

SUPREME COURT OF QUEENSLAND

CITATION: *7-Eleven Stores Pty Ltd v United Petroleum Pty Ltd & Anor (No 2)* [2011] QSC 267

PARTIES: **7-ELEVEN STORES PTY LTD**
ACN 005 299 427
(applicant)
v
UNITED PETROLEUM PTY LTD
ACN 085 779 255
(first respondent)
FINESSE PROPERTIES PTY LTD
ACN 119 991 329
(second respondent)

FILE NO: SC No 9382 of 2009

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 8 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 20 May 2011

JUDGE: Peter Lyons J

ORDER: **The applicant is permitted to proceed with a claim for rent against the first respondent.**

CATCHWORDS: LANDLORD AND TENANT – RENT – BREACH OF COVENANT TO PAY – ACTIONS TO RECOVER RENT OR DAMAGES – ACTION TO RECOVER RENT – where the applicant leased premises from the second respondent – where the applicant granted a sublease to the first respondent – where the first respondent purported to terminate the sublease for failure by the applicant to comply with its obligations under the sublease – where it was determined the sublease had not been effectively terminated – whether the applicant can pursue a claim for payment of rent and interest

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – JUDGMENTS AND ORDERS – OTHER MATTERS – where proceeding started by originating application – where broader claim for relief found in statement of claim – whether relief that may be granted by the Court is limited by the form of the originating application and/or statement of claim

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – JURISDICTION AND AVAILABILITY

– specific performance of lease – whether specific performance of an accrued obligation to pay rent under the sublease could be ordered

Uniform Civil Procedure Rules 1999 (Qld), r 156, r 658

Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1, considered

Cousins Securities P/L & Ors v CEC Group Ltd & Anor; CEC Group Ltd v Cousins Securities P/L & Ors [2007] 2 Qd R 520, [\[2007\] QCA 192](#), cited

Turner v Bladin (1951) 82 CLR 463, [1951] HCA 13, considered

COUNSEL: P Franco for the applicant
D O’Sullivan for the first respondent

SOLICITORS: Shand Taylor for the applicant
Clayton Utz for the first respondent

- [1] **PETER LYONS J:** The applicant (*7-Eleven Stores*) brought proceedings against the first respondent (*United Petroleum*) to enforce a sublease. In reasons for judgment delivered on 16 December 2010 (*December 2010 reasons*), a determination was made that United Petroleum had not validly terminated the sublease. 7-Eleven Stores now seeks a judgment against United Petroleum for unpaid rent, including the rent for March 2011.

Background

- [2] While background matters are more fully set out in the December 2010 reasons, it is convenient to repeat some of them in these reasons.
- [3] The second respondent (*Finesse Properties*) leased land on which a service station and store are located to 7-Eleven Stores. 7-Eleven Stores sub-leased the premises to United Petroleum, for a term commencing on 21 January 2009, and expiring on 30 July 2014. United Petroleum ceased to occupy the premises on 23 July 2009. It alleged that it had effectively terminated the sublease the previous day. As mentioned earlier, the December 2010 reasons determine that that contention is not correct.
- [4] After United Petroleum ceased to occupy the premises, 7-Eleven Stores commenced proceedings by way of an originating application. It initially sought a declaration that United Petroleum had not validly terminated the sublease, and an order that United Petroleum specifically perform the sublease. Both United Petroleum and Finesse Properties were respondents to the application. United Petroleum’s purported termination was based (at least in part) on the failure of 7-Eleven Stores to perform its obligations under the sublease (principally in relation to repair of the premises). These were a mirror of obligations imposed by the lease on Finesse Properties. In the application, 7-Eleven Stores sought in the alternative, a declaration that Finesse Properties had repudiated the lease, and damages against it.
- [5] On 8 December 2009, directions were made. One direction permitted the amendment of the originating application. As a result of the amendment, the

declaration sought in relation to the sublease became a declaration that the sublease was valid and subsisting. The declaration in relation to Finesse Properties became a declaration that United Petroleum's termination of the sublease was caused by breach by Finesse Properties of the lease. Directions were given for the exchange of pleadings and affidavits, with the trial to proceed on affidavit evidence for three days commencing on 29 March 2010. Costs orders were made against United Petroleum.

- [6] On 26 March 2010, on the application of United Petroleum, the trial was adjourned, with further directions about the service of affidavits and amended pleadings. It came on for hearing before me on 8 September 2010, and continued the following day (*September hearing*). Further written submissions were received in late September and early October 2010, resulting in the delivery of the December 2010 reasons.
- [7] It is convenient to note some features of the pleading on which the trial was conducted. The statement of claim included an allegation that the sublease was "still on foot"; and an alternative allegation that the sublease was terminated by United Petroleum on 22 July 2009. It was further alleged that the conduct relied upon by United Petroleum as justifying the termination of the sublease had the consequence that Finesse Properties had been in breach of its obligations under the lease, and that the termination of the sublease was caused by a breach of the obligations which Finesse Properties owed to 7-Eleven Stores.
- [8] The statement of claim then alleged (and it was admitted by the other parties) that United Petroleum vacated the premises on 23 July 2009. It also alleged that the premises had been vacant since 23 July 2009, and that United Petroleum failed to pay rent to 7-Eleven Stores; and accordingly that 7-Eleven Stores had suffered loss by reason of the termination of the sublease. There was then an allegation that 7-Eleven Stores did not at that time intend to attempt to relet the premises, by reason of its claim for specific performance of the sublease. It alleged that it could not quantify its loss, said to be accruing at a rate of \$13,291.66 per month. (Evidence led at the trial demonstrated this to be the monthly rent claimed by 7-Eleven Stores from United Petroleum, as set out in invoices issued by 7-Eleven Stores to United Petroleum).
- [9] The statement of claim concluded with a prayer for relief. The relief sought against United Petroleum included a declaration that the sublease remained valid and subsisting; and an order that it be specifically performed. In addition to costs, it also sought the following:
- "4. Such further or other order (including, if necessary, directions regarding any assessment of compensation in lieu of specific performance or damages for breach of the Sublease) as to the Court seems just."
- [10] The structure of the statement of claim would rather strongly suggest that the pleadings relating to the premises being vacant and the failure by United Petroleum to pay rent were made in support of the alternative claim against Finesse Properties for breach of its obligations under the lease. However, the prayer for relief did not expressly include a claim for such damages. In its defence, United Petroleum pleaded to these allegations. Although it admitted vacating the premises on 23 July 2009, it did not admit that the premises had been vacant thereafter. It denied that it

had failed to pay rent to 7-Eleven Stores from 23 July 2009, relying on its alleged termination of the sublease for that denial. It did not admit the allegation of loss relating to the monthly sum of \$13,291.66, on the basis that it remained uncertain as to the truth of the allegation; and further alleged that if the loss were suffered, then 7-Eleven Stores had failed to mitigate that loss by reletting the premises. No discretionary basis was pleaded for refusing specific performance. No issue was raised as to whether 7-Eleven Stores was ready, willing and able to perform its obligations under the sublease.

- [11] Evidence led at the trial on behalf of 7-Eleven Stores included an affidavit from Ms Maree Ball, the national property development manager for 7-Eleven Stores, that 7-Eleven Stores had continued to issue invoices to United Petroleum for rent, and that these had not been paid. An earlier affidavit of Ms Ball (sworn on 17 September 2009) included evidence that United Petroleum had not attempted to return the keys to the premises. Although Ms Ball was cross-examined, there were no questions suggesting the payment of rent at any time after the premises had been vacated in July 2009. Nor were any questions directed to whether 7-Eleven Stores remained ready, willing and able to perform its obligations under the sublease; or as to the possibility of reletting the premises to another party.
- [12] At the end of the September hearing, the solicitor who then appeared for United Petroleum provided written submissions to which he spoke. His written submissions were in terms directed to the question whether specific performance should be granted. The order was opposed on the basis that the sublease had been validly terminated. There were no submissions relating to the question whether 7-Eleven Stores had proven that it was ready, willing and able to perform the sublease; or to the rent which United Petroleum would be required to pay, if it were ordered to perform the lease.
- [13] Mr Franco of Counsel who has appeared for 7-Eleven Stores throughout the hearing, provided written submissions at the end of the September hearing, stating that the relief sought by 7-Eleven Stores against United Petroleum included an order that the sublease be specifically performed. In the course of his oral submissions at that hearing, attention was drawn to the application for the order for specific performance. I then asked Mr Franco if I were to determine that the sublease had not been validly terminated, what order he sought. He responded that a declaration that the lease was valid and subsisting might well be sufficient, and shortly after, that such a declaration might be all that was required. He also submitted that it was not necessary that United Petroleum go back into possession of the premises; rather, it could perform the sublease by paying the rent. I again inquired about the form of order sought, if it were to extend beyond a declaration. Mr Franco replied by inviting me to proceed “on the basis that at this stage all we’re asking your Honour to do is to make that first declaration” (that is, that the sublease was valid and subsisting). The solicitor representing United Petroleum did not seek to make any further submissions about these matters.
- [14] Notwithstanding an invitation to do so, the solicitor for United Petroleum did not file supplementary submissions.
- [15] In view of the way that the matter had been left at the September hearing, when I delivered the December 2010 reasons, I invited the parties to make submissions about the orders to be made (as well as costs).

- [16] On 22 December 2010, the solicitor for 7-Eleven Stores wrote to the solicitor for United Petroleum enclosing a draft order. The draft included a declaration that the sublease is valid and subsisting; an order that United Petroleum specifically perform the lease; an order that United Petroleum pay a specified amount for rent, and interest on unpaid rent to 31 December 2010; and costs orders.
- [17] On 23 December 2010, the solicitor for United Petroleum advised the solicitor for 7-Eleven Stores by telephone that, following the delivery of the December reasons, United Petroleum intended to go back into possession of the premises. There was a discussion as to whether United Petroleum had retained keys to the premises. By a subsequent email of the same day, the solicitor for 7-Eleven Stores advised that a padlock had been installed after United Petroleum had left the premises, and nominated a person who could be contacted for the key to it. The email also offered any further assistance required.
- [18] On 4 January 2011, Mr Burge, the manager, special projects, for United Petroleum, wrote to Ms Ball, the national property development manager for 7-Eleven Stores, stating that United Petroleum would re-enter the site, and would “arrange to remit to you the rental balance”; and that costs of the proceedings would be paid “once the assessment is received”. Ms Ball replied by email of 10 January 2011, attaching a table of rent, and asserting that a rent review “will also be applicable from January”.
- [19] In a telephone conversation between Mr Burge and Ms Ball in mid to late January 2011, Mr Burge stated that he agreed with the rental calculation which had been provided to him.
- [20] An email of 24 January 2011 from the solicitors for 7-Eleven Stores to the solicitor then acting for United Petroleum advised that it was proposed to remove the specific performance order from the list of proposed orders, a revised version of the proposed orders being attached to the email. The email advised that there had been contact between the clients, and there appeared to be no dispute about the amount owing for rent. Comments on the proposed orders were sought from the solicitors for United Petroleum. By email of 31 January 2011, the solicitor for 7-Eleven Stores sought a response to his email of 24 January 2011 to the solicitor for United Petroleum.
- [21] By early February 2011, new solicitors were instructed for United Petroleum.
- [22] The matter came back before me on 14 February 2011. On that occasion, Mr Franco provided a draft judgment seeking a declaration that the sublease was valid and subsisting, an order for payment of rent and interest, and orders for costs. A direction was made that by 4pm on Tuesday 1 March 2011, United Petroleum was to identify those parts of the draft judgment which were not in dispute; and as to those parts which were, to provide submissions and material on which it intended to rely.
- [23] On 1 March 2011, the solicitors for United Petroleum sent to the solicitors for 7-Eleven Stores the submissions they proposed to rely upon. Generally they dealt with costs issues. However, one paragraph set out the orders for which United Petroleum contended, including an order that the claim for specific performance be dismissed. Another paragraph stated that United Petroleum disagreed with 7-Eleven Stores’ calculation of rent, reference being made to an attached schedule. That schedule reflected a rent review in January 2011, rather than in January 2010,

as 7-Eleven Stores contended. Those submissions were amended on about 9 March 2011, but not in ways which are at present material.

- [24] At a hearing on 24 March 2011, costs orders were made in favour of Finesse Properties; and a direction was made that legal argument regarding the claim for rent made by 7-Eleven Stores against United Petroleum and the claim by 7-Eleven Stores for its costs of the proceeding on an indemnity basis, be heard on 20 May 2011 (*May hearing*).
- [25] In the meantime, on 17 March 2011, the solicitors for United Petroleum sent to the solicitors for 7-Eleven Stores a notice of termination of the sublease, said to have been served by United Petroleum on 7-Eleven Stores that day.
- [26] On 21 March 2011, a document entitled "Supplemental Submission of the First Respondent" was delivered to the solicitors for 7-Eleven Stores. It submitted that the claim for specific performance of the sublease should be dismissed and that no order should be made for the payment of rent. Those submissions resulted in the making of the order of 24 March 2011 to which reference has previously been made. However, at the May hearing, argument was heard on the first of the two issues referred to in paragraph three of the directions given on 24 March 2011, namely, the claim by 7-Eleven Stores for the payment of rent.

Contentions of the parties

- [27] Finesse Properties did not participate in the May hearing.
- [28] The supplemental submissions of United Petroleum ranged wider than the two issues listed for the May hearing. They commenced with a submission that the claim for specific performance should be dismissed for a number of reasons, namely that 7-Eleven Stores had, in its closing address at the September hearing, invited the court to proceed on the basis that it was only being asked to make a declaration that the sublease was valid and subsisting, and did not subsequently alter its position; that 7-Eleven Stores did not prove that it was ready, willing and able to perform its obligations under the sublease; and that the nature and duration of the obligations under the sublease meant that it was inappropriate for an order for specific performance to be made.
- [29] Dealing specifically with the question of rent, the supplemental submissions made on behalf of United Petroleum commenced with a submission that it had, in an earlier outline, submitted that no orders should be made for the payment of rent. It was further submitted that the claim for rent was a claim for the payment of a debt, and not an order for specific performance. No claim for rent was made either in the amended originating application, or the amended statement of claim. The trial had not been conducted in relation to an obligation to pay rent, or the amount payable; nor had there been an adjudication on those questions. It was submitted that 7-Eleven Stores could now seek such an order only by a further amendment of its application and statement of claim, and by an application to reopen its case; and that leave to do so should be refused.
- [30] Further, it was submitted that there were three issues as to the quantum of the rent payable, which required evidence, which evidence had not been led at the trial, and which had not been the subject of submissions. The first of these issues was the proper construction of the clause providing for a rent review. It was said that there

may be evidence relevant to the construction of that clause, though none could be identified by Mr O'Sullivan of Counsel, who appeared for United Petroleum. It was also said that clause 28.1 of the sublease (providing for an abatement of rent if the premises were damaged, or access was obstructed, limiting the ability of United Petroleum to conduct its business "to the full extent") was to be taken into account. The third issue was said to be that 7-Eleven Stores was faced with an obligation to establish it that it had a "legitimate interest" in keeping the premises vacant and insisting on United Petroleum paying rent; or alternatively, that 7-Eleven Stores had a duty to mitigate its loss, by terminating the sublease. Further, Mr O'Sullivan relied in oral submissions on the notice of 16 March 2011 as bringing the sublease to an end.

- [31] 7-Eleven Stores had provided written submissions in support of its claim for rent. Those submissions dealt with the construction of the rent review clause. The oral submissions for 7-Eleven Stores commenced with the proposition that it is perfectly appropriate to determine a party's entitlement to specific performance, before dealing with the grant of relief, including orders for payment of money. Reference was then made to paragraph 4 of the prayer for relief against United Petroleum (set out earlier in these reasons). It was submitted that it was always contemplated that there would be a "two stage process". In any event, the pleadings dealt with the issue of non-payment of rent; and there was sufficient evidence to support the making of an order for payment of rent.
- [32] With respect to the statement made during closing submissions at the September hearing, attention was drawn to the fact that this had occurred after United Petroleum had closed its case and made its final submissions. Moreover, the statement was qualified by the words "at this stage". It was said that that position was taken because it was hoped that, if I determined the matter in favour of 7-Eleven Stores, the parties would be able to agree about other orders. The statement could not be said to constitute an abandonment of any other claim to relief which had been made by 7-Eleven Stores. Reference was made to the email from Mr Burge, showing an intention to return to the premises and pay the rent. It was submitted that United Petroleum only raised at a very late stage the question whether 7-Eleven Stores could, in these proceedings, seek an order for rent, and that no explanation was given for its doing so.
- [33] With respect to the issues which United Petroleum raised in relation to the claim for rent, it was submitted that the effect of the rent review clause involved simply a question of construction. The question of abatement depended upon the effect of the restriction of access to the premises, on the business of United Petroleum, a matter which, though raised by United Petroleum's counterclaim, it had not pursued at the trial. Further, it was pointed out that the abatement did not relate to the rent claimed, but to the rent which had been paid in full. It was also submitted that, after the December reasons, there had been directions, the effect of which was to require United Petroleum to put forward evidence it relied upon in opposition to the rent claim. The failure by United Petroleum to do so was, it was submitted, reason why it should not now be permitted to put forward further evidence on this matter.

Progressing the claim for rent

- [34] It is first necessary to determine whether, in the proceedings as presently constituted, 7-Eleven Stores should be permitted to pursue an order or judgment for rent.

- [35] It is trite to say that a claim for unpaid rent may be brought by an action at common law, sometimes referred to as an action for debt. The claim and statement of claim on which 7-Eleven Stores relies do not fit this description.
- [36] There seems no reason to think that a party cannot bring a claim for the specific performance of a lease. In *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*¹ a decree ordering specific performance of a covenant in a lease requiring a tenant to keep premises open for trade had been made in the Court of Appeal. An appeal to the House of Lords succeeded, not on the ground that specific performance could not be claimed, but because the covenant to be performed would require the defendant to carry on a business, resulting in difficulties relating to enforcement, and because an order stating the defendant's obligations could not be precisely drawn. The case rather strongly suggests that a lessor could seek an order for specific performance of a lease, though other remedies may be considered more appropriate.
- [37] As a general proposition, equity will not decree specific performance in favour of a plaintiff who has an adequate remedy at law.² Nevertheless, a court may make an order for the specific performance of an obligation to pay a sum of money where the vendor has performed its obligation to transfer land under a contract of sale.³ The explanation lies in the principle that specific performance must be available mutually, that is, to each party to the contract. It is difficult to see, therefore, that specific performance could not be ordered of an accrued obligation to pay rent.
- [38] However, it is not necessary to determine this issue by reference to the claim by 7-Eleven Stores for specific performance of the sublease. The prayer for relief in its statement of claim included the claim for further and other relief, previously mentioned. No objection was taken to the fact that this extended beyond the relief sought in the originating application (on the basis that it might be treated as the claim), in reliance on r 22 of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*). Nor was any objection made to the width of that part of the prayer for relief.
- [39] It is doubtful that, where the relief claimed in the statement of claim is wider than that claimed in the claim itself, the former is of no effect.⁴
- [40] Further, as has been mentioned, United Petroleum pleaded to allegations relating to its failure to pay rent. While the December 2010 reasons did not determine the amount of rent outstanding, that was because United Petroleum had not raised any issue about that question. Moreover, the communications between United Petroleum and 7-Eleven Stores and their legal representatives, subsequent to the December 2010 reasons, demonstrate that United Petroleum expected that it would be required to pay rent as a consequence of what had then been determined.

¹ [1998] AC 1.

² Meagher R, Heydon J & Leeming M, *Equity: Doctrines and Remedies* (4th ed Butterworths LexisNexis Australia 2002) at [20-030]; where the authors drew attention to the limitations on that doctrine.

³ *Turner v Bladin* (1951) 82 CLR 463 at 473, discussed in Meagher, Heydon & Leeming at [20-045].

⁴ *Cousins Securities P/L & Ors v CEC Group Ltd & Anor*; *CEC Group Ltd v Cousins Securities P/L & Ors* [2007] QCA 192 at [30]; but see *Equititrust Limited v Gamp Developments P/L & Ors* [2009] QSC 115 at [12] and *Equititrust Limited v Gamp Developments Pty Ltd (No 2)* [2009] QSC 168 at [10]; neither case referring to *Cousins*; and these cases themselves being concerned with an application for summary judgment.

- [41] It should also be noted that, in granting relief, the court is not confined to the relief claimed.⁵
- [42] In the circumstances, I am satisfied that 7-Eleven Stores is not precluded by the form of its application and statement of claim from now seeking to recover outstanding rent.
- [43] However, it is necessary to say something about the scope of a further hearing. 7-Eleven Stores now seeks to claim payment of an amount calculated in part by reference to rent at a higher rate than that identified in its pleadings. It seems to me that United Petroleum should be permitted to contest the increase, or, more specifically, the date from which it is to take effect. The other potential issues identified by Mr O'Sullivan were the availability of an abatement under clause 28.1 of the sublease; whether 7-Eleven Stores had an obligation to establish a legitimate interest in keeping the premises vacant, and whether it had failed to mitigate its loss by terminating the sublease; and whether the sublease had been terminated in March 2011. Since I indicated at the May hearing that I would only determine the question whether 7-Eleven Stores could proceed with its claim for rent, it seems inappropriate to rule on the scope of a further hearing relating to rent, without confirming that the parties have no further submissions to make about these matters.

Conclusion

- [44] I propose to direct that 7-Eleven Stores be permitted to pursue, in these proceedings, a claim for the payment of rent; and to make directions about a further hearing on this question. I shall hear further submissions from the parties about such directions, and in particular, as to the issues to be raised at such a hearing.

⁵ See rr 156, 658 of the *UCPR*.