who could have produced affirmative evidence that the first respondent retained possession if that had been the fact, failed to do so. In their Lordships' opinion the proper conclusion to be drawn from the whole of the evidence in the case, scanty as it may be, is that the first respondent did part with possession of the premises. The trial judge was therefore correct in his conclusion that the evidence established a breach of the covenant contained in clause 1 (g) of the lease."

[85] Two points may be made here about the decision of the Judicial Committee in *Lam Kee Ying v Lam Shes Tong*. First, the issue whether there had been a parting with possession was not resolved in favour of the lessee by reason of the fact that the occupant was its subsidiary. Secondly, the absence of "affirmative evidence" from the lessee that it "retained possession", as opposed to enjoying the right to reclaim possession, was fatal to the lessee's case that it had not parted with possession.

[86] A different view of the significance of the circumstance that the relationship between a lessee and the occupant of premises is that of holding company and subsidiary respectively was taken in the Court of Appeal of England and Wales in *Akici v LR Butlin Ltd*. In that case Neuberger LJ said:⁴⁰

"Where a lessee owns all the shares in, and exclusively controls, a company which is operating the only activity conducted in the demised premises, it appears to me that, unless it is inconsistent with other facts, it is permissible to treat the company as the agent of the lessee for the purposes of identifying who is in possession of those premises.

It is clear that such an analysis is open in principle from the reasoning of the House of Lords in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465: see, for instance

⁴⁰ [2006] 1 WLR 201 at 217 – 218 [79] – [81].

the speech of Lord Buckmaster, at p 478, and Lord Sumner, at p 483. It is only right to acknowledge that in that case the arrangement to that effect was expressly agreed: see p 474. None the less, where the lessee has covenanted not to part with or share possession (and even more, perhaps, where he is seeking to remedy the breach of having done so) it appears to me right at least to lean in favour of an analysis of the relationship between lessee and occupier which results in there being no breach of covenant. This approach appears to derive some support from the judgment of Bankes and Warrington LJ in *Chaplin v Smith* [1926] 1 KB 198, 207 and 209–210.

It is true that the very fact that a person chooses to conduct his business through a company is because the company is treated as a different entity in law from him, and that there is therefore nothing unfairly artificial in treating him as sharing possession with (or, depending on the facts, as parting with possession to) the company. However, where the lessee owns all the shares in, and is in sole control of a company, it seems to me that it is justifiable in principle, as well as commercially sensible, to treat the lessee as in possession through the medium of the company (possibly as well as through his own presence). In such a case, it is no more artificial to treat the lessee as being in possession through the company than it is to treat an employer who requires an employee to reside in premises as enjoying possession through his employee: see *Street v Mountford* [1985] AC 809 at 818, 818F–G."

- [87] Where commercial activity is conducted by corporations organised under the *Corporations Act 2001* (Cth) and its analogues, the legal doctrines of separate corporate personality and limited personal liability are brought into play,⁴¹ so that the business conducted by Decipha is, prima facie, its own business and not the business of Australia Post.⁴² One may accept that the courts should not be astute to allow legal forms to defeat commercial substance, but here the commercial substance was that Decipha occupied the Premises in order to conduct a business operation which Australia Post could not conduct because the operation was to be carried out by employees it chose not to employ. The discussion by Neuberger LJ does not encompass a case, such as the present, where the subsidiary has been chosen by the holding company to conduct the activities on the premises in question because the lessee chooses not to carry on those activities through its own employees.
- [88] On occasion the courts have been willing to penetrate the corporate veil when the concept of separate corporate personality is sought to be used to defeat public convenience, or to justify wrong, or to protect fraud, or to defend crime.⁴³ It may also be that a subsidiary's relationship with its holding company is so arranged that the parent company's business is conducted by the subsidiary as an agent of the parent.⁴⁴ Such cases are, however, exceptional: the decision of the Privy Council

⁴¹ *Salomon v A Salomon & Co Ltd* [1897] AC 22; *Lee v Lee's Air Farming Ltd* [1961] AC 12; *Friend v Brooker* (2009) 239 CLR 129 at 161 [88].

⁴² *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

⁴³ *United States v Milwaukee Refrigerator Transit Co*, 142 F 247, 255 (1905); *Hotel Terrigal Pty Ltd (in liq) v Latec Investments Ltd (No 2)* [1969] 1 NSW 676.

⁴⁴ *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

in *Lam Kee Ying v Lam Shes Tong*⁴⁵ stands as a reminder that the doctrines of separate corporate personality and limited personal liability are not set at nought by the mere existence of a relationship of subsidiary and holding company.

- [89] In *Lam Kee Ying v Lam Shes Tong*,⁴⁶ the Judicial Committee decided that there had in fact been a parting with possession by the lessee even though, as the court below had held, the second respondent, the occupant, was the subsidiary of the first respondent, the lessee. Sir Harry Gibbs, who delivered the advice of the Privy Council, expressly made the point that the court below was wrong to treat the circumstance that the second respondent was a subsidiary of the first respondent as apt to defeat the inference that the lessee had parted with possession to the second respondent. Sir Harry Gibbs said:⁴⁷

"... [T]he [Federal Court] went on to hold that ... the trial judge had erred in finding that there was a breach of covenant; in the opinion of the Federal Court, there had been no assignment of the lease and the second respondent, although let into occupation by leave and licence of the first respondent, had not been given possession.

... The sole breach alleged was a parting with the possession of the demised premises. It could not be disputed that the first respondent had permitted the second respondent to occupy the premises. Counsel for the respondents ... very properly, did not place any reliance on the fact that the second respondent was a company controlled by the lessee in submitting that there had been no parting with possession ..."

- [90] These remarks are consistent with the view that the circumstance that Australia Post might alter the existing state of affairs in which Decipha has possession of the Premises, by the exercise of its power as shareholder, is not inconsistent with the conclusion that that state of affairs does presently exist. The absence of a documented agreement between Australia Post and Decipha in relation to the terms on which Decipha is in occupation of the Premises is also consistent with the view that Decipha has possession of the Premises unless and until Australia Post exercises its corporate power to change that situation. More importantly, it is also consistent with the absence of affirmative evidence from Australia Post that it retained possession of the Premises, eg by virtue of the retention of keys to the Premises by employees of Australia Post.
- [91] These observations do not, I think, give undue weight to the legal technicality that Australia Post and Decipha are separate legal persons. Decipha's business was conducted by its own employees who were not employees of Australia Post. Decipha made its own contracts with customers. One should not assume that these commercial realities could be, or would be, changed by the stroke of a pen especially when one bears it in mind that Australia Post had no use for the Premises other than as a site for Decipha's business. Decipha had given consideration to seeking a sub-lease of the Premises; that would have been consistent with the "commercial reality" of the situation. This did not occur, and while it may be accepted that Australia Post was entitled to take such steps as it might be advised to ensure that it did not breach cl 7.1 of the lease, to say this is to recognise that it is

⁴⁵ [1975] AC 247.

⁴⁶ [1975] AC 247.

⁴⁷ [1975] AC 247 at 255 – 256.

Australia Post, not Ace, which is driven to rely on legal forms to defeat the inference which would otherwise be drawn from commercial substance. And the only legal form on which Australia Post can rely is the relationship of holding company and subsidiary. In my respectful opinion, this point does not rebut the conclusion which otherwise flows from the facts of the case.

- [92] I note that in the lease in question here, there was no covenant against sharing possession. The effect of a covenant against sharing possession was explained by Neuberger LJ in *Akici v Butlin Ltd*⁴⁸ as being "to prevent the conversion to a single lessee into what, in practical terms, will amount to a joint tenancy". It may be accepted for the sake of argument that there is no parting with possession in the mere sharing of possession. But if, as appears to be the case here, Decipha had such a degree of control over the Premises that they were used solely for Decipha's operations conducted by it in its own right, it is accurate to say that it had obtained possession of the Premises from Australia Post. This description of the circumstances of Decipha's occupation of the Premises is no less accurate because that position could have been changed by the exercise by Australia Post of its corporate power over its subsidiary.
- [93] I turn now to consider in more detail some aspects of the evidence which were not regarded as significant by the learned trial judge and which support the conclusion that Australia Post parted with possession of the Premises to Decipha.

Parting with possession: the evidence

- [94] Mr John Miller has been the state operations manager for Decipha since February 2003. He gave evidence that no sub-lease or licence document was entered into between Australia Post and Decipha. He said in cross-examination that Decipha "were occupying the premises under the Post [*scil* Australia Post] banner as Post mailroom Solutions as the business evolved or changed into Decipha ...". Mr Miller agreed that Decipha paid the rental to Australia Post by cheque or monthly transfer to Australia Post. He said that Decipha successfully tendered to various organisations, such as Westpac Banking Corporation, Suncorp Metway and the Queensland Government, for the right to undertake mail sorting operations for them. Decipha's operations expanded within the Premises, especially with the Queensland Government contract. In March 2005 Mr Miller corresponded with Ace in relation to the possibility of renewing the lease with Decipha as the lessee. That correspondence reflected Decipha's need for the entirety of the Premises for its operations. That initiative enlivened Ace's interest in renegotiating the terms of the lease, especially in relation to rent.
- [95] In cross-examination Mr Miller accepted that "in all respects [Decipha] now occupied the entirety of the premises". The following passage of cross-examination is important:
- "And because of that level of control that Decipha had over these premises, it was, from Decipha's perspective, appropriate that there be a lease now not between Australia Post and Ace, but between Decipha and Ace Property?-- Correct.
- The necessity for such a step being undertaken was something that was obviously discussed and advice sought from Decipha's perspective?-- Yes.

⁴⁸ [2006] 1 WLR 201 at 208 [29].

The decision made was to make that proposal?-- Correct.

So as to reflect reality?-- Yes.

Can I then go to the second last line of that paragraph. The proposal, however, never eventuated. Do you see that?-- Yes.

The reality is that - what was it, Mr Allan told Decipha that they shouldn't do it? Is that what happened?-- No.

Why was it then that the proposal never eventuated?-- We had discussions or negotiations with Ace and couldn't come to an agreement around the terms and conditions of a lease.

That is, the reality was that because of what Decipha sought to do to the property, the landlord sought in this lease with Decipha, proposed by Decipha itself, an increase in rent over that which Australia Post was charging?-- Correct.

But that increase in rent is a separate issue from the realisation that Decipha had that the appropriate relationship between the parties, Ace Property on one hand and Decipha on the other, ought to be in fact a lease between Decipha and Ace?-- Yes.

It was when the question of rent arose that a device was arrived at, from Decipha' perspective I suggest, namely, that what would happen is that Australia Post would exercise its option?-- Correct.

The purpose of the device was not to reflect the reality on the ground, namely, Decipha's occupation of the premises in every respect and what it proposed to do to those premises, but to circumvent the requirement by the landlord for a different rental structure?-- Yes."

- [96] Mr Miller was cross-examined about the entry by Decipha into the contract with Mr Ryan for the carrying out of the renovations to the Premises. The following passage is important:

"That being the case, can I ask you why it was that you considered that it was appropriate for Decipha to enter into this building contract with Mr Ryan rather than Australia Post?-- Because it was for Decipha. Decipha were going to raise the capital to do it rather than Post.

When you say it was for Decipha, that is, this was something being undertaken for Decipha's interests and not Australia Post's?-- Correct.

This was something which you knew was to the benefit of Decipha, not Australia Post?-- Correct.

This was something which was entirely independent of any input by or influence by Australia Post; it was a Decipha board decision?-- Correct.

A decision by you on behalf of Decipha?-- Yes."

[97] Mr Miller said that Decipha occupied the entirety of the Premises after the renovations had been completed in early 2007.

[98] The following passage in Mr Miller's cross-examination is important:

"From Decipha's perspective, what was sought then was not to reflect the realities on the ground by entering into a sublease with Australia Post or a lease with Decipha, but to seek that Australia Post exercise its option?-- We tried to negotiate a lease individually with John, because of the fit-out work and primarily because we initially looked at him to fund the fit-out works, but obviously because we couldn't come to terms around the conditions of the lease. We then moved back to Post to exercise its options.

It's a little more than that, Mr Miller. You decided to seek a lease on behalf of Decipha because that reflected the true position?-- Correct.

Namely-----?-- Correct.

Correct, yes.

Quite apart from any question of funding of works?-- Yes.

So let's go back to that proposition. Notwithstanding the decision by Decipha that the appropriate course in all the circumstances was itself to either become sublessee from Australia Post or lessee from Decipha, because terms satisfactory to Decipha couldn't be gleaned from the landlord, what happened was that Decipha sought that Australia Post exercise its option?-- Correct.

That was a suggestion by Decipha to Australia Post that that happen?-- Yes, I believe so.

Who was it, on Decipha's position, that requested Australia Post exercise its option so as to avoid the consequences to Decipha in terms of rent? Who was it, you?-- Myself and Vince Rosano.

You and Mr Rosano resolved between yourselves on behalf of Decipha, or just you?-- Both of us on behalf of Decipha.

To approach Australia Post?-- Yes.

And to say to Australia Post that, 'We want you to exercise the option' because that will avoid this issue with rent?-- Correct.

You did so notwithstanding your view up until that time that the appropriate course to reflect what was in fact happening with these premises was for Decipha to enter into a lease or sublease?-- Yes.

You sought to ignore your own views about the factual or objective realities on the ground as to occupation, use and control of the premises and seek from Australia Post the exercise by it of its option, notwithstanding that Australia Post had no interest in the operation or conduct of any business out of the building?-- Post have an interest because of our return back to Post. So Post does have an interest but effectively we are running a commercial business, yes."

[99] Mr Miller was cross-examined about the letter of 11 October 2007 from Five D to Ace in which Five D referred to a lease between Australia Post and Decipha:

"Now, as at October '07, it would appear from the letter that Mr Lambert on behalf of Five D describing himself as National Finance Manager, Australia Post?-- Yes.

Is asserting to Ace that Australia Post has leased out the premises to Decipha; do you see that?-- I do.

That situation would certainly have reflected Decipha's intent during these discussions in '05, wouldn't it?-- Yes.

And that assertion by Mr Lambert certainly reflected the reality in so far as Decipha's exclusive possession of the premises at Victoria Street were concerned, didn't it?-- Correct."

[100] It may be noted here that in *Chaplin v Smith*⁴⁹ Scrutton LJ spoke of "exclusive occupation" of premises as the equivalent of "exclusive possession". In the same case Bankes LJ (with whom Warrington LJ relevantly agreed) regarded the lessee's retention of "the power to exercise real and effective possession of the premises" as decisive against the argument that there had been a parting with possession by the lessee.⁵⁰ Their Lordships were referring to possession of the premises in the sense of sole control of the premises in fact rather than the legal right or power to decide whether the factual state of affairs should continue.

[101] Mr Miller's evidence that Decipha was in sole occupation and control of the premises was important, not as an attempt on his part to express a legal opinion as to the legal classification of Decipha's occupation (as to which his evidence was irrelevant), but because the facts of which he gave evidence support the legal conclusion that there was, in law, a parting with possession by Australia Post in favour of Decipha. That evidence strengthens the inference which might otherwise be drawn, in the absence of evidence to the contrary, from the facts that Decipha made payments by way of rent to Australia Post and that the business operations conducted in and from the Premises were exclusively conducted by Decipha's employees, that there had been such a parting with possession.

[102] Mr Vincent Rosano is the national operations manager of Decipha. He swore an affidavit for Australia Post to which was exhibited a Decipha board paper "Business Case for Property Fit out 100 Victoria Street West End, QLD". This paper was prepared after a meeting with Mr Homewood in March 2005. It discusses aspects of Decipha's business and the nature of Decipha's commercial interest in the Premises. It provides support for the proposition that the business conducted by Decipha on the Premises was carried on by Decipha in its own right. It is in the following terms:

"Background

Decipha operates the QLD operations from Victoria Street, West End, leased from Australia Post. The current lease expires in February 2007 with a five year option to extend.

The building comprises 3 levels with 1,663m² available for use of which Decipha currently utilizes 1,023m². The remaining space of 640m² is available next door.

⁴⁹ [1926] 1 KB 198 at 211.

⁵⁰ [1926] 1 KB 198 at 205.

To use next door as a suitable warehouse space and improve the functionality of the building to maximize the available space alterations, fit out and additional air-conditioning is required.

Current leasing cost to Decipha, including the 640m² next door is \$251,500 pa or \$153.00 per m², including outgoings.

The Business Need

The business growth in QLD requires use of the additional space next door, and suitable fitout.

The Whole of Government screening opportunity is scheduled to commence on the 1st July and requires approx 350m². Other clients listed in the table below are scheduled to come on board from April to June 2006.

The immediate concern is to ensure we have enough space available for the committed clients and the future opportunities. Without the proposed fit out we will not be able to accommodate these at the West End site.

That table below are the likely new accounts that will require additional space in the short term include:

Opportunity	Estimated Space Required m²	Estimated Timing	Estimated Revenue Value	Probability
	100	Apr 2006		90%
	15	June 2006		50%
	15	June 2006		50%
	350	Jul 2006		99%
Total	480			

Based on our current space utilization, committed new contracts and favorable new business the proposed works would still provide approx 20% spare capacity for future growth, i.e. 130m². Additional space may be able to be relinquished by purchasing better design equipment for existing clients such as Westpac and Suncorp.

If floor capacity becomes an issue on the Victoria Street site a second smaller facility could be sourced near by [sic] to accommodate the Whole of Government screening contract and provide the current West End site with the 350 m². The Screen operation would be the logical part of the business to be separated.

Fit out to be undertaken

The landlord has agreed to fit out the building to our specifications. Initial plans and layout have been sketched and agreed to in principle. The fit out estimated cost is \$371,000 GST exclusive. This amount includes \$15,000 of contingent and \$22,000 for security equipment i.e. CCTV, access control etc.

The following is a description of the major works that are included in the plan to be completed by the landlord:

1. Complete suspended ceiling and lighting
2. Air condition
3. Repair / fit-out three additional toilets
4. Paint and 'make good' all new works and existing areas
5. Upgrade power supply to facility to accommodate increased lighting, equipment and air-conditioning
6. Relocate and fit-out comms room
7. Provide and complete security fit-out as per specs including access control system

Lease Arrangements

In principle the proposed lease terms and conditions are the same as the existing lease. A summary of the main terms and conditions are included in this document.

The building will require fit out before Decipha can take up the space next door.

The landlord has agreed to fit out the building with the [following] lease arrangements:

1. Money for fit-out financed at 7.25% pa.
2. The existing lease is to roll through its current option period for 5yrs commencing Feb 2007. This will provide occupancy on this site until Feb 2012.
3. Rental increases are capped at CPI or 3% which ever is the lesser based on rental only (not fit-out).
4. Market review of the rental cost for the option period (Feb 2007) cannot exceed 5% of the previous years rent [sic].

Financial impact

The current rental costs are:

Annual Rent with outgoings	\$251500
Cost per m2	\$151.00

The proposed fit-out to the site will cost \$371,000 GST exclusive. The amount will be amortized over 5 years with a finance fee of 7.25%.

In summary the costs are as follows:

Existing annual rent with outgoings:	\$251,000
Amortized annual fit out cost:	\$74,000
Annual interest charged for Fit out	\$5400
Total annual rent	\$331,000
New cost per m2	\$199.00

Budget impact

From a budget perspective, Decipha had planned to either move or complete building works on the current site from Oct 2005 due to the

Whole of Government project. The budget had allowed for increase of \$66,000.00 pa at rates similar to those outlined above.

Board Approval

Approval is sought to proceed to commission Australia Post CRE to draw up a variation to the existing lease and authorize the landlord to commence the fit out and plan to have the building ready for occupancy by May 2006."

[103] Mr Rosano was cross-examined about this board paper in the following exchange:
"Look at the first paragraph, 'background'?-- Yep.

You describe, for the benefit of the board and no doubt with the concurrence of Mr Parnell and Mr Gale, the situation that pertained at Victoria Street to be this. That Decipha operates its operations from there and it does so under a lease from Australia Post, didn't you?-- It's a typing error.

Oh. What part's a typing error? - The 'leased from Australia Post'.

What, it's meant to be leased by Australia Post?-- That's correct.

Well, that's a fairly significant distinction, isn't it? How did that typo manage to get through all of this consultation?-- Well, it didn't - you know. Well, what can I say? I do make typing mistakes.

Well, what you might say is that the leasing arrangement that you refer to in this document, in fact, reflected the true position as between Decipha, a separate corporate entity, and Australia Post. That is, it was to all intents and purposes a lessee of Australia Post. That's why you described it as that?-- That's not correct.

Well, it paid rent to Australia Post, even when it occupied 50 per cent, didn't it?-- Yes.

Right. And the rent that it paid to Australia Post was described as such in Decipha's tax returns, wasn't it? That is a deductible business expense by way of rent?-- I'm not qualified to answer that.

Well, you're the national operations manager. You know that Decipha paid rent to Australia Post and claimed that payment as a deduction, didn't it?-- It's an expense, absolutely.

Right, and it's an expense because it was characterised as rent?-- That's correct.

...

Certainly. Once it occupied 100 per cent of the premises, it paid to Australia Post a sum representing the entirety of the figure that Australia Post had to pay to the landlord?--That's correct, yes. At some stage we were paying for 100 per cent.

Yep, and all other incident expenses arising under Australia Post's lease?-- The outgoings if that's what you mean, yes.

Yes. So when it occupied 100 per cent it paid, that is Decipha paid, to Australia Post every cent which Australia Post might be liable to - the landlord under Australia Post's lease?-- Yes."

- [104] The learned trial judge did not refer to this evidence, but she did express reservations about Mr Rosano's reliability as a witness. In my respectful opinion, Mr Rosano's explanation of the reference in the board paper to the lease to Decipha from Australia Post as a "typing mistake" is inherently improbable and unworthy of belief. The paper was prepared for the information of Decipha's board; it was solely concerned to discuss Decipha's business as a business conducted by it in its own right. Australia Post was referred to as an outside party in the last paragraph of the paper.
- [105] Some uncontroversial facts relating to Decipha's occupation of the Premises have already been noted, viz that Decipha paid rent to Australia Post for the Premises and the outgoings in respect of the Premises; after the renovations, Australia Post did not conduct any physical activities relating to its own business on the Premises; and Decipha paid for the renovations which were made specifically to accommodate its business. One may also note now the following matters:
- (a) the terms of Mr Rosano's Decipha Board minute which shows that Decipha's business was carried on by it in its own right;
 - (b) Mr Miller's evidence that Decipha exercised control over the Premises;
 - (c) the circumstance that the business activity conducted on the Premises was conducted by Decipha through its employees who were not employees of Australia Post;
 - (d) the circumstance that activity conducted on the Premises consisted of the performance of contracts made between Decipha and its customers;
 - (e) the circumstance that the renovations to the Premises were carried out by Decipha: the contract for the renovations was made by Decipha, and included an obligation on Decipha to make possession of the Premises available to the builder.
- [106] The significance of these pieces of evidence was not adverted to by the learned trial judge. Each of these aspects of the evidence tends, in my respectful opinion, to take the present case outside the scope of the discussion by Neuberger LJ in *Akici v LR Butlin Pty Ltd*. Taken together, they are, in my respectful opinion, consistent only with the conclusion that Australia Post did in fact part with possession of the Premises in favour of Decipha at the latest at the time of the renovations.
- [107] This conclusion cannot be avoided by the argument that Decipha was merely the alter ego of Australia Post or its agent for carrying on business on the Premises. In truth Decipha was not merely the alter ego of Australia Post. To accept that Decipha was merely the alter ego or agent of Australia Post would be to set at naught the deliberate establishment by Australia Post and Decipha of the corporate structure whereby the Premises would be deployed in Decipha's business, a business which Australia Post could not carry on because it did not employ the individuals who were to conduct its operations, and the customers to whom services were rendered were the customers of Decipha, not of Australia Post. That deliberate

decision "brought with it the attendant legal doctrines of corporate personality and limited personal liability" of the shareholder, Australia Post.⁵¹ Nor was Decipha carrying on business on the Premises as agent for Australia Post. The business which Decipha conducted on the Premises generated rights and liabilities in Decipha vis-à-vis its own customers, employees and suppliers. These rights and liabilities were not in the eye of the law the rights or liabilities of its holding company.

[108] For these reasons I respectfully differ from the learned trial judge on the issue whether Australia Post parted with possession of the Premises to Decipha.

Parting with possession: Ace's consent

[109] There was, of course, no breach of cl 7.1 of the lease unless Australia Post's parting of possession to Decipha occurred without the consent of Ace. That issue was not considered by the learned trial judge. I turn now to consider that issue.

[110] The consent of the landlord was not required to be in writing under cl 7.1 of the lease. Mr Homewood was the directing mind and will of Ace for the purpose of determining whether Ace consented to Decipha's possession of the Premises. Australia Post contends that Mr Homewood consented to a parting with possession by Australia Post in favour of Decipha. That contention can be made good only if Mr Homewood knew of the facts which establish that Australia Post parted with possession of the Premises. In *Ex parte Ford; In re Caughey*,⁵² Sir George Jessel MR, with whom Mellish and Baggallay LJJ agreed, said: "You cannot consent to a thing unless you have knowledge of it."

[111] The evidence suggests that Mr Homewood had some general idea that Decipha was involved in the occupation of the Premises, and that he must have inferred as a fact that Decipha was a legal entity separate and distinct from Australia Post. It is another thing, however, to conclude that Mr Homewood knew and consented to Decipha's sole possession of the Premises.

[112] The learned trial judge made no finding as to what precisely Mr Homewood did know, but in relation to Mr Homewood's evidence of his understanding of Decipha's place in the scheme of things, her Honour said:⁵³

"In a similar vein, the relationship between [Australia Post] and Decipha with each other and with [Ace] at the relevant times was vexed. Despite [Australia Post's] concern to keep the lease in place, it was less than open with [Ace] about the occupation of Decipha of the premises during the period leading up to the renovations and the exercise of the option. At the same time, [Ace] was not unaware of the existence of Decipha, even if [Ace] were not aware of the precise details of its corporate existence. I found it surprising, however, in light of [Australia Post's] confused communications with [Ace] about the role of Decipha that [Australia Post] seeks in its written submissions to attack the credit of Mr Homewood, [Ace's] managing director, on the basis that his evidence about his knowledge of Decipha was generally unsatisfactory. I will analyse the evidence relating to the nature of Decipha's occupation of the premises, when

⁵¹ Cf *Friend v Brooker* (2009) 239 CLR 129 at 161 [88].

⁵² (1876) 1 Ch D 521 at 528.

⁵³ [2009] QSC 199 at [15].

dealing with that issue in these reasons. At the outset, however, I reject the attack on Mr Homewood's evidence that was made by [Australia Post] in general terms. It did not accord with my assessment of Mr Homewood's evidence, as he gave his oral evidence, and in reconciling his evidence with the contemporaneous documents. He readily made concessions and under cross-examination genuinely attempted to recall the numerous conversations and dealings about which he was questioned. [Australia Post's] submissions on Mr Homewood's evidence about Decipha and its activities gave no weight to the fact that Mr Homewood's knowledge of the role and activities of Decipha was affected by the conflicting information that he received from the employees of both [Australia Post] and Decipha."

- [113] It is apparent from this passage that the learned trial judge formed a favourable view of Mr Homewood. Her Honour does seem to have found that Mr Homewood was not "aware of the precise details of [Decipha's] corporate existence".⁵⁴ That view is consistent with the conclusion to which my review of the evidence has led me.
- [114] I am unable to conclude that Mr Homewood knew that Decipha was, in fact, in sole possession of the Premises. As I have noted above, Australia Post's primary position at trial and in this Court was that there had been no parting with possession by it in favour of Decipha. Australia Post had no reason to present Mr Homewood with the full picture which has led me to conclude that Decipha, and not Australia Post, was in possession of the Premises. Australia Post knew that if Decipha was to be given a sub-lease, the rent advantage which it enjoyed would have to be renegotiated. It is hardly surprising then that Australia Post did not inform Mr Homewood of the facts relating to Decipha's possession of the Premises. I have referred to these facts above. They only emerged fully at trial or shortly prior to trial in the course of disclosure. Accordingly, it is also hardly surprising that Australia Post was unable to prove that Mr Homewood knew enough to understand that Australia Post had parted with possession prior to giving the notice of breach of covenant.
- [115] I conclude that Australia Post was, and remains, in breach of cl 7.1 of the lease.
- [116] I note that this breach is one which, on the view of Neuberger LJ in *Akici v LR Butlin Ltd*,⁵⁵ is able to be remedied. That view was accepted as correct by this Court in *Nashvying Pty Ltd & Ors v Giacomi*.⁵⁶ But even though it is a breach capable of being remedied, it has not been remedied, and no undertaking has been offered by Australia Post to remedy that breach. No doubt that is because Australia Post's primary position has been that it did not part with possession of the Premises, but it is of some significance to the determination of Australia Post's claim to relief from forfeiture.

The grant of a licence

- [117] Lest I be wrong in my conclusion that Australia Post breached cl 7.1 of the lease by parting with possession of the Premises to Decipha, I turn to consider whether there was a breach of the covenant against the granting of a licence in cl 7.1 of the lease. Ace contends that no parting with possession is necessary to infringe cl 7.1 by the granting of a licence.

⁵⁴ [2009] QSC 199 at [15].

⁵⁵ [2006] 1 WLR 201 at 214 [64].

⁵⁶ [2008] Q Conv R 54-684 at [59] – [76].

- [118] It is said on Ace's behalf that to the extent that Decipha has occupied and used the Premises with the consent of Australia Post, then, at the very least, Australia Post must be taken to have licensed Decipha's occupation of the Premises. For Australia Post to allow the occupation of the Premises by Decipha was necessarily to license that occupation. A licence only makes lawful occupation that would otherwise be unlawful as a trespass. In ordinary legal parlance, to speak of a licence is not to speak of a transfer of possession.⁵⁷
- [119] Australia Post's argument to the contrary is that cl 7.1 of the lease, considered as a whole, means that only those licences which involve a parting with possession contravene the clause. Australia Post retained possession of the Premises in the sense that it could at any time have terminated Decipha's occupation.
- [120] Australia Post's argument depends on whether "licence" in cl 7.1 should be read *eiusdem generis* with "sub-lease" so as to connote a parting with possession of the Premises as a necessary element of the licence in question. This argument is said to draw strength from the collocation in cl 7.1 of the words: "sublet or licence or otherwise part with possession of the Premises". I am unable to accept this argument.
- [121] It is well-settled that the courts should not be astute to conclude that there has been a breach of a covenant which may result in the forfeiture of a lessee's estate.⁵⁸ On the other hand, the courts should not strain to defeat a lessor's legitimate entitlement to prevent the occupation of its premises by persons other than those to whose occupation it has consented.⁵⁹
- [122] I do not consider that the *eiusdem generis* approach to construction should be applied to the interpretation of cl 7.1 of the lease. In cl 7.1 there is a paucity of species from which one might reliably identify a genus in order to limit the ordinary scope of the word "licence" which extends to any permitted occupation. More importantly, the courts should seek to give effect to all the words in a provision of an agreement. If one were to read the word "licence" in cl 7.1 as referring only to those licences which were not licences as usually understood but which involved the lessor parting with possession, the reference to "licence" would be rendered otiose and the evident intention to provide the lessor with a meaningful protection additional to protection against unilateral changes in possession would be defeated.
- [123] In my view Australia Post did breach cl 7.1 of the lease when it allowed Decipha to occupy the Premises without Ace's consent even if Australia Post did not part with possession. The notice of breach of covenant did not particularise the granting of a licence as a breach of the lease. Accordingly, Ace is not in a position to terminate the lease in reliance on that breach. That is so by reason of cl 13.3 of the lease and s 124 of the *Property Law Act*. Nevertheless, it is the case, in my respectful opinion, that even if Decipha's occupation of the Premises does not involve possession of the Premises but merely permission to occupy, then Australia Post is in breach of cl 7.1 of the lease. Australia Post has never sought Ace's consent to the grant of that licence, and so it cannot sensibly be said that Ace has unreasonably

⁵⁷ *Millenium Productions Ltd v Winter Garden Theatre (London) Ltd* [1946] 1 All ER 678 at 680; *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533.

⁵⁸ *Lam Kee Ying v Lam She Tong* [1975] AC 247 at 256.

⁵⁹ Cf *Clarence House Ltd v National Westminster Bank plc* [2009] 1 WLR 1651 at 1659 – 1660 [21], a sharing of possession of leased property was held to be a breach of a covenant against alienation.

refused that consent. It is arguable that Mr Homewood must have understood that Decipha was in occupation of the Premises with Australia Post's consent, but it was not suggested to Mr Homewood in cross-examination that he was minded to consent to the grant of a licence and that his silence on the issue in all the circumstances manifested that consent. I am unable to conclude that the licence was granted with Ace's consent.

Clause 9.1: the renovations

[124] For the sake of completeness, I note that Ace did not seek to argue, either at first instance or on appeal, that because the renovation works were carried out by Decipha rather than by Australia Post, the provisions of cl 9 of the lease were irrelevant because they are directed only to renovations by "the lessee". It might have been argued by Ace that Australia Post, by allowing Decipha to carry out the works outside the terms of the lease, repudiated the lease thereby entitling Ace to terminate the lease without the need to comply with cl 13.3 of the lease or s 124 of the *Property Law Act*. But, as I say, this point was not raised or argued.

[125] The learned trial judge held that Australia Post was in breach of cl 9.1 of the lease by proceeding with the renovations without Ace's consent. In relation to this issue and the issues of estoppel and waiver relating to the renovations, the learned trial judge's findings of fact were as follows:⁶⁰

"From the time that Mr Allan informed [Ace] on 26 July 2006 that [Australia Post] would be undertaking the renovations, rather than expecting [Ace] to fund them, the parties contemplated that the requirements of clause 9.1 of the lease would be observed. That was consistent with how the parties had ensured compliance with the terms of the lease up until that time. The enthusiasm that Decipha had for undertaking the renovations overtook the prudence of ensuring that compliance with clause 9.1 was completed before the works commenced.

I find that the renovations, as constructed, substantially accorded with the plans and the scope of works that the parties had negotiated about in June 2006 for [Ace] to undertake at [Australia Post's] request. Even though [Australia Post] did not disclose to [Ace] the details of the contract that Decipha had entered into with Mr Ryan for those works on 25 September 2006, [Ace] was aware of the extent and approximate value of the works proposed to be carried out.

By 1 November 2006 when Mr Homewood was aware that the renovations had commenced, he did not respond to [Australia Post's] request for formal approval to the works either by proceeding with the steps to ascertain whether he would approve the works or to inform [Australia Post] that it should not proceed on the basis that the approval would be forthcoming. Instead, Mr Homewood allowed the works to continue and deferred his inspection of the premises until the works were almost completed in January 2007.

Because of the expectation of both parties that written approval would be sought and obtained under clause 9.1 of the lease, it is not

⁶⁰ [2009] QSC 199 at [96] – [99].

appropriate to characterise the conduct of Mr Homewood as amounting to approval under clause 9.1 of the lease. The conduct of [Ace] between 1 November 2006 and the inspection of the works in January 2007 was consistent only with a representation that [Ace] would not withhold its approval to those works."

[126] The learned trial judge concluded:⁶¹

"Although the renovations were paid for and managed by Decipha, [Australia Post] adopted Decipha's conduct as its own in its dealings with [Ace], such as by seeking [Ace's] approval to the works. The renovations can be characterised for the purpose of the lease as [Australia Post's] works."

[127] Her Honour went on to conclude in relation to the estoppel issue:⁶²

"There is no question that [Australia Post] breached clause 9.1 of the lease by commencing the renovations in late September 2006, without [Ace's] prior approval. I am satisfied, however, that [Ace's] conduct from 1 November 2006 in allowing those renovations to continue at significant expense which [Australia Post] relied on by completing the renovations means that [Ace] must be estopped from relying on the breach of clause 9.1 of the lease that was committed when the renovations commenced and continued without [Ace's] approval. In any case, [Ace] was fully acquainted with the breach of the lease, when it negotiated a resolution with [Australia Post] between February and September 2007 as to how those works would be dealt with under the terms of the lease that came into existence on the exercise of the option. If it were necessary to consider waiver, [Ace] unequivocally waived its right to act on the breach of clause 9.1 of the lease."

[128] It is convenient to discuss the issues of estoppel and waiver in relation to the breach of cl 9.1 of the lease in the broader context of the arguments raised on Australia Post's notice of contention in relation to both cl 7.1 and cl 9.1.

Australia Post's notice of contention

[129] The arguments put by Australia Post pursuant to its notice of contention seek to provide a complete answer to all of the allegations of breach raised by Ace. It is convenient here to make two general points. In practical terms it is only necessary to be concerned with the breaches of cl 7.1 and cl 9.1. That is because I have concluded that there was no breach of cl 6.1, and whether or not there was a breach of cl 17 depends on my conclusion in relation to the breaches of cl 7.1 and cl 9.1 of the lease.

[130] First, even if Ace were estopped or otherwise precluded from relying upon the breach of cl 9.1 to terminate the lease it would not follow that Ace would be precluded from relying upon a breach of cl 7.1 to terminate the lease.

[131] Secondly, consent, or estoppel or election could preclude Ace relying on a breach of cl 7.1 of the lease only if Mr Homewood's conduct was informed by knowledge of the facts establishing that the nature and extent of Decipha's occupation of the

⁶¹ [2009] QSC 199 at [100].

⁶² [2009] QSC 199 at [101].

Premises was such as to amount to sole possession of the Premises. On my view of the facts of the case, Mr Homewood did not have that knowledge.

- [132] Strictly speaking, these two points suffice to dispose of the arguments advanced by Australia Post pursuant to its notice of contention save for its claim to relief from forfeiture. For the sake of completeness, and because the arguments are relevant to relief from forfeiture, I turn now to deal with the arguments bearing upon the issue of estoppel in relation to Australia Post's breaches of cl 7.1 and cl 9.1 of the lease. I will then discuss the issue of waiver in relation to those breaches.

Estoppel

- [133] In relation to the estoppel found by the learned trial judge in respect of the renovations, Ace did not expressly represent to Australia Post that it was content for Australia Post or Decipha to enter into binding contractual obligations for the carrying out of the renovations in the absence of a resolution of the outstanding issues then under negotiation. A representation must be clear to found an estoppel.⁶³ It is not apparent from her Honour's reasons precisely what specific representation or promise Ace is estopped by its conduct from denying. I am unable to discern a basis in the evidence or her Honour's findings of primary fact, for the conclusion that Ace could be taken as representing that its consent to the renovations had been, or would be, forthcoming whatever the outcome of the negotiations.
- [134] It may be accepted that Ace failed to protest when it became aware that Australia Post had taken it upon itself to carry out the renovations without Ace's consent. But prior to that failure to protest was there no unequivocal representation by Ace that Ace accepted that the negotiations in relation to the terms on which the lease would be extended were concluded. The parties had been engaged in a process of trying to reach agreement on a package of arrangements. Ace was concerned not only that the lease be extended, but also to improve its position in relation to the rent if it could legitimately do so. In these negotiations Ace's strongest bargaining chip was its entitlement, acting reasonably, to withhold consent to the renovations. It is objectively unlikely that Australia Post could have understood from Ace's failure to protest at the commencement of the works that Ace was indicating its willingness voluntarily to throw away this bargaining chip without express confirmation to that effect. It must be borne in mind that Australia Post was pressing for Ace's express response at the time Decipha entered into the contract for the construction of the renovations and thereafter. I am unable to conclude that Ace, prior to becoming aware of the commencement of the works, acted in a way unequivocally apt to induce Australia Post to conclude that Ace was content to abandon the negotiation of the terms on which the renovation might proceed with Ace's express approval.
- [135] On the learned trial judge's findings, Mr Homewood became aware of the commencement of the renovations after they had commenced. Mr Homewood's conduct did not induce Decipha to enter into the contract for the renovation work. It is difficult to see what Ace could have done once Mr Homewood became aware of the commencement of the renovation works to relieve Decipha from the liability it had contracted to pay the builder for the renovations. The contract between Decipha and the builder contained no provision which would allow Decipha to walk away from the contract. It cannot even be assumed, in the absence of evidence, that

⁶³ *Legione v Hateley* (1983) 152 CLR 406 at 435 – 437.

Decipha would have been disposed to cancel the construction contract if Ace had expressly objected to the works when Mr Homewood inspected the alterations. In these circumstances it is difficult to see how Australia Post established detrimental reliance on Ace's words or conduct so as to estop Ace from acting upon the breach of cl 9.1 involved in the commencement of the works without Ace's approval.

- [136] A party who sets up an estoppel must show that a detriment will enure to that party if the other party is allowed to depart from the position on which the first party has been induced to act.⁶⁴ Australia Post cannot satisfy this requirement. It was Decipha which contracted with the builder for the construction of the renovations. Any detriment resulting directly from the waste of the money spent on the renovations in reliance on Ace's conduct will enure to Decipha. Whether, and the extent to which, that detriment is also a detriment to Australia Post was not established by evidence. The Court should not speculate in favour of Australia Post on this point when it was open to it to call evidence to prove a necessary part of its case.
- [137] Thus far under this heading the focus of discussion has been upon Australia Post's contention that Ace is estopped from terminating the lease in reliance on the breach of cl 9.1 found by her Honour. Australia Post advances the further argument that Ace induced Australia Post to exercise its right to extend the lease and in consequence is estopped from relying upon any breach at all, including any breach of cl 7.1, to terminate the lease. Australia Post argues that it is entitled to sustain the judgment in its favour on the footing that Ace, with knowledge of Australia Post's breaches, stood by while Australia Post exercised its option to renew the lease. In consequence, so it is said, it would be contrary to conscience if Ace were now to be allowed to terminate the lease in reliance on those breaches. There are a number of difficulties with this argument.
- [138] First, Australia Post needs to persuade this Court to make findings of fact that Ace, through Mr Homewood, cynically induced or allowed Australia Post to exercise the option to extend the lease before Ace raised the absence of formal approval to the carrying out of the renovation works with a view to improving Ace's position under the newly extended lease. The learned trial judge did not make findings of fact to this effect, but it is said on behalf of Australia Post that this Court should do so. I am not persuaded that this Court should make the findings of fact sought by Australia Post.
- [139] The view which the learned trial judge expressed of Mr Homewood, and which is set out above, is quite inconsistent with a conclusion that he was cynically engaged in leading Australia Post up the garden path to the exercise of the option to extend the lease. The evidence, even without the benefit of the learned trial judge's favourable observations concerning Mr Homewood, does not afford a basis for finding that Mr Homewood encouraged Australia Post to exercise the option to extend the lease in the belief that the negotiations in respect of the renovations had been concluded to Mr Homewood's satisfaction. Indeed, on the evidence, there is no reason to doubt that Australia Post's personnel knew that those negotiations had not been concluded when Decipha commenced the renovations and, indeed, when they decided to exercise the option to extend the lease.

⁶⁴

Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641 at 674 – 675.

[140] A compelling indication of just how remote from reality Australia Post's argument on this point is may be found in the email of 10 July 2006 sent by Mr Allan of Australia Post to Mr Gray, the Queensland Manager, Corporate Real Estate of Australia Post. Mr Allan's email was a response to Mr Rosano's proposal that Australia Post should exercise the option to extend the lease and continue as tenant of the Premises in order to "retain the favourable arrangements currently in place for extension and take away the risk of changing the starting position", and Decipha would take a sub-lease of the Premises from Australia Post. Mr Rosano's proposal also suggested that there be a negotiation with Ace in relation to sharing the risk of wasted cost of the renovations between Ace and Decipha if Decipha was forced to vacate the Premises due to pressure by government agencies. Mr Allan's email of 10 July in response to this proposal was in the following terms:

"I have known John for about eight years having negotiated the original lease at West End.

My understanding of John is he is very honourable and a gentleman, but is not a fool.

The issue that John as the Landlord faces is that his investment has declined over the past five years and will more so in the next five years. The terms of our lease are extremely beneficial to Post. The most obvious is the option we have. This option is capped at 5% with 3% annual increases throughout its term.

Because of this John's growth has fallen behind yields for this type of property and has no means of catching up until 2012. In addition, he has sustained the impact of Land Tax no longer being recoverable from tenants. Presently, Land Tax is about \$24,000 per annum, which in effect nets his rent back to about \$100,000 per annum.

The only positive about this investment is its capital growth, which is happening whether he has a tenant or not.

Earlier this year John Miller asked me to provide market information as to comparable buildings in the area. This building sits at about \$75 sq mtr net whereas the evidence available in other buildings averaged greater than over twice this rate a sq mtr.

The current Lease if changed in any significant form will allow the landlord to renegotiate the essential terms. At least it will give him the opportunity to recover rental to a more appropriate level which in this instance could be as much as at least closer to \$200k per annum than what we pay. I am not saying he would do that but I am saying we are open to that risk.

In the instance of capital expenditure, John is simply a Bank for Post. He does not have to do it other than strengthening his relationship with us. He no doubt raises the funds externally at comparable interest rate and recovers it through rental cash flow. There are small advantages to him doing this but nothing as a leverage for us to take advantage of.

Tony, it would be totally uncommercial for us to ask John to participate in risk. In my view he would neither contemplate [nor] enter such an agreement as there is no benefit. Moreover, it would be construed as completely 'screwing' him for no reasonable reason.

I cannot support this approach at this stage."

- [141] In the light of this memorandum the suggestion that Mr Homewood had a motive to engage in the cynical manipulation of the negotiations to lure Australia Post into exercising its right to an extension of the lease can be seen to be fanciful. It sorely tests one's credulity to suggest that Mr Homewood would have been interested in extending the lease at below market rent, and there is no indication in the evidence that Australia Post's employees believed that Mr Homewood was content to abandon his interest in attempting to improve Ace's position in relation to the rent if he could do so by negotiation.
- [142] Secondly, Australia Post's argument requires one to conclude that Mr Homewood had, in fact, accepted that his expectations for the outcome of the negotiations in relation to the renovations had been met when Australia Post informed him that it would itself bear the capital cost of the renovations. In this regard, it was put to Mr Homewood in cross-examination that he had "won" the negotiation when Australia Post informed him that it wished to proceed with the renovations on the basis that it would meet the capital cost. Mr Homewood's answer was: "I didn't see it that way." This answer reflected Mr Homewood was clinging to his hope of obtaining a return on the outlay of the cost of the renovations. Having regard to the learned primary judge's assessment of Mr Homewood and my own assessment of the appeal record, I am unable to conclude that Mr Homewood's evidence on this point should not be accepted.
- [143] Another difficulty with Australia Post's argument at the factual level is that, for the reasons I have already explained, Mr Homewood did not know of, or consent to, Australia Post's breach of cl 7.1 of the lease. This breach afforded Ace an entirely separate basis on which to terminate the lease even if it were precluded from terminating the lease for breach of cl 9.1.
- [144] Fourthly, it is essential for Australia Post to identify a detriment which it would suffer by virtue of having exercised the option if Ace were now allowed to terminate the lease for breach by Australia Post. It is important to understand Australia Post does not argue that it should now be allowed to resile from the consequences of its exercise of the option. If Australia Post had not exercised the option, Australia Post would now have no lease at all. Australia Post does not contend that it should be freed from the lease which it was induced to extend. To the contrary, Australia Post insists on remaining as lessee.
- [145] The only detriment to which Australia Post might point as a basis for estopping Ace from terminating the lease is a loss of the benefit of the expenditure on the renovations. As I have already noted, while the loss of that benefit may be a detriment to Decipha, the Court should not speculate as to whether, and the extent to which, the loss of that benefit is a detriment to Australia Post. And even if Australia Post did suffer a detriment, one cannot properly conclude that the amount of the wasted expenditure is such a detriment as would warrant holding that Ace is precluded from terminating the lease. Such an outcome could well be

disproportionate to any equity to relief which Australia Post could show. As things stand Australia Post is unable to show that an estoppel precluding Ace from terminating the lease would be a proportionate response in the circumstances. If Australia Post were able to quantify the monetary value of any loss suffered by it as a result of wasted expenditure on the renovations – which it has not done – then the amount of that pecuniary loss would constitute "its minimum equity to relief". That minimum equity might have been satisfied by an order for money payment by Ace of that amount.⁶⁵

- [146] In summary on this point, I do not consider that Ace was estopped from relying upon the breach of cl 9.1 or cl 7.1 to terminate the lease.

Waiver

- [147] At the outset of the discussion under this heading, some brief reference to what is meant by "waiver", as that term is used in relation to the loss of contractual rights, is desirable. In *Sargent v ASL Developments Ltd*,⁶⁶ Stephen and Mason JJ preferred to treat cases where a party's words or conduct are regarded as precluding him or her from exercising a legal right which would otherwise be available, as cases of election or estoppel. In such cases the doctrine of "waiver" is subsumed within the doctrine of election. Stephen J explained that, within a binary classification of estoppel and election, "Estoppel depends upon what a party causes his adversary to do. Waiver by election depends upon what the party himself intends to do, and has done".⁶⁷ It will be seen that the argument made by Australia Post in relation to waiver as an issue separate from estoppel failed to observe this distinction in that Australia Post focused exclusively on what Ace allegedly caused Australia Post to do and failed to plead or prove what Ace intended to do, and did, in terms of an election between competing rights.

- [148] In *Freshmark Limited v Mercantile Mutual Insurance (Australia) Limited*,⁶⁸ Dowsett J, with whom McPherson JA agreed, referred to *Sargent v ASL Developments Ltd* and to the examination by the High Court in *Commonwealth of Australia v Verwayen*⁶⁹ of the "boundaries" of estoppel, waiver and election and concluded:⁷⁰

"The better view is that a mere indication of an intention not to rely upon contractual rights will not generally constitute a waiver sufficient to bar a future action to enforce such rights. Waiver should not be seen as an alternative weapon to estoppel in the war against the doctrine of consideration. However, where a party elects between alternative rights available under a contract, such election will usually be final."

- [149] The view of Dowsett J, viz that there is no separate doctrine of waiver of contractual rights based on representations or conduct by a party unless the representations or conduct amount to a binding election or are accompanied by detrimental reliance sufficient to support an estoppel or consideration sufficient to support a contractual

⁶⁵ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 423; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 413, 417, 429, 441, 454; *Callaghan v Callaghan* (1995) 64 SASR 396 at 407.

⁶⁶ (1974) 131 CLR 634 at 643 – 647 and 654 – 656.

⁶⁷ (1974) 131 CLR 634 at 647.

⁶⁸ [1994] 2 Qd R 390 at 397 – 403.

⁶⁹ (1990) 170 CLR 394.

⁷⁰ [1994] 2 Qd R 390 at 403.

variation, has been vindicated by the decision of the High Court in *Agricultural & Rural Finance Pty Ltd v Gardiner*.⁷¹

[150] In light of the discussion of this point in *Agricultural & Rural Finance Pty Ltd v Gardiner*,⁷² it would seem prudent no longer to speak of "waiver" of contractual rights and obligations and to confine its use to other fields of legal discourse such as the waiver of the right to legal professional privilege and waiver of a defence under a limitation statute.

[151] As to waiver by election, in *Sargent v ASL Developments Ltd*, Mason J (as his Honour then was) said:⁷³

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

Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made it cannot be retracted ... No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

... An election takes place when the conduct of the party is such that it would be justifiable only if an election had been made one way or the other ... So, words or conduct which do not constitute the exercise of a right conferred by or under a contract and merely involve a recognition of the contract may not amount to an election to affirm the contract."

[152] In *Sargent v ASL Developments Ltd*, Stephen J, with whom McTiernan ACJ agreed, said:⁷⁴

"The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other; thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease (Viscount Dilhorne in the *Kammins Ballrooms Case* ([1971] AC at p 873); Herring CJ in the *Coastal Estates Case* ([1965] VR at p 436); Kitto J in *Tropical Traders Ltd v Goonan* ((1964) 111 CLR 41 at p 56)).

⁷¹ (2008) 238 CLR 570 at 588 [56], 601 – 602 [95] – [96], cf 620 [144] – [145] and 625 [162].

⁷² (2008) 238 CLR 570 at 588 [55], 589 – 590 [60], 602 [99] – [100] and 625 [162].

⁷³ (1974) 131 CLR 634 at 655 – 656.

⁷⁴ (1974) 131 CLR 634 at 646 (citations footnoted in original).

- [153] In relation to the breach of cl 9.1 of the lease, it has been seen that the learned trial judge concluded that "If it were necessary to consider waiver, the defendant unequivocally waived its right to act on the breach of clause 9.1 of the lease".⁷⁵ Her Honour did not identify expressly the exercise of rights by Ace which constituted the election involved in that waiver. That is hardly surprising given that Australia Post did not plead any such facts as part of a case of waiver by election or articulate them in its submission to her Honour. The earlier part of the paragraph of her Honour's reasons in which she expressed that conclusion referred only to Ace's "conduct from 1 November 2006 in allowing [the] renovations to continue at significant expense which [Australia Post] relied on". Because waiver in this context is in substance concerned with an election by Ace, these findings are not sufficient to sustain a conclusion that Ace exercised a right conferred by the lease consistent only with its continuing in operation. And oddly, Australia Post had not sought to support its case of election by reference to Ace's receipt of rent. If Ace demanded and received payment of rent with knowledge of the breach, that would be an unequivocal affirmation of the lease, but Australia Post did not plead or argue such a case. This Court is not free to speculate on what might have been.
- [154] For present purposes it is sufficient to say that the findings of the learned trial judge, directed as they were to Australia Post's reliance on Ace's conduct, rather than to Ace's exercise of its rights under the lease, are not apt to sustain the conclusion that Ace elected to affirm the lease notwithstanding Australia Post's breach of cl 9.1 of the lease. It can also be said that there was no election by Ace to allow the extension of the lease notwithstanding the breaches of cl 9.1. The extension of the lease occurred by virtue of the unilateral exercise by Australia Post of its option to extend the lease: Ace did not exercise any right under the lease as so extended save possibly claiming and receiving payment of rent. And in this regard, as I have noted, Australia Post did not rely upon the payment and receipt of rent as constituting an election by Ace to be bound by the lease notwithstanding the breach of cl 9.1 of which Ace was clearly aware after November 2006. Accordingly, I disagree with the learned trial judge on the issue of waiver of the breach of cl 9.1 of the lease.
- [155] Australia Post did not plead any case of waiver by election as distinct from estoppel. It did, however, make a submission to the learned trial judge that there had been a waiver of rights by Ace on the footing that "waiver" meant "waiver by election". It contended that Ace knew of Decipha's use and occupation of the Premises in 2007 and that the 2006 to 2007 renovation had been completed without its approval and therefore had "an election to make: it could either complain of those breaches or it could proceed to finalise its negotiations in order to formalise Australia Post's exercise of its option. It elected in favour of the latter and ... is bound by its election." Its argument on waiver was also put to the learned trial judge in the following way:
- "Ace had an election to make between forfeiting and not forfeiting the lease as a result of the breaches of which it complains. By its conduct in late 2007 ... it elected not to forfeit the lease on those grounds. It cannot now resile from its election."
- [156] The waiver argument advanced by Australia Post depends on Ace's knowledge of the facts of Decipha's occupation of the Premises. Actual knowledge of the facts

⁷⁵

[2009] QSC 199 at [101].

which give rise to the alternative and inconsistent rights is essential to a binding election. Thus in *Sargent v ASL Developments Ltd*, Stephen J, with whom McTiernan ACJ agreed, said of the doctrine of election:⁷⁶

"For the doctrine to operate there must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election as between the two inconsistent rights which he possesses (*Craine v Colonial Mutual Fire Insurance Co Ltd* ((1920) 28 CLR 305 at p 326); *United Australia Ltd v Barclays Bank Ltd* ([1941] AC 1 at p 30)).

The nature of the knowledge which an elector must possess is a matter upon which the authorities are [somewhat] at variance. An elector must at least know of the facts which give rise to those legal rights, as between which an election must be made; without that knowledge the doctrine of election will not be available to make irrevocable his choice of one particular right, although in appropriate circumstances an estoppel may still arise which produces that very consequence and this without any such requirement of knowledge on the part of the party who is estopped. The extent of knowledge of relevant facts necessary for the doctrine of election to apply has been described as 'full knowledge of the material facts' (*Bennett v L & W Whitehead Ltd* ([1926] 2 KB 380 at p 410). In *Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* ((1941) 65 CLR 603) a knowledge of circumstances such as will provide information from which the decisive fact giving rise to the legal right is 'a clear if not a necessary inference' was held to be sufficient ((1941) 65 CLR at p 617)."

- [157] As I have already noted, the learned trial judge made no specific findings in relation to Mr Homewood's knowledge of the facts relating to Decipha's possession of the Premises, but I am unable to conclude that the facts to which I have referred as establishing that Decipha was in possession of the Premises were known by Mr Homewood. For that reason the case of waiver by way of election in relation to the breach of cl 7.1 must fail even if it were to be accepted that Ace made an election which precluded it from terminating the lease by reason of the breach of cl 9.1 of the lease.
- [158] It may also be noted that the decision of the High Court in *Agricultural & Rural Finance Pty Ltd v Gardiner* made the point that a forbearance to exercise a right of termination does not operate prospectively to vary the terms of a contract. Forbearance in respect of past breaches has only a temporary effect, so that the promisee may later insist upon adherence to the strict letter of the contract in respect of subsequent breaches.⁷⁷ Accordingly, even if Ace were to be treated as having made a binding election in relation to the breach of cl 9.1 and any breach of cl 7.1 which occurred in the past, Ace would not be precluded by election from exercising a right of termination based on the continuing breach of cl 7.1.
- [159] In concluding my discussion of this aspect of the case, I need to refer again to the lacuna in the argument advanced by Australia Post at trial and in this Court in relation to waiver by election. No reliance was placed on the payment of rent by

⁷⁶ (1974) 131 CLR 634 at 642 (citations footnoted in original).

⁷⁷ (2008) 238 CLR 570 at 592 – 599 [68] – [87], 625 [162], cf 620 [144] – [145].

Australia Post to Ace after the circumstances justifying termination of the lease were alleged to have arisen. As the High Court's approval of the *Kammins Ballrooms Case* in *Sargent v ASL Developments Ltd* shows, acceptance of rent after grounds for termination have arisen will ordinarily constitute a binding election not to terminate the lease. As I have said, nothing was sought to be made by Australia Post in this respect; and in the end, nothing turns on this because, as I have concluded, Ace did not have sufficient knowledge of the facts relating to the breach of cl 7.1 of the lease to bind it to an election until after the full details of Decipha's occupation of the Premises emerged.

Clause 17: Ace's legal costs

[160] In relation to the issue relating to Ace's legal costs, the learned trial judge said:⁷⁸

"Although the tax invoice for the legal costs of \$2,941.71 that are the subject of the notice describes the costs as those incurred in respect of the 'lease renewal for period of 09 November 2007 to 24th June 2008 as per attached documents from Nicol Robinson Halletts Lawyers' (doc 258), a letter of explanation from [Ace's] solicitors sent to [Australia Post's] solicitors on 4 September 2008 (doc 267) specified that the costs related to work that [Ace's] solicitors were instructed to undertake in relation to breaches of the lease by [Australia Post].

[Australia Post] disputes its liability to pay these costs on the basis that either it was not in breach of the lease or [Ace] is estopped from contending to the contrary. In view of the conclusions I have reached in respect of the other three breaches alleged in the notice, [Australia Post] is not liable under the lease for these legal costs incurred by [Ace] between 9 November 2007 and 24 June 2008."

[161] It will be seen that the basis on which her Honour resolved this issue against Ace has been reversed by my conclusions in relation to the breach of cl 7.1 of the lease. I would therefore conclude that this breach has been established as well.

Relief from forfeiture

[162] In my respectful opinion, the circumstances of the breaches of cl 7.1 and cl 9.1 of the lease were not such as to attract relief from forfeiture.

[163] Consideration of the question of relief from forfeiture requires attention to a number of issues: the gravity of the breach or breaches in question, whether the breach was inadvertent or wilful, the damage to the covenantee and the relative loss to the covenantor if relief is not granted.⁷⁹

[164] Sometimes these issues overlap in practice. Thus, as to the first and last of these considerations, in consequence of the breach of cl 9.1, Ace was deprived of the commercial opportunity to bargain to recoup (by way of the interest upon repayment of the costs of the renovations) some part of its disadvantage. It may be that this opportunity would have been narrow because of constraints upon the legitimate scope of an attempt to vary the terms of the lease as the price of consent. But to the extent that the parties were at liberty to bargain for consideration other

⁷⁸ [2009] QSC 199 at [102] – [103].

⁷⁹ *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723 – 724; *Legione v Hateley* (1983) 152 CLR 406 at 449.

than a variation of the lease, such as the terms of financing of the renovations, there was an opportunity which Ace might have been able legitimately to exploit. To grant Australia Post relief from forfeiture would allow Australia Post to secure for Decipha the benefit of the extended lease at an advantageous rent in circumstances where Australia Post's precipitate action pre-empted the possibility of a more advantageous negotiated outcome for Ace.

- [165] As to the breach of cl 7.1 of the lease, it would clearly be unjust to Ace to grant Australia Post relief from forfeiture. To do so would have the effect of regularising an **ongoing** breach of cl 7.1 of the lease. In *Austotel Pty Ltd v Franklins Self-Serve Pty Ltd*,⁸⁰ Kirby P (as his Honour then was) spoke of the need for courts to be: "careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people ... If courts do not show caution here they will effectively force on commercial parties terms which the court [decides] ... [T]he contract then enforced will not be that which the parties have concurred in but a different one, determined by the court".
- [166] Neither the breach of cl 7.1 nor the breach of cl 9.1 was the result of inadvertence on the part of Australia Post.⁸¹ Australia Post's breach of cl 9.1 was deliberate and, initially at least, high-handed. The breach of cl 7.1 by Australia Post may not have been deliberate: rather, it may be better understood as the result of an imperfect appreciation by the individuals involved of the consequence of Australia Post's ceding possession of the Premises to Decipha. But it may be said with equal accuracy that Australia Post was content to seek the commercial advantages of what was, for practical purposes, a sub-lease to Decipha while seeking to deny Ace the opportunity to take legitimate advantage from the commercial reality of that situation.
- [167] This is not to deny that Australia Post was entitled vigorously to pursue its own commercial advantage, but to the extent that Australia Post deliberately did so, there is nothing inequitable or unfair in holding it to the consequences of that conduct. Indeed it would not be fair to grant relief from forfeiture so as to crown that conduct with success. Importantly in this regard, Ace did not contribute by its words or conduct to either of Australia Post's defaults.⁸²
- [168] In relation to the breach of cl 9.1, the expenditure on the renovations was incurred, not by Australia Post but by Decipha. This means that, as between Ace and Australia Post, the extent to which Australia Post will suffer loss in the event of the termination of the lease is speculative. And in any event, Decipha's assumption of obligations to its builder was not induced by Ace's conduct.⁸³
- [169] As to the ongoing breach of cl 7.1 of the lease, Australia Post has not proffered an undertaking to remedy that breach. As I have noted, the remedy for the situation which has arisen in consequence of that breach cannot be achieved by the stroke of a pen bearing in mind that the business conducted on the Premises by Decipha is not conducted by employees of Australia Post. One cannot be confident that this situation can be easily altered.

⁸⁰ (1989) 16 NSWLR 582 at 585 – 586.

⁸¹ Cf *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 365 [147].

⁸² Cf *Legione v Hateley* (1983) 152 CLR 406 at 449; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 365 [145].

⁸³ Cf *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 352 [106].

- [170] For these reasons, I would not be disposed to grant relief from forfeiture. The better course, in my view, is to leave the parties to seek to complete the negotiation which Australia Post pre-empted. If the parties cannot reach agreement then further litigation may be necessary. That eventuality would be regrettable, but the prospect of further litigation, as unattractive as it is, is not as unpalatable as allowing Australia Post to secure to its subsidiary, Decipha, commercial advantages which it did not obtain, and might not be able to obtain, from a freely and fairly made bargain.

Summary of conclusions

- [171] In summary, I conclude that:
- (a) Australia Post did not breach cl 6.1 of the lease;
 - (b) Australia Post breached cl 7.1 of the lease;
 - (c) Australia Post breached cl 9.1 of the lease, and Ace is not precluded by estoppel or waiver by election from terminating for that breach;
 - (d) Australia Post breached cl 17 of the lease; and
 - (e) Australia Post is not entitled to relief from forfeiture.
- [172] I would order that:
- (a) the appeal be allowed;
 - (b) the declaration and order made at first instance be set aside and in lieu thereof, it be ordered that the application be dismissed; and
 - (c) Australia Post pay Ace's costs of the proceedings, at first instance and on appeal, to be assessed on the standard basis.

- [173] **FRYBERG J:** Keane JA has set out the facts of this case and I need not add to that.

Clause 6.1: Decipha's use of the premises

- [174] I agree with what Keane JA has written in paras [65] – [70] of his reasons for judgment.

Clause 7.1: Decipha's occupation of the premises

- [175] In *Lam Kee Ying Sdn. Bhd v Lam Shes Tong*, the Privy Council wrote:

“[The respondents’] submissions were based on a number of cases in which it was held that a lessee who retains the legal possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises: *Peebles v. Crosthwaite* (1896) 13 T.L.R. 37, 38; (1897) 13 T.L.R. 198, 199; *Jackson v. Simons* [1923] 1 Ch. 373, 380; *Chaplin v. Smith* [1926] 1 K.B. 198, 206, 209-210; and *Pincott v. Moorstons Ltd.* (1936) 156 L.T. 139, 140. Accordingly it has been said that a lessee who grants a licence to another to use the demised premises does not commit a breach of the covenant:

‘unless his agreement with his licensee wholly ousts him from the legal possession ... nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession: *Stening v. Abrahams* [1931] 1 Ch. 470, 473-474.’

Their Lordships regard these decisions as settling the law and as proceeding upon correct principles. A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises.”⁸⁴

[176] In the circumstances of this case, it could not be held that Australia Post parted with possession of the premises unless it were shown that Decipha had taken possession of them. On the facts a finding that no one was in possession was not open. The question was whether Decipha had possession of the premises in law. If it was merely an occupier, Australia Post would not have breached the alienation covenant.

[177] What is meant by possession in law was described by Lord Browne-Wilkinson in *J A Pye (Oxford) Ltd v Graham*:

“40 In *Powell’s* case 38 P & CR 470 Slade J said, at p 470:

‘(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (‘animus possidendi’).’

Counsel for both parties criticised this definition as being unhelpful since it used the word being defined—possession—in the definition itself. This is true: but Slade J was only adopting a definition used by Roman law and by all judges and writers in the past. To be pedantic the problem could be avoided by saying there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (‘factual possession’); (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (‘intention to possess’).”⁸⁵

[178] That was said in the context of a case about title by adverse possession, but it was applied in the context of an alienation covenant in *Clarence House Ltd v National Westminster Bank plc*.⁸⁶ The clause in question in the latter case was significantly different from that under consideration here; but the quoted statement of the law is equally applicable.

[179] As between Australia Post and Decipha, Australia Post was the “owner” of the lease; it held the paper title. In the absence of evidence to the contrary it would be taken to be in possession of the land the subject of the lease. However as Keane JA has demonstrated, there is an abundance of evidence to the contrary. Decipha alone had physical custody and control of the premises and there can be no doubt that through its relevant officers, it had an intention to maintain that custody and exercise control on its own behalf and for its own benefit.

⁸⁴ [1975] AC 247 at pp 255-6.

⁸⁵ [2003] 1 AC 419 at p 435.

⁸⁶ [2010] 1 EGLR 43 at p 48.

- [180] Mullins J found that there had not been any parting with possession of the premises by Australia Post, despite what she described as the indications in the evidence that suggest that the occupation of Decipha was consistent with exclusive possession of the premises. The basis for the finding is unclear. Rent was paid to Ace by or on behalf of Australia Post; but there was a degree of ambiguity about whether the latter was acting in its own right or as agent for Decipha. Her Honour wrote that Australia Post had been careful not to relinquish its control over the lease and the premises, but did not state the basis for that finding. In my judgment that finding was not correct. As Keane JA has demonstrated, the evidence that Decipha was in exclusive possession of the premises was convincing.
- [181] Her Honour held that the control was facilitated by the fact that Australia Post was the holding company of Decipha. There are conflicting views on whether such a relationship is relevant to the question of parting with possession. In *Lam Kee Ying Sdn. Bhd v Lam Shes Tong*, the Privy Council noted that counsel rightly did not place any reliance on such a relationship. As Keane JA has pointed out, a different view was taken by the Court of Appeal in *Akici v LR Butlin Ltd*.⁸⁷ I see no need to analyse the difference. Surely what must be significant is not the description of the legal relationship but the manner in and extent to which, on the facts of the case, the holding company implements the power potentially available to it.
- [182] In the present case there was no evidence that Australia Post exercised any control over the activities at the premises nor that it had any right through its officers to go on to the premises without an invitation. Even if one considers the relationship, its case is not made out.
- [183] It was not argued that by giving Decipha exclusive possession in return for an indemnity as to the rent, Australia Post sublet the premises.

Parting with possession: Ace's consent

- [184] In its outline of argument Australia Post submitted, should the Court reach the conclusion that it breached cl 7 by parting with possession, that Ace gave its consent. In doing so it adopted the submissions which it made at trial. However at trial it made no submission that Ace had consented to its parting with possession of the premises. It submitted only that Ace had consented to Decipha's occupation of the premises. That is not surprising; for that was all that it had pleaded. Consent to mere occupation by Decipha was not the same as consent to parting with possession. In my judgment it was not open to Australia Post to make the latter submission.
- [185] In any event, the evidence does not warrant an inference that Mr Homewood knew Decipha's state of mind in relation to the question of possession. If he did not know of Decipha's intention to possess the premises, he could not have consented to Decipha's having legal possession; nor, consequently, could he have consented to Australia Post's parting with possession.
- [186] I also agree with what Keane JA has written on this point.⁸⁸

⁸⁷ [2006] 1 WLR 201 cited in para [86].

⁸⁸ Paragraphs [109] - [115].

Parting with possession: unreasonable withholding of consent

- [187] In the further alternative Australia Post submitted that Ace had unreasonably withheld its consent. Again this was not a matter raised on the pleadings or argued at first instance. There the only issue was whether Ace had unreasonably withheld its consent to Decipha's occupation of the premises. In my judgment it is not open to Australia Post to make this submission.
- [188] In any event, the evidence does not support the finding of unreasonable withholding of consent. As Australia Post rightly conceded, consent cannot be said to have been withheld unless and until it has been asked for. It is no answer that no reasonable objection could have been made if consent had been sought.⁸⁹ Australia Post submitted that an application for Ace's consent was implicit in discussions which occurred by e-mail, fax and letter between February and July 2006 and on 9 June 2006 at a meeting.
- [189] None of those discussions contains any reference to consent for Australia Post to part with the legal possession of the premises. They do refer to activities which imply occupation of the premises by Decipha, but nowhere in them can I find anything which can be construed as a request for consent to anything, let alone consent to parting with legal possession of the premises.
- [190] The submission must be rejected.

Parting with possession: estoppel and election

- [191] Australia Post submitted that Ace was estopped from relying upon the breach of cl 7.1 because its conduct amounted to a representation to the effect that it consented to Decipha's occupation of the premises. It submitted that Australia Post had relied on that representation to its detriment. Two detriments were suggested to have been caused by reliance on the alleged misrepresentation. They were first, the exercise of the option on 26 October 2006 and second, causing Decipha to enter into the renovation contract.
- [192] I am prepared to assume for present purposes that a representation that Ace would consent to Decipha's occupation of the premises can be teased out of the discussions referred to above. Such a representation could not create an estoppel in respect of breaches of covenant of which Ace was unaware; nor is a representation that one consents to another's occupation of premises equivalent to a representation that one consents to that other's taking legal possession of the premises. That is enough to dispose of the submission.
- [193] I also agree with Keane JA that there is no evidence that Australia Post suffered any detriment as a result of Decipha's entering into the renovation contract.
- [194] As to election, I agree with what Keane JA has written under the heading "Waiver".

The grant of a licence

- [195] I also agree with the Keane JA's construction of "licence" in cl 7.1.⁹⁰

⁸⁹ *Hendry v Chartsearch Ltd* [1998] CLC 1382 at p 1393 per Henry LJ, pp 1393-4 per Millett LJ.
⁹⁰ Paragraphs [117] - [122].

[196] Australia Post submitted that the words “otherwise part with possession” in cl 7 indicated an intention to capture only licences which involved parting with possession. It submitted that “licence” was included in the clause because the draughtsman must have been aware of a statement in *Woodfall’s Law on Landlord and Tenant* (citations omitted): “The question whether the grantee has exclusive possession is no longer the crucial test distinguishing between leases and licences”.⁹¹ I doubt if that statement represents the law in Australia. It is inconsistent with the reasoning of the High Court in *Radaich v Smith*.⁹² It is also inconsistent with a more recent statement of the law by McHugh J:

“501 The distinction between a lease or demise and a licence hinges on whether a legal right to exclusive possession of the land or tenement has passed. Thus, as *Halsbury’s Laws of Australia* states (footnotes omitted):

‘Except in exceptional circumstances, a transaction will be characterised as a lease where a grantor has given the recipient exclusive possession of the relevant premises for a limited duration and retained a reversionary interest in the premises. ‘Exclusive possession’ is a right which permits the holder to exclude other persons from the property. A lessee having exclusive possession of the demised premises can restrict all persons, including the lessor, from the demised premises, subject to any contrary statutory provision and certain exceptions.’

502 Accordingly, a contract giving a person the legal right to exclusive possession of land or tenement for a determinate period, however short, is a lease. When the cases talk of exclusive possession, they speak of legal possession. It is the right to legal possession that constitutes a lease. Indeed, it is a pity that the term ‘exclusive possession’ was ever used, although its use dates back to about 1830. As Mr D W McMorland has pointed out: ‘Between 1830 and 1950 a number of cases used the phrase ‘exclusive possession’ to indicate the distinguishing feature of a tenancy, but it is always quite clear that it is used in the sense of the legal right to sue in trespass.’

503 The adjective ‘exclusive’ adds nothing to the concept of possession. As the editor of *Salmond on Jurisprudence* has pointed out, ‘exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time’. It is the legal right to possession, not the physical fact of exclusive ‘possession’ or occupation, that is decisive.”⁹³

There may be limited exceptions in areas such as family law and native title; but none which has any apparent application in the present circumstances.

[197] If Australia Post’s argument were correct, “licence” would have little or no work to do in the clause. On the other hand, the clause makes perfect sense if construed to cover licences, subleases and partings with possession other than subleases.

⁹¹ Wellings V G and Huskinson N (eds), *Woodfall’s Law on Landlord and Tenant*, 28th ed, Sweet & Maxwell, London, 1978, at para 1-0017.

⁹² (1959) 101 CLR 209.

⁹³ *State of Western Australia v Ward* (2002) 213 CLR 1 at pp 222-3 (citations omitted and dissenting on other grounds).

- [198] It follows that if, contrary to my conclusion above, Australia Post did not part with legal possession of the premises (and assuming it did not sublet them), it licensed them to Decipha within the meaning of that clause. Unless Ace consented to the licence, Australia Post breached the clause.
- [199] It seems fairly clear on the evidence that Mr Homewood knew of Decipha's presence on the premises; in other words that he knew it was at least in joint occupation. If he turned his mind to the question he would no doubt have deduced that Decipha was there with Australia Post's permission. The question is whether he consented to that arrangement. It was not suggested that any express consent was given nor was he asked if he ever turned his mind to the question of whether to consent. Certainly he never objected, even after Decipha took over the whole of the premises in 2007. His silence provides some foundation for inferring his consent; but I hesitate to draw the inference because Mr Homewood was not cross-examined on the point. As it is unnecessary for me to decide it, I prefer not to.

Clauses 9.1 and 17: the renovations and legal costs

- [200] I find it unnecessary to consider these aspects of the appeal.

Relief from forfeiture

- [201] Even now Australia Post has not attempted to remedy its breach of covenant by seeking Ace's consent for it to part with legal possession to Decipha (assuming a breach of this magnitude and duration is capable of remedy⁹⁴). It could have done so without prejudice to its primary position that there had been no breach. It seeks relief from forfeiture while continuing its breach.
- [202] He who seeks equity must do equity. The Court should not rewrite the lease.⁹⁵ I would refuse relief from forfeiture.

Orders

- [203] I agree with the orders proposed by Keane JA.
- [204] **DOUGLAS J:** I have had the advantage of reading the reasons of Keane JA and Fryberg J. I agree with their Honours' reasons. Keane JA has set out fully the facts that lead to this dispute. I wish to say something in addition about the issue whether Australia Post parted with the possession of the premises to Decipha or whether Decipha occupied the premises simply as Australia Post's agent.
- [205] The learned trial judge approached the issue by emphasising that the payments of rent and outgoings under the lease had always been remitted to Ace by or on behalf of Australia Post, which took responsibility for those payments. Her Honour pointed out that Five D managed the premises on behalf of Australia Post and not Decipha, including the raising of maintenance issues.⁹⁶ She also emphasised Australia Post's position as the holding company of Decipha in facilitating its control over the lease and the premises.⁹⁷ Decipha's activities also related to Australia Post's postal service activities.

⁹⁴ See *Nashying Pty Ltd v Giacomi* [2008] Q Conv R 54-684.

⁹⁵ Paragraph [165].

⁹⁶ *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [90].

⁹⁷ *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [92].

- [206] Her Honour did not expressly conclude that any occupation of the premises by Decipha was as Australia Post's agent. Her view was, however, that the control exercised by Australia Post over Decipha's possession of the premises meant that the use Australia Post made of the premises was that which it allowed Decipha to conduct.⁹⁸ Such an approach seems to me to be consistent with the view that Decipha was occupying the premises as Australia Post's agent. It may well be, therefore, that, following the views expressed by Neuberger LJ in *Akici v LR Butlin Ltd*,⁹⁹ her Honour regarded Decipha as the agent of Australia Post for the purposes of identifying who was in possession of the premises.
- [207] Neuberger LJ himself pointed out, however, that that approach was permissible unless it was inconsistent with other facts. The facts emphasised by Keane JA at [105] – [107] and the absence of affirmative evidence from Australia Post that it retained possession of the premises by retention of the keys, mentioned by his Honour at [90] of his reasons, persuade me, that, in this case, Australia Post did part with possession of the premises.
- [208] That is not to say that in every case where a holding company owns subsidiaries it will be in breach of a lease merely because a subsidiary also operates in the holding company's premises without the landlord's consent. An obvious comparison is with the situation where the lessee is a natural person who engages employees to operate his or her business from leased premises. That would not mean, normally, that the lessee had parted with possession of the premises. Similarly, many corporations' subsidiaries may merely be agents in such a context.
- [209] The question whether there has been a parting with possession is rather different, however, and still depends upon all the facts and circumstances.¹⁰⁰ Where those facts and circumstances show that the subsidiary has been deliberately created as an entity whose employees are not to be employed by the principal and the other evidence is that it is in charge of the premises as it was here, the conclusion I would draw is that the principal has parted with possession of the property.
- [210] I also agree with the orders proposed.

⁹⁸ *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [93].

⁹⁹ [2006] 1 WLR 201 at [79] – [81].

¹⁰⁰ *Lam Kee Ying Sdn Bhd v Lam Shes Tong* [1975] AC 247 at 256F.