SUPREME COURT OF QUEENSLAND

CITATION:	*Rivers (Australia) Pty Ltd v Mainscar Pty Ltd* [2012] QSC 63
PARTIES:	**RIVERS (AUSTRALIA) PTY LTD ACN 004 151 893** (Plaintiff) v **MAINSCAR PTY LTD ACN 100 718 616** (Defendant)
FILE NO/S:	BS 4376 of 2008
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12-13 March 2012
JUDGE:	McMurdo J
ORDER:	**(1) A declaration that the plaintiff is entitled to a lease for a period of five years from 2 June 2008 of the premises currently occupied by it.** **(2) The defendant's counterclaim is dismissed.**
CATCHWORDS:	LANDLORD AND TENANT – RENEWALS AND OPTIONS – EXERCISE OF OPTION – RIGHT TO EXERCISE OPTION – where the plaintiff purported to exercise its option to renew a lease for a period of further five years – where the right to a renewed lease was conditional upon the plaintiff not being in default of its obligation to pay outgoings - where the defendant claimed that the plaintiff was in breach of the covenant to pay outgoings under the original lease - whether the plaintiff's right to renewal of the lease was lost by a breach of a covenant of the existing lease ESTOPPEL – GENERALLY – where the plaintiff claimed that the defendant was estopped from claiming that the option to renew was not exercised – where the defendant responded to the plaintiff's correspondence regarding the option - whether there was sufficient evidence of the parties' state of mind to establish an estoppel by silence *Property Law Act 1974* (Qld), s128

Ballas v Theophilos (No 2) (1957) 98 CLR 193, 196, cited

Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd (1999) 9 BPR 17,067 [1999] NSWSC 999, cited

Lolly Pops (Harbour Side) Pty Ltd v Werncog Pty Ltd (1998) 9 BPR 16,361 [1998] NSWSC 304, cited

Prudential Assurance Co Ltd v Health Minders Pty Ltd (1987) 9 NSWLR 673, 683, cited

Quadling v Robinson (1976) 137 CLR 192, 200-201, cited

Whitegum Petroleum Pty Ltd v Bernadini Pty Ltd [2010] WASCA 229 at [32], cited

COUNSEL: AP Collins for the plaintiff
DS Savage SC for the defendant

SOLICITORS: HWL Ebsworth Lawyers for the plaintiff
Tucker & Cowen for the defendant

[1] The plaintiff has a shop in Mackay, in premises which it has occupied since 2003. The shop was leased to it by the defendant for five years from 2 June 2003. The lease contained an option to renew for a further five years. The plaintiff claims to have duly exercised that option and to occupy under that further lease. This is disputed by the defendant.

[2] In particular, the defendant denies that the option to renew was duly exercised. Alternatively it says that when the original term expired, the plaintiff was then in breach of its covenant to pay outgoings. The right to a renewed lease was conditional upon the plaintiff not being in default so that the plaintiff was disentitled to a further term. It says that the plaintiff has remained in possession wrongfully and it claims mesne profits.

[3] The option provision within the lease was, relevantly, as follows:

> "15.1 Option to Renew
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> If the Tenant:
>
> (a) not less than six (6) months prior to the expiration of this Lease gives written notice to the Landlord that it wishes to renew this Lease; and
>
> (b) has at all times up to the date of expiration of the Term complied punctually with its obligations under this Lease;
>
> then the Landlord must grant to the Tenant a further lease of the Premises ("the Further Lease") on the following conditions:

(c) the Further Lease is for the period [five years] commencing on expiry of the Term;

(d) the rent for the first and each subsequent year of the Further Lease will be five percent (5%) of the Tenant's Turnover;

…"

[4] The original lease expired on 1 June 2008. More than six months prior to then, the plaintiff sent the correspondence by which it says it exercised the option. It relies upon an email from its Mr Bell to the manager of the shopping centre, of which these premises are part, which was sent on 21 August 2007. It relies also upon Mr Bell's letter to Flower & Hart, the then solicitors for the defendant, dated 22 August 2007.

[5] The email was in these terms:

> "I hereby confirm that we wish to exercise our 5 lease option as from the 18 April 2008. Please acknowledge receipt of this correspondence, and arrange for the lease extension documentation to be forwarded to our solicitor …"

[6] The letter to Flower & Hart was as follows:

> "Please find enclosed copy of email as forwarded this day to the lessors exercising our lease option at the above premises for your information."

[7] Clause 14.4 of the lease provided:

> "Any Notice under this Lease:-
>
> (a) must be in writing;
>
> (b) may be served by being delivered or sent by post to the party at the address shown in the Reference Data …"

The relevant address shown in the Reference Data was that of Flower & Hart.

[8] The plaintiff says that either the email or the letter constituted an exercise of the option. The defendant says that the email was no notice to it, because it was sent to someone else who was not its agent for this purpose. That point must be accepted. Plainly Flower & Hart were appointed for this purpose, as the defendant appears to accept. However the defendant says that the letter was not the exercise of the option, but simply an assertion that the option had been exercised on the previous day. Further, the defendant points to the fact that the email referred to the new term

as commencing not on 2 June 2008, but on 18 April 2008. The defendant says that this made the letter an offer by the plaintiff to take a lease from 18 April 2008, rather than an exercise of the option.

[9] The question is whether the plaintiff's letter to Flower & Hart, enclosing as it did the email, was a clear and unequivocal communication that the plaintiff then and there elected to take a further lease.[1] Upon an objective view, the reference in the email to a commencement of the new lease in April 2008 was a mistake. The plaintiff already had a right to occupy in April and May 2008 under its existing lease. In theory, the plaintiff may have had some reason to have its new lease expire in April 2013, rather than in June 2013. But there is no indication of any circumstance which would make that more than a theoretical possibility. The email and the letter each referred to an exercise of the plaintiff's option. A recipient of the letter, with its enclosure, could have had no reasonable view other than that the plaintiff meant to be bound immediately by an agreement for a further term. I conclude that the option was duly exercised.

[10] Therefore it is unnecessary to consider the plaintiff's alternative case, which was that the defendant is estopped from denying that the option was exercised, but it is appropriate that I explain why, in my view, the defendant would not have been estopped. The plaintiff here relied upon an email from Ms Rasmussen, an employee of the centre manager to whom Mr Bell's email was addressed, which was sent on 22 August 2007 in these terms:

> "Thank you for your email and I will have the documentation forwarded as requested below."

The plaintiff also relied upon the absence of any communication by or on behalf of the defendant, until after the period by which the option had to be exercised, which was to the effect that it had not been exercised. The response by Ms Rasmussen could not, of itself, found an estoppel. It was not a representation made by the defendant. Therefore the case was one of an estoppel by silence. That case would have required the plaintiff to prove, firstly, that it assumed that there was a binding agreement for a new lease by a due exercise of the option. The defendant argued that this was not proved because there was no evidence which, if accepted, would prove that this was the plaintiff's state of mind. There was no oral testimony in the plaintiff's case and, in particular, there was no evidence from Mr Bell. I would accept that the plaintiff did believe that it had duly exercised the option, inferring that fact from my interpretation of Mr Bell's correspondence of 21 and 22 August 2007. But it is that from which I have concluded that the option was duly exercised. If I am wrong in that interpretation, then the correspondence could not found an inference that the plaintiff believed that it had duly exercised the option. Similarly, there is no direct evidence of the defendant's state of mind and, in particular, as to what it understood of the plaintiff's assumptions or expectations as to a new term. Again, if I am wrong in my interpretation of Mr Bell's correspondence, then there would be no basis for a finding that the defendant had a state of mind which would

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1 *Ballas v Theophilos (No 2)* (1957) 98 CLR 193, 196; *Quadling v Robinson* (1976) 137 CLR 192, 200-201; *Prudential Assurance Co Ltd v Health Minders Pty Ltd* (1987) 9 NSWLR 673, 683; *Whitegum Petroleum Pty Ltd v Bernadini Pty Ltd* [2010] WASCA 229 at [32].

be necessary to establish the alleged estoppel. The same applies to an argument, raised by written submissions after the hearing, that there was an estoppel by convention.

[11] The option having been duly exercised, was the plaintiff's entitlement to a further lease lost by a breach of covenant of the existing lease? As can been seen from the terms of the option provision set out above, the obligation upon the defendant to grant a further lease was conditional upon the plaintiff "at all times up to the date of the expiration of the Term [having] complied punctually with its obligations under this Lease". The defendant's case is that the plaintiff failed to comply with its obligation to pay certain outgoings, which were the subject of an invoice from the defendant to the plaintiff on 8 May 2008.

[12] At the hearing, the plaintiff indicated that it wished to rely upon s 128 of the *Property Law Act 1974* (Qld), which provides in part as follows:

> "…
>
> (4) Where an act or omission that constituted a breach by a lessee of the lessee's obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of 14 days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and –
>
> (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of 1 month next succeeding service of the notice; or
>
> (b) where such relief is so sought –
>
> (i) the proceedings in which the relief is sought are disposed of, insofar as they relate to that relief, otherwise than by granting relief; or
>
> (ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the Court for that purpose.
>
> …"

In this case, the alleged breach of the lessee's obligations occurred after the letter by which the option was exercised. There is a difference in judicial opinion, in respect of the relevantly identical statute in New South Wales, as to whether the section is engaged in that circumstance.[2] However, the plaintiff had not pleaded that s 128 was engaged and that the defendant had failed to give a notice according to it. I ruled that this was a case which should have been pleaded by the plaintiff. I disallowed the plaintiff's application to amend, because it would have raised a factual issue as to whether the parties, through their respective solicitors, had effectively compromised any possible reliance by the plaintiff upon s 128. Accordingly, no s 128 question now arises. The sole issue is whether, as at the expiry of the original term on 1 June 2008, the plaintiff was in breach.

[13] Clause 3.12 of the lease was as follows:

> "3.12 Outgoings
>
> (a) The Tenant must promptly pay all assessments for electricity gas and water relating to the Premises to:
>
> • the relevant supplier if directly assessed;
>
> • the Landlord if supplied by it.
>
> (b) If the Landlord is the supplier then it may not charge more than the tariff which would have been payable if supplied directly by the relevant authority to the Tenant. The Landlord may require that the Tenant purchase supplies from it under this Clause."

[14] The relevant expenditure here was for electricity, and more specifically, the electricity used for the air-conditioning of the shopping centre. The electricity supplied to the defendant, which then claimed what it said was the appropriate contribution from the plaintiff having regard to its use of the air-conditioning.

[15] Remarkably, the defendant had made no charge for electricity for air-conditioning prior to April 2008. That was admitted in a letter from the defendant's solicitors to the plaintiff's solicitors on 1 May 2008, where it was asserted that this was because of the plaintiff's "longstanding and wrongful refusal to pay those costs". It appears that the first claim for an amount of this kind was within a notice to remedy breach of covenant, which was one of four notices served upon the plaintiff on or about 14 April 2008. The relevant notice alleged a breach of cl 3.12 by failing to pay sums set out in an attached schedule, which listed about 50 amounts said to have been "levied to the Centre" on various dates from July 2003 to March 2008. Part of each amount was claimed from the plaintiff according to the proportion of the area of its shop to the area of the centre as a whole. The charges to the plaintiff totalled $122,195.64.

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[2] See, in particular, *Lolly Pops (Harbour Side) Pty Ltd v Werncog Pty Ltd* (1998) 9 BPR 16,361 [1998] NSWSC 304; *Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd* (1999) 9 BPR 17,067 [1999] NSWSC 999.

[16] On 21 April 2008, the plaintiff's solicitors wrote to the defendant's solicitors as follows:

> "We note that in respect of the Notice to Remedy Breach of Covenant issued for non-payment of electricity charges levied in relation to air-conditioning of the premises, totalling $122,195.64, that the Notice fails to detail each of the invoices by which the charges were levied by your client to our client.
>
> Our client has instructed us that it has never received invoices for these charges and has never been notified that the moneys are due and owing. If your client disagrees, please identify the invoice numbers immediately and provide copies of them along with evidence that they were provided to our client so that we may take further instructions. …"

[17] On 24 April 2008, the plaintiff's solicitors wrote again about this and other matters. They sought "details of the tariff at which the payments have been calculated together with evidence as to the tariff charged by the supplier to your client" and other information including "copies of the tax invoices for each of the alleged amounts due and owing". It was to this correspondence that the defendant's solicitors responded by admitting that their client had not issued invoices for these amounts. They added that nevertheless the defendant required payment of those amounts by the following day. On 7 May the defendant's solicitors sent copies of what were said to be the relevant invoices from Ergon Energy.

[18] On 8 May 2008, the plaintiff's solicitors wrote to the defendant's solicitors, complaining that details of the electricity charges were unclear. In particular, they wrote, it was unclear that the costs invoiced by Ergon Energy to the defendant related only to electricity supplied for the purpose of running air-conditioning in the lettable area of the shopping centre. They asked for "Statements of Accounts attached to the tax invoices rendered by Ergon Energy which show a breakdown of the charges rendered to [the defendant]".

[19] On the same day, the defendant issued an invoice addressed to the plaintiff, claiming that sum of $122,195.63 as the cost of electricity for air-conditioning from 2 June 2003 to 11 March 2008 showing a "due date" of 22 May 2008.

[20] Again on 8 May, the plaintiff's solicitors wrote, asking for confirmation that the defendant would allow the plaintiff until 22 May to pay that invoice and to remedy any alleged breach in respect of this outgoing. They wrote:

> "In our view, this further time would enable our respective clients to resolve the issue between them as to the separate metering of electricity to our client. We note that our client has remained at all times willing to act reasonably in relation to these issues, but requires further documentation and information to assist it to resolve the ambiguity in respect of the amounts which your client seeks payment of under the notice to remedy breach and the ambiguity arising from

> the tax invoices rendered by Ergon Energy to your client, which were provided to our client today.
>
> We would be pleased to hear from you in relation to this issue as soon as possible.
>
> We also look forward to hearing from you in relation to our proposal … that an electrician be allowed to enter the relevant parts of the Centrepoint Centre on behalf of our client to assess the metering of electricity to our client, including which meters relate to our client's premises and which meters are paid directly by our client. …"

[21] On 14 May 2008, the defendant's solicitors said that their client would not take any step adverse to the interests of the plaintiff until after 22 May. They refused access to an electrician engaged by the plaintiff to inspect parts of the centre, upon the basis that the defendant was not obliged to permit such an inspection and did not consider that it was necessary in order to "resolve the current dispute". On the following day, the plaintiff's solicitors responded that the refusal of access to an electrician was unreasonable, because "such an inspection would allow a resolution of this issue to be reached between our clients once and for all".

[22] On 20 May 2008, the plaintiff's solicitors wrote again, expressing concern that the dispute had not been resolved. They wrote:

> "In the circumstances, so as to remove any doubt that our client has the ability to pay any sum properly due and payable, our client has transferred the sum in dispute of $122,195.63 to our trust account, to be held on behalf of our client until the dispute in relation to these allege[d] charges is resolved.
>
> We again call on your client to provide the information previously requested so our client is in a position to ascertain how the sum is calculated. Otherwise if your client intends to take any steps adverse to our client's interest we request that date to be extended to 1st June 2008. As you are aware, 1 June 2008 is that date on which your client presently requires our client to vacate its tenancy. We expect that these issues will be resolved prior to that date."

[23] There was a response from the defendant's solicitors on the same day, advising that the defendant had arranged for an electrician to inspect the relevant meters and to report "shortly". They wrote that "once that report is received, we will confirm the amount payable by your client on account of electricity costs for the air-conditioning".

[24] On 22 May, the plaintiff's solicitors sought an extension of the date for compliance with the notice to remedy breach of covenant and of the date for payment according to the invoice of 8 May. On the same day, the defendant's solicitors emailed that the defendant agreed to "extend the date for compliance with the relevant notice

until 1 June 2008 as you requested". There was no specific reference to an extension of the time for payment according to the invoice.

[25] On 26 May, the plaintiff's solicitors wrote to contend that the defendant had agreed to that extension to pay the invoice, adding that the plaintiff was "still awaiting receipt of various documentation and information from your client to assist in determining the veracity of the alleged charges. …" They confirmed that $122,195.63 had been paid into their trust account "on behalf of our client until the dispute in relation to these [alleged] charges is resolved".

[26] In the meantime, the present proceedings had been commenced by an Originating Application, returnable on 30 May 2008. On 28 May, the plaintiff's solicitors wrote proposing an adjournment to 16 June, because "that additional time should enable our clients to resolve the issues currently in dispute between them". They noted that "your client's electrician will not be in a position to deliver his report in relation to the metering of our client's tenancy until approximately 2 June 2008".

[27] On the return date of the Application on 30 May 2008, the defendant gave certain undertakings and by consent the application was adjourned to 16 June 2008. It undertook not to terminate the lease prior to that adjourned date. There was also an undertaking in the curious terms that the defendant would "extend the expiry date of the lease to 30 June 2008, without prejudice to either party's rights or claims in relation to the matters referred to in the statement of claim and/or the plaintiff's entitlement to a further lease as and from 2 June 2008". Neither party suggests that this varied the original lease. The same may be said of undertakings in like terms given upon subsequent interlocutory hearings, the last of which (4 July 2008) was the defendant's undertaking "to extend the expiry date of the lease until 4.00pm on the date after judgment is entered in the proceeding or until earlier order of the Court …". The notion that one party to a lease might unilaterally extend its term is unusual at least. The defendant should be understood as having undertaken not to retake possession by the date expressed within it. It is common ground that the original term did expire on 1 June 2008 and that the question is whether the plaintiff was in breach of its covenant at that point.

[28] Although ultimately it is the plaintiff's conduct until 1 June 2008 which must be assessed, it is relevant to consider some subsequent events. On 1 July 2008, the defendant's solicitors advised of the outcome of the inspection by the electrician who had been appointed by their client. The electrician's letter (dated 30 June 2008) described his difficulties in identifying the relevant meter or meters until, after several hours of work, he established that a particular meter was the one which was relevant to the plaintiff's shop. In response to a Notice to Admit, the defendant admitted that its "8 May 2008 invoice was not based upon a reading of [that] meter". The letter of 1 July advised that this meter had been installed in February 2005 but that the amounts claimed for the period prior to then were accurate. A revised schedule was attached, altering the amounts claimed from 11 February, in some cases increasing them, in others decreasing them. Overall, the total amount claimed rose from $122,195.64 to $137,510.97.

[29] This did not resolve the dispute about electricity charges. Ultimately, that dispute was not resolved until 2010 when it was agreed that the plaintiff should pay the amount which the defendant had claimed originally. That amount was paid on 22 July 2010. The fact that such an amount was ultimately paid might indicate that it was something which was always truly payable. However, that figure is unlikely to have been what was truly payable because of the mistake as to the meters. The true figure may have been higher or lower. The evidence goes no further than that the parties compromised by settling upon the amount originally claimed. No witness was called to prove the amounts claimed by the defendant. But the plaintiff's pleading did not deny that the true amount chargeable by the defendant was at least the amount which it ultimately paid. Accordingly, the defendant was not put to proof on that subject.

[30] The plaintiff's principal argument was that at no time prior to the expiry of the original lease on 1 June 2008 did the defendant provide what was required by cl 3.12, which was an "assessment". It argued that its obligation was to pay all "assessments" and that what had been provided to it did not have a necessary element of considered compilation. Rather, it was simply an invoice. The suggested difference between the two was important, it was said, because an assessment in this relevant sense would have provided sufficient information to enable the plaintiff to decide then whether it was payable.

[31] The focus upon the word "assessment" in this argument is not persuasive. There was, in my view, an assessment which had been made by the defendant which was evident from the schedule which accompanied the notice to remedy breach of covenant given on 14 April 2008. It is likely to have been an incorrect assessment but an assessment nevertheless. It is not suggested that the computation was not a genuine attempt to quantify the plaintiff's liability.

[32] Nevertheless, the uncertainty surrounding the amount which was then claimed was relevant. The plaintiff's obligation was to *promptly* pay all assessments of such outgoings. This did not require the plaintiff to make a payment before reasonable queries as to the accuracy of the amount claimed were answered. It was relevant to consider whether the defendant had charged "more than the tariff which would have been payable if [the electricity had been] supplied directly by the relevant authority to the Tenant". It was also relevant to consider the accuracy of the apportionment of the electricity costs between the plaintiff's shop and other premises.

[33] In the defendant's argument, it was conceded that the plaintiff was entitled to a reasonable time to pay what was claimed, but it was said that this time had expired prior to the expiry of the lease. In my view, the requirement was that the amount be paid promptly, although there may not be a practical difference in this case between that and within a reasonable time. Under either measure, the need for some checking by the plaintiff was relevant. It was also relevant that the information which the defendant had provided was hardly detailed and that the amount claimed was on any view a large sum, representing a substantial addition to the rental. Under this lease, the rent was a percentage of turnover of the plaintiff's business and there is no evidence of what rent had been paid over the period for which this

electricity change was made. But from July 2008 until the present, the plaintiff has paid rent of about $80,000 per year.

[34] There was no tax invoice until that of 8 May 2008. It demanded payment by 22 May. It cannot be said that promptness required a payment before that date. Then on 20 May, the defendant's solicitors advised that an electrician had been arranged to inspect the relevant meters and to report, after which the amount payable would be "confirmed". That letter affected the required timing of the payment. It effectively said that the amount claimed need not be paid pending that report of the electrician. Then on 22 May, the date for payment was extended at least until 1 June. And the conduct of the parties in agreeing to the orders which were made on 30 May was consistent with the plaintiff's obligation to pay being suspended pending the report of the electrician.

[35] In those circumstances, the defendant has not established that the plaintiff had breached cl 3.12 by the expiry of the lease on 1 June 2008. It is not to the point that there may have been a failure to observe that covenant beyond the expiry of the original term. The question is whether the plaintiff was in breach at that point which, after all, was little more than a week from the date specified for payment within the invoice. Especially having regard to the defendant's solicitors' letter of 20 May, the obligation to make a prompt payment did not require that invoice to be paid by 1 June when the amount to be paid was still in doubt.

[36] Accordingly, the defendant has failed to prove the breach upon which it says that the plaintiff became disentitled to a further lease. It follows that there should be a declaration that it is entitled to a lease for a period of five years from 2 June 2008 of the premises presently occupied by it at 105 Victoria Street, Mackay.

[37] Although the defendant's counterclaim will be dismissed, it is necessary to make some findings as to that claim. Had I upheld the counterclaim, I would have awarded mesne profits measured by the difference between the rental paid by the plaintiff, which totalled $298,196.08, and the market rental as assessed by the court appointed valuer, Mr Caleo. He assessed the market rental as at 1 June 2008 at $225 per square metre, which he rounded to $178,000 per annum. He agreed that this would have increased broadly in line with inflation. Applying, say, an annual increase of three percent would result in a figure from the beginning of June 2008 until mid March 2012 of about $700,000. Accordingly, I would have allowed $400,000, together with interest at nine percent on half that sum over a period of 25.5 months. With some basis, the defendant argued that Mr Caleo's valuation was too conservative. But Mr Caleo did not resile from his evidence and I could not simply reject his valuation and substitute my own.

[38] There will be a declaration in the terms set out above. I will hear the parties as to further orders including costs.