SUPREME COURT OF QUEENSLAND

CITATION:	*Bentley v Chang Holdings Pty Ltd* [2012] QSC 366
PARTIES:	**MICHAEL LOUIS BENTLEY AND LINDA ROSEMARY BENTLEY ATF THE BENTLEY FAMILY TRUST** (applicants) v **CHANG HOLDINGS PTY LTD ACN 071 724 233** (respondent)
FILE NO/S:	BS 11582 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 August 2012
JUDGE:	Philip McMurdo J

ORDER:

1. **It is declared that the applicants have validly exercised an option granted under clause 13.01 of Registered Lease 705116939 ("the lease") granted by the respondent as lessor to the applicants as lessees of land described as Lot 1 on RP 612483, County of Livingstone, Parish of Rockhampton, Title Reference 30430174 and are entitled to possession of that land under a further lease in accordance with clause 13.01.**
2. **The respondent is restrained from taking any steps to:**
   (a) terminate (or act on any purported termination of) the lease; and
   (b) recover possession of the land,
   in reliance on:
   (i) any purported failure of the applicants to exercise that option; or
   (ii) either of the documents described as "Notice to Remedy Breach" dated 7 September 2010 and 5 July 2011.
3. **It is declared that the respondent is liable to pay to the applicants pursuant to cl 2.14 of the lease an amount of $43,561.80.**
4. **It is declared that:**
   (a) the elevators in the premises constructed on the land are not "appurtenances" as that term was

defined in the lease; and

(b) the applicants are not liable for the costs of effecting the repair which is now required to be made to the elevator situated on the northern side of the demised premises.

CATCHWORDS: LANDLORD AND TENANT – RENEWALS AND OPTIONS – EXERCISE OF OPTION – RIGHT TO EXERCISE OPTION – where the applicant lessees exercised their option to renew the lease under the relevant provisions of the original lease – where the respondent lessor argues that the applicants have determined any renewed lease due to their breaches of several provisions of the lease – where the respondent sent the applicant two notices in purported compliance with s 124 of the *Property Law Act* 1974 (Qld) – where the alleged breaches occurred after the exercise of the option to renew but before the expiry of the term of the original lease – whether the alleged breaches in the s 124 notice gives the respondent the right of forfeiture of the lease

LANDLORD AND TENANT – COVENANTS – AS TO REPAIR – FAIR WEAR AND TEAR EXCEPTION – where one of the lifts in the building required repair – where the applicants claim that the breakdown of the lift amounted to fair wear and tear which is an exception to the obligation of the lessee under the lease to maintain the demised premises – where the respondent claims that the lift is an appurtenance, not the subject of the fair wear and tear exception and therefore the lessee must maintain them under the lease – whether the lifts are an appurtenance and therefore fall outside the fair wear and tear exception

Property Law Act 1974 (Qld), s124, s128

Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd (1989) 4 BPR 9575; (1989) NSW ConvR 55-459, cited
Brennan v Kinjella Pty Ltd (1993) 6 BPR 13,168, cited
Eighteenth Ashlaw Nominees Pty Ltd v Vadelly Pty Ltd Supreme Court of Queensland, 25 November 1987, (unreported), Williams J, cited
Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd 9 BPR 17, 067; (1999) NSW ConvR 55-920, cited
Grescot v Green (1700) 1 Salk 199; 91 ER 179, cited
Karcominakis v Big Country Developments Pty Ltd [2000] NSWCA 313, cited
Jack Butler & Staff Pty Ltd v Black (1991) ANZ ConvR 186, cited
Kumaragamage v Rallis [2001] NSWSC 466, cited
Nessmine Pty Ltd v Devuzo Pty Ltd (1989) NSW ConvR 55-496, considered
Reilly v Liangis Investments Pty Ltd [2000] NSWSC 47, cited
Renshaw v Maher [1907] VLR 520; (1907) 13 ALR 265, cited
Rethmeier v Pioneer House Pty Ltd (1990) NSW ConvR 55-

516, cited

COUNSEL: C Johnstone for the applicants
Mr J Chang appearing on behalf of the respondent company

SOLICITORS: Hillhouse Burrow McKeown for the applicants

[1] The applicants conduct the business of the Rockhampton Plaza Hotel. They claim that they are entitled to those premises under a lease for a term of five years from October 2010. The respondent, which is the registered owner of the premises, denies that they have any entitlement to possession.

[2] The respondent granted a lease of the premises, which was duly registered, to a company called Plaza Hotels Australia Pty Ltd for a term of 10 years commencing on 11 October 2001. The applicants purchased the business, including the leasehold, in October 2006. They became the registered lessees. The respondent consented to that assignment by deed which the parties, together with the assignor, executed in January 2007.

[3] The lease contained several options to renew, the first being for a period of five years. The option was to be exercised by a notice in writing to be given at least six months prior to the expiration of the original term. The applicants, through their solicitors' letter of 2 July 2009, gave notice of the exercise of the option. That was confirmed by further correspondence, but it is the letter of 2 July 2009 which is relevant. I accept the evidence of Mr Herps, the applicants' solicitor, that it was sent to 11 Rincon Street, Heritage Park, which was then the registered office of the respondent. This was the method of notification which was expressly permitted by the lease.[1] Moreover, by a letter from the respondent's then solicitors to the applicants' solicitors dated 21 June 2010, the respondent acknowledged "receipt of the notice from [the applicants] in the Exercise of Option for the Lease for a further 5 years from 11 October 2010 to 10 October 2015".

[4] The validity of the exercise of the option is now disputed by the respondent by an argument which is to the effect that the applicants had not complied in all respects with the terms of the lease. Clause 13.01 of the lease conferred the option upon conditions as follows:

> "13.01 If the Lessee shall duly and punctually pay the rent hereby reserved throughout the whole of the said term and shall strictly observe and perform all the covenants, agreements and stipulations … on the part of the Lessee herein contained or implied and shall give not less than six (6) calendar months notice in writing prior to the expiration of the current term to the Lessor of its desire to exercise the option for renewal herein contained then the Lessee shall have an option for renewal or further renewal of this Lease for the term [of five years] upon the same terms and conditions as are herein contained … save and except this sub-clause and save and accept that the base rental … shall be varied in accordance with the provisions of clause 13.04 herein."

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1 Clause 15.03.

[5] No notice in purported compliance with s 128 of the *Property Law Act* 1974 (Qld) was given. For the applicants it is argued that the challenge to the exercise of the option cannot succeed because the respondent gave no notice under s 128. However, the evidence raises a question, to which I will return, about whether there was a breach which postdated 2 July 2009 and which therefore, according to some of the authorities, would be outside the operation of s 128.

[6] There are further issues about the entitlement or otherwise of the applicants to occupy the premises. The respondent says that it has determined any renewed lease upon the grounds of the applicants' breaches of several provisions.

[7] The respondent has given two notices purportedly under s 124 of the *Property Law Act*. The applicants say that neither notice was effective because it was bad in form and because, in any case, the alleged breaches did not occur.

[8] There is also a question as to the position of the parties under the original lease, relating to its terms about the maintenance and replacement of the air-conditioning system. The applicants claim that they are entitled to $75,000 from the respondent as its agreed share of the cost of replacing the system. At one point and before all of the system was replaced, the respondent seemed to concede that it would contribute half of the cost of the replacement, up to the amount of $75,000 which was its maximum liability according to the relevant covenant of the lease. But it now argues that it has no obligation to contribute anything.

[9] Before going to the defaults alleged within the s 124 notices, I should discuss another argument made by Mr Chang, a director of the respondent who was permitted to represent it in this case. Clause 19 of the lease contained a warranty by the lessee that it was the sole beneficial owner of the lease and had not entered into the lease as a trustee. Of course the original lease was granted, not to the applicants but to their predecessor. But the respondent says that they became bound by the same warranty. By the deed of covenant executed in January 2007 between the present parties and the original lessee, the applicants agreed to pay the rent and to "perform the other terms of the Lease". But there was no specific warranty by the applicants in terms corresponding with cl 19 of the lease. In my view, the covenant to perform the other terms of the lease did not result in their warranting to the effect that they were the beneficial owners. And such a warranty would be quite inconsistent with their having executed the deed expressly as the trustees for the Bentley Family Trust. Further, this point was not relied upon in either of the s 124 notices. For these reasons the trusteeship of the applicants is irrelevant.

Financial records

[10] The lease provided for three components of rental. There was a base rental, which was originally $250,000 per annum subject to annual CPI adjustments but capped at four per cent per annum. There was a so-called Turnover Rental, which was at the rate of three per cent per annum of the gross receipts from the lessee's business (as defined in the lease), payable quarterly in arrears. And there was the so-called incentive rental, calculated at eight per cent of Net Operating Profit (as defined in the lease).

[11] Clause 1.10, headed "Provision of Records and Information" was as follows:

> "1.10.1 This clause applies to clauses 1.07 and 1.08.

1.10.2 The Lessee must maintain complete and accurate records of its financial and related transactions associated in any way with the business conducted upon the demised premises and without limiting the generality hereof must maintain such records according to generally accepted accounting principles and standards.

1.10.3 The Lessee must keep such records for at least three (3) years after the end of each Operating Year.

1.10.4 The Lessee must upon the Lessor's request supply the Lessor or the Lessor's nominee with copies of such records as the Lessor may reasonably require for the purposes of calculating or assessing the rentals payable under clauses 1.07 and 1.08 hereof.

1.10.5 The Lessor and/or the Lessor's nominated auditor must be entitled to inspect the Lessee's records referred to in this clause at any reasonable time upon two (2) business days notice and the Lessee must make the records available for inspection and copying. The Lessee must provide reasonable facilities and equipment for such purposes.

1.10.6 The Lessee's failure to comply with the terms of this clause is a fundamental breach of the Lease.

1.10.7 If an audit of the records discloses Gross Receipts or Nett Operating Profit to have been understated then the Lessee must immediately pay the Lessor the shortfall in the amount that ought to have been paid to the Lessor under clauses 1.07 and 1.08 and if the understatement in either case is greater than 5%, the Lessee must pay the costs of the audit."

[12] The respondent has made several requests for the supply of bank statements for the account or accounts which the applicants have operated in this business. The applicants have consistently maintained that the bank statements need not be produced. There have been some other documents requested by the respondent from time to time, not all of which have been supplied to it. However, the respondent's s 124 notice which relied on cl 1.10 required only the provision of certain bank statements.

[13] The statements for any bank account relating to the business would form part of the records which the lessee was obliged to maintain, keep for three years and, if reasonably required for the purposes of calculating or assessing the rentals payable, copy to the lessor. The applicants' position has been and is that the bank statements were not required for the purpose of calculating the turnover and incentive rentals, because the respondent already had sufficient information in order to do so. They say that the demands for their bank statements were a tactical exercise in a dispute which had developed between the parties in relation to air-conditioning. They do not seem to contend that the bank statements would be outside the scope of records of their financial and related transactions associated in any way with their business.

In my view, they are within that description. It would be difficult to envisage an audit being conducted under cl 1.10.7 without reference to bank statements.

[14] As to the purpose of the request for the bank statements, according to the evidence of Mrs Bentley, Mr Chang asked them to provide bank statements when the applicants took over the lease. The reason he then gave was "that we must be maintaining separate books and that he [wanted] to see the true accounts". That evidence indicates that the respondent's requests for the statements predated the dispute about the air-conditioning (which I will discuss below). But it also indicates that the respondent's purpose was to investigate the accuracy of the information which had been provided by the respondent (and its predecessor) and from which the rental had been calculated.

[15] On 19 October 2008, Mr Chang sent an email to Mrs Bentley about several matters, which included a request for "copies of your financial reports and bank statements for at least [the] last 3 financial years … including the records which the previous lessee … had provided to you before you purchasing their business".

[16] No bank records have been provided to the respondent but the applicants have provided copies of quarterly profit and loss statements generated from their accounting system and copies of their Business Activity Statements.

[17] After 2008, it seems that the next request for bank statements was that within the letter from the respondent's solicitors to the applicants' solicitors of 21 June 2010. (This is the letter to which I have referred already as containing an acknowledgement of receipt of a notice exercising the option to renew.) It included this:

> "Please request your client to provide the following financial records pursuant to clause 1.10 [to] assist [in] determining the rental amount within 14 days:
>
> 1. Bank statements of the business conducted on the premises for the previous 2 years ending 31 May 2010;
> 2. Detail[ed] guest records / occupancy records for the last 2 years ending 31 May 2010; and
> 3. Profit and loss statements and balance sheet of the business conducted on the premises for the previous 3 financial years."

[18] On 7 September 2010, the respondent's solicitors served a notice purportedly pursuant to s 124 in these terms:

> "With reference to the lease of the premises, dated the 19th day of September 2001, for a term of 9 years commencing on the 11th October of 2001 and the covenant by the lessee to provide records and information, especially provision for bank statements for the last 12 months, and the breach by you of that covenant I give you notice and require you to remedy that breach by providing a copy of the bank statements for the business accounts for the business conducted from the premises for the last 12 months period within 10 days."

[19] On the same day, they wrote to the applicants' solicitors as follows:

> "We note the following:

1. On 21 June 2010, our client requested the following documents:

   (i) Bank Statements for the business accounts for the previous 12 months;
   (ii) Detail guest records and occupancy records for the last 2 years; and
   (iii) Profit and loss statements and balance sheet of the business for the previous 3 financial years.

   However, we have only received the profit and loss statements for the previous 3 financial years and a bank statement for the period between 15 May 2010 to 31 May 2010.

2. On 5 August 2010, our client requested once again the detail[ed] guest records and occupancy records for the last 2 years and bank statements for the business accounts for the previous 12 months. However, on 10 August 2010 your client fails to provide the documentation requested but provided quarterly Business Activity Statements. The BAS Statements were reproduced by QuickBooks accounting software and is not even a copy of the 'official' BAS lodged with ATO. It does not even specify the entity related to those BAS statements. Our client cannot accept these statements to be the true account related to your client's business.

3. On 13 August 2010, our client requested a third time, the occupancy records and the bank statements. Finally, on 16 August 2010, the occupancy records were provided by your client. However, your client still has not provided the bank statements.

4. On 26 August 2010, we received a copy of your client's Profit and Loss Statements signed by your client's accountant. However, we note that it was certified by a Commissioner of Declaration that this is a true copy of the original sighted. Further, there is an annotation that these accounts are unaudited. Accordingly, the accuracy of these accounts cannot be ascertained.

Our client feels that your client has for some reason not been cooperative. It shall be a simple task to provide the documentation requested in our letter of 21 June 2010, yet it takes 3 requests and your client still have not provided the documentation requested.

Our client has no alternatively, but to issue your client with a Notice to Remedy Breach."

[20] In that letter of 7 September 2010, reference was made to requests of 5 and 13 August 2010 for bank statements. But those requests are not in evidence and I am

unable to determine precisely what bank statements were there requested. Therefore, I cannot determine how, if there was a breach in failing to provide the statements which were requested on those dates, this compared with the default which was alleged in the s 124 notice.

[21] According to cl 1.10.4, the obligation to supply copies of records arose only upon a request by the lessor. The request made in the letter of 21 June was for bank statements for the two year period ending on 31 May 2010. The s 124 notice complained of the failure to provide bank statements "for the last 12 months" and the required remedy of that breach was to provide statements "for the last 12 months period". On any view, that period did not correspond with the period specified in the letter of 21 June. But there was some overlap between those two periods and if the request made on 21 June 2010 was a valid request under cl 1.10 of the lease, the respondent was entitled to rely upon the failure to provide each of the bank statements which were then requested as a default which entitled it to forfeit the lease. The fact that not all of the material which had been requested in the June letter was included within the notice would not matter for its validity under s 124. Nor would it matter that the notice also claimed a default or defaults which did not then exist, at least because there had been no prior request for statements for any period after 31 May 2010.[2]

[22] Were the applicants required to supply the bank statements requested by the letter of 21 June 2010? I accept the evidence of Mrs Bentley that the lessor had sufficient information to be able to calculate, as he had done, the turnover and incentive rentals. Mr Chang did not suggest otherwise. But it did not have all of the documentation which would be required to assess whether that information was correct. The lessor was entitled to pursue an investigation of the correctness of that information by exercising the powers under cl 1.10.5. Under that provision the lessor and/or its nominated auditor could inspect the lessee's records and themselves make copies. The lessee was to provide facilities and equipment to permit the lessor and/or its auditor to make those copies. But cl 1.10.5 did not require the lessee to make the copies and to provide them to the lessor. The evidence does not reveal any request or demand by the respondent to *inspect* the records, with or without the assistance of an auditor. Rather the respondent has purported to rely only upon cl 1.10.4.

[23] Clause 1.10.7 addressed the possibility that an audit would disclose an understatement of gross receipts or net operating profit. The only express term by which those matters were to be "stated" by the lessee was cl 1.10.4. It was by the operation of this clause that the lessor was to be told of them, by means of the provision of copies of the relevant records. Upon the evidence, I am satisfied that the respondent's purpose in demanding copies of the bank statements was to check the accuracy of the information from which it had been able to calculate or assess the rentals. Its power in that respect was under cl 1.10.5. But that provision did not oblige the applicants to provide copies of their records: rather it entitled the respondent and/or its auditor to inspect and themselves make copies of the records. The point is a fine one, but in my conclusion, the applicants' argument in this respect is correct. The respondent was not entitled to require them to produce copies of their bank statements, as it demanded by its letter of 21 June 2010. For the same reason, the respondent's demand for the production of bank statements,

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[2] See eg, *Kumaragamage v Rallis* [2001] NSWSC 466 at [42].

within its solicitors' letter of 7 September 2010, did not give rise to an obligation upon the applicants to produce copies of those records.

[24] It follows that the respondent's s 124 notice which was dated 7 September 2010 was of no effect. As it happened, the respondent did not purport to terminate the original lease, which expired on 10 October 2010. But on 5 July 2011, the respondent's solicitors wrote to the applicants' solicitors claiming that the failure to comply with that notice, as well as an alleged failure to "duly and punctually pay the rent through the whole of the [original] lease term" and otherwise to "strictly observe and perform all the covenants, agreements and stipulations", had resulted in the purported renewal of the lease being ineffective and the applicants' occupation from the expiry of the original term being as monthly tenants. By the same letter, the respondent purported to terminate that monthly tenancy.

[25] Had the respondent established that the applicants did breach the lease by failing to provide the bank statements as demanded in June 2010, a question would have arisen here as to the consequence of that breach upon the applicants' right to a renewed lease. For the applicants, it was submitted that no breach of the original lease could have deprived the applicants of a renewed term absent a notice by the respondent under s 128. That would be correct for any breach which predated the relevant notice of the exercise of the option. But the position would not have been so clear had there been a breach by failing to provide the bank statements which were demanded in June 2010, because that was a point between the notice of exercise of the option and the expiry of the original term.

[26] Section 128 is concerned only with a breach by a lessee which occurs before the exercise or purported exercise of the option to renew. Most of the cases have held that with a lease and an option to renew such as in this case, the exercise of the option, for the purposes of s 128, occurs upon the giving of the notice of exercise of the option.[3] Upon this view, s 128 does not operate to limit or exclude the lessor's right to rely upon a breach by the lessee which occurs after the notice of exercise of the option, where the option is made conditional upon the performance of the lease until its expiry. In these circumstances, in some cases it has been held that the lessee is protected by s 124, because once the lessee has given notice, there is a concluded agreement for lease for the renewed term, which constitutes a lease for the purposes of that section.[4] Examples are *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*;[5] *Brennan v Kinjella Pty Ltd*;[6] *Reilly v Liangis Investments Pty Ltd*[7] and in this Court, *Eighteenth Ashlaw Nominees Pty Ltd v Vadelly Pty Ltd* and[8] *Jack Butler & Staff Pty Ltd v Black*.[9] But other cases have held that s 124 (or its equivalent) does not assist the lessee so that under an option such as in the present case, any breach by the lessee between the exercise of the option and the expiry of the original term would be fatal to the lessee's entitlement to the further lease: see

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3 cf *Nessmine Pty Ltd v Devuzo Pty Ltd* (1989) NSW ConvR 55-496, where Hodgson J held that the option in that case was exercised only upon the expiry of the original term

4 By the definition in s 123.

5 (1989) 4 BPR 9575; [1989] NSW ConvR 55-459.

6 (1993) 6 BPR 13,168.

7 [2000] NSWSC 47.

8 Supreme Court of Queensland, 25 November 1987 (unreported), Williams J.

9 (1991) ANZ ConvR 186 (Mackenzie J).

eg *Rethmeier v Pioneer House Pty Ltd*[10] and *Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd*.[11]

[27] Counsel for the applicants argued that if there was a breach by failing to provide the bank statements, between the exercise of the option and the expiry of the original term, or a breach within the period of the new lease, the applicants should be relieved from forfeiture, they being willing and able to provide the statements which had been requested. Had I found that they were in breach and that under s 124 or otherwise there was a power to relieve against the loss of their option to renew, I would have been persuaded to do so. The stance which they adopted in refusing to provide bank statements, if incorrect, had an arguable legal basis. The respondent would not be prejudiced if the statements were to be produced now.

[28] I go then to the breaches which were alleged in the second of the respondent's notices under s 124. This was dated 5 July 2011, which was well after the expiry of the original lease. Curiously the notice referred to the original lease as being then current, and claimed that the respondent would be entitled to re-enter or forfeit that lease in the event of a failure to comply with this notice by 5 August 2011. And this notice was given on the same day as the letter was written by the respondent's solicitors which purported to terminate what was said to be the then monthly tenancy. Nevertheless, it is necessary to discuss each of the breaches alleged within that notice.

Removal of walls

[29] The first complaint was about the removal of walls between certain rooms. The required remedial action was the provision of an engineering assessment about the removed walls and the performance of all works necessary to ensure a safe structure by no later than 5 August 2011. And by the same date, the applicants were to provide a certificate from an engineer stating that the walls between those rooms were structurally sound and safe.

[30] Clause 3.10 of the lease provided that the lessee was not to cut, make holes in, mark, deface, drill or damage any of the floors, walls, ceilings or other parts of the demised premises, or permit that to happen (except in circumstances which are not presently relevant).

[31] Clause 5.01 of the lease provided that the lessee was not to make or cause to be made any structural or other alterations or additions to the demised premises without the consent in writing of the lessor. It also provided that the lessee was not to cut, mark, deface, drill, injure or make holes in any of the walls of the demised premises. It provided that it was a deemed term of any consent to such work that the lessee would, if requested to do so by the lessor, restore the premises to their previous condition.

[32] It should be noted that there is no evidence that the removal of these walls has compromised the structural safety of any part of the building. But the real difficulty for the respondent here is that the work was done not by or under the authority of the applicants, but during the occupation of their predecessor. The work done to the walls was not a breach by them. Mr Chang says that the applicants became bound

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10 (1990) NSW ConvR 55-516.

11 (1999) NSW ConvR 55-920.

to remedy their predecessor's default. But that is not the effect of the deed of covenant executed in January 2007. Under that deed, the applicants became obliged to perform the terms of the lease. But any breach of covenant here was by the alteration of the walls prior to the assignment to the applicants. Therefore, they are not liable for such a breach.[12]

[33] There was an obligation in cl 5 to restore the premises, if requested by the lessor, in a circumstance where the lessor had given consent to the work which was done to them. But Mr Chang does not seem to suggest that this was the circumstance in which these walls were removed.

Palm trees

[34] This notice also complained of the removal of palm trees which had been in a garden bed in front of the hotel. Mrs Bentley said that they were removed by Ergon Energy in August 2008, after a representative from that company told the applicants that the trees were a danger to nearby powerlines. She said that this was explained to Mr Chang in his visit to the hotel in December 2008, and he then made no complaint about the matter. He made his first complaint in this notice of July 2011.

[35] I see no reason to reject this evidence. There would seem to be no reason why the applicants would have removed the trees. The notice given by the respondent again relied upon cll 3.10 and 5.01. It is far from clear that either of those provisions would have been breached, had this work been performed by or on the instructions of the applicants. But that point need not be considered given the applicants' non-involvement in the work. There was no breach by them in this respect.

Air-conditioning works

[36] The remaining complaint under the notice of July 2011 was that the applicants breached cll 5.01 and 3.10 of the lease by "replacing the air-conditioning system" without the respondent's consent. The applicants did replace the air-conditioning system but they say that this was done with the respondent's consent. It was replaced during 2008 and 2009.

[37] The s 124 notice required the applicants to remedy this default, not by doing any work to the premises, but by providing "an independent assessment report" as to the need to replace the previous system and as to the capacity and life of the new system. Those reports were demanded by 5 August 2011.

[38] In the applicants' case, there was evidence from Mr Funch, an employee of a company which has serviced and maintained the air-conditioning plant and equipment at the premises over the last five years. There was no challenge to his evidence which was as follows. In January 2007, the compressor motor failed on the chiller plant, requiring that motor to be urgently replaced. At that point, the air-conditioning was not operational. Mr Funch then provided a written advice which strongly recommended the replacement of the condenser and other items at an estimated cost of about $44,000. From then on, the air-conditioning plant and equipment continued to require regular repairs, beyond normal maintenance, due to

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[12] See *Grescot v Green* (1700) 1 Salk 199; 91 ER 179; *Renshaw v Maher* [1907] VLR 520; (1907) 13 ALR 265; *Karcominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [133] per Giles JA with whom Handley and Stein JJ A agreed.

its age and very poor condition. It frequently failed to operate, particularly in hot weather.

[39] In July 2008, Mr Funch observed that the chiller was in need of urgent and significant refurbishment and the individual room units were unreliable and performing poorly, and concluded that the cost of repairing the chiller was such as to make it more economical to install a new chiller and the individual room units should be replaced with a full refurbishment of the ground floor fan coils. He estimated the cost of all of those works at about $211,000 plus GST. He did not then set out those views in a written report. But on about 15 July 2011, at the applicants' request, he provided a report as to the condition of the plant as at July 2008 and the estimated cost of repairing or replacing it. In his opinion, that plant and equipment was past its useful working life, had suffered various major breakdowns and required the expenditure which he had estimated "to return it to an effective operable state".

[40] The reason he did not provide a written report in July 2008 was that the applicants then told him that they were going to install a different air-conditioning system, consisting of split system air-conditioners to all rooms as this option was cheaper and would cause less disruption to the operation of the business. It is this alternative system which was installed by the applicants in 2008-09.

[41] I accept also the evidence of Mrs Bentley about the condition of the system which was replaced. Again that evidence was not challenged. She said that by 2008, the old system "when it ran" could never sufficiently "cool the rooms to make them comfortable, and also constantly broke down". The biggest single source of revenue for the hotel each year is for the accommodation of members of the Singapore Air Force. That contract is worth about $250,000 per annum in revenue to the applicants. This customer had complained in 2007 and 2008 about the air-conditioning, saying that it would not return unless the problem was fixed. Other customers had complained about the air-conditioning.

[42] Mrs Bentley said that Mr Chang was well aware of these problems and had agreed that there would be significant maintenance and power savings which would be achieved by installing split system air-conditioning units.

[43] Clause 2.14 of the lease was as follows:

> "The Lessee is to maintain the air-conditioning and to enter into a maintenance contract with a recognised contractor. The Lessee is to be responsible for all costs of maintenance except that if [an] independent assessment is that a major breakdown has occurred requiring replacement of the system, the Lessor will contribute one half of the reasonable costs of the replacement limited nevertheless to $75,000."

[44] On 1 August 2008, the applicants wrote to Mr Chang referring to that clause. They wrote:

> "Although the chilled water unit is still running at the moment, Cec Funch Refrigeration and Air-Conditioning are of the opinion that the system will not last another summer. He was very surprised that the chiller lasted through the summer just gone.

> We are in the process of air-conditioning the top 3 levels with fujitsu split system reverse cycle units.
>
> We would very much appreciate your help in doing the next 3 floors. …
>
> We would like to get the air-conditioning done on the bottom levels as soon as possible and get both lifts working to their full capacity."

[45] On 12 August 2008, Mr Chang replied by email as follows:

> "… According to the Lease clause 2.14, the Lessee is to be responsible for all costs of maintenance except that if [an] independent assessment is that a major breakdown has occurred requiring replacement of the system, the Lessor will contribute one half of the reasonable costs of the replacement limited nevertheless to $75,000. We promise to contribute one half of the costs for the split air-conditioning system limited nevertheless to $75,000. However we believe that we should have the right to get an independent quote from our supplier for the air-conditioning system. …"

[46] On 19 October 2008, Mr Chang sent a further email to Mrs Bentley. Again, he agreed that the system should be replaced with a split system. He was concerned that the work be done at the best price. He expressed surprise that the split system had been installed already on levels 4, 5 and 6 but he did not complain about that or allege that there had been a breach of the lease. Rather, he wrote:

> "However, you have already paid and installed those system (sic) on levels 6, 5 and 4. Therefore, we will install 3, 2 and 1 at our cost with our own supplier, but the cost for the ground floor will need to be paid half and half by you and us. I believe that it will be fair by doing it this way. If you have no objection, then we will start to organise for the installation."

[47] On the following day, Mrs Bentley responded as follows:

> "Yes, that would be great if you could proceed with the air-conditioning for 1st, 2nd and 3rd levels. … We are happy to go halves with installation of the ground level.
>
> We acted upon your verbal go-ahead to install the 6th, 5th and 4th level. …"

[48] Mrs Bentley gave evidence that she did have Mr Chang's prior approval for the work done on levels 4, 5 and 6. Her evidence in that respect does not entirely correspond with her letter of 1 August 2008. Nevertheless, I am persuaded to accept that evidence. The point is immaterial, however, because if the respondent had not given prior consent to this work, it consented to it by Mr Chang's emails.

[49] At the end of 2008, Mr Chang came to the premises with someone who installed air-conditioners. After an inspection, Mr Chang proposed that the compressor units of split system air-conditioners could be installed on levels 1, 2 and 3 within cavities between internal dividing walls. Mrs Bentley said that this was physically impossible and that she believed that the results would be ineffective.

[50] On about 7 January 2009, Mr Chang's air-conditioning contractor provided a quote for the supply and installation of split system air-conditioning units for levels 1, 2 and 3 and for the ground floor in the sum of $37,115. On about 20 January 2009, Mr Chang asked Mrs Bentley to obtain a quote from a local contractor for the same work. She did so and forwarded that quote to him on about 31 January 2009.

[51] After then, Mrs Bentley heard nothing from Mr Chang about the performance of this work. She sent several emails asking about when the work would be performed. At one point they discussed the possibility that she would provide him with details of other contractors who could quote for the work. One of those contractors subsequently came to the premises to prepare a quote.

[52] Ultimately the applicants believed that they could wait no longer and they proceeded to have the split system installed on the remaining floors. They were concerned to have that work completed in time for the arrival of the guests from the Singapore Air Force.

[53] In an email of 12 April 2010, Mr Chang claimed that the respondent had not installed the split system, as Mr Chang had said it would, because of the unavailability of a contractor and of the relevant equipment until late 2009.

[54] For the applicants it is submitted that there was no requirement to obtain the respondent's consent to the replacement of the system, because that work was outside the field of cll 3.10 and 5.01. I am unpersuaded that cl 5.01 was not applicable. But the evidence plainly demonstrates that the respondent agreed to the work which had been done on levels 4, 5 and 6 and to the performance of effectively the same work on the remaining levels. Indeed, the respondent agreed to bear the cost of the performance of the work on those other levels. It follows that there was no breach of the original lease by the replacement of the air-conditioning system. Nor was there a basis in this respect for seeking to terminate the renewed lease. It should also be added that there is no evidence that the replacement system is other than satisfactory, safe and economical.

[55] The applicants claim that the respondent is liable under cl 2.14 to pay them $75,000 towards the cost of replacing the air-conditioning system. Mr Funch was an independent assessor for the purposes of cl 2.14. His assessment in July 2008 was that the system had to be replaced. He recommended a different system from that which was subsequently installed. But that difference is immaterial because, on any view, the replacement which was effected was cheaper than that which he recommended. Under cl 2.14, the independent assessment did not have to be recorded in writing. I am also satisfied that the condition of the system in July 2008, as described by Mr Funch, constituted a major breakdown in the terms of cl 2.14. Mr Chang did not seem to suggest otherwise. The system was not completely broken down in that it was still functioning to some extent. But as Mr Funch described, the plant was requiring frequent repairs and was unreliable and performing badly. In my view, its non-performance was sufficient to constitute a major breakdown requiring replacement of the system. Mr Chang apparently agreed at the time.

[56] The question then is whether the applicants are entitled to recover as much as $75,000. Mrs Bentley says that they have spent a total of $156,073.89 on labour, parts and the purchase of new air-conditioning units. But of this amount, $30,800 is

said to be the cost of the applicants' own time spent in the replacement project. In addition, there are three invoices, respectively dated 22 February 2008, 13 March 2008 and 17 April 2008, which seem to well predate the replacement of the system. Mr Funch inspected the old system in July 2008 and Mrs Bentley's letter of 1 August 2008 indicates that the work had then just commenced. I am not persuaded that the applicants are entitled to the total of those three invoices. Nor should the applicants recover for what they attribute to their own time. The result is that they are entitled to one half of a total of $87,123.60, which is $43,561.80.

Lifts

[57] A further issue between the parties is about the responsibility for the cost of the repair of one of the lifts. In September 2011, the lift broke down and there followed emails from the applicants to Mr Chang informing him that the lift was unrepairable and required a "complete upgrade" which should be done, they claimed, at the cost of the respondent. There is evidence in the applicants' case from Mr Hulbert who works for Kone Elevators Pty Ltd. According to his evidence, which is uncontradicted and I accept, this lift no longer works because of problems with its printed circuit boards. The boards are obsolete and boards of this kind have not been made since the early 1980s. The lift is 40 years old, as is the other lift in the building which is the last of its kind operating in Queensland. To return the unused lift to service, there would have to be a complete replacement of the control system and other works costing about $129,000 plus GST.

[58] The respondent claims that this is the responsibility of the applicants according to cl 4.07. The applicants say that it is cl 4.06 which is relevant, and that this is the result of fair wear and tear which is an exception to the obligation on the lessee to maintain the demised premises. Clauses 4.06 and 4.07 are as follows:

> "4.06 FAIR WEAR AND TEAR
>
> The Lessee shall at its own cost and expense keep and maintain the demised premises and all appurtenances therein in good and tenantable repair and condition as at the date of commencement fair wear and tear and damage by fire flood storm tempest explosion riot civil commotion war or otherwise by inevitable accident or act of God and without any neglect or default on the part of the Lessee alone excepted PROVIDED ALWAYS that the exception in respect of fair wear and tear shall apply only if the Lessee shall have taken all reasonable measures and precautions to ensure that any damage defect or dilapidation which at any time shall be occasioned by fair wear and tear and not give rise to or cause or contribute to any damage to the demised premises.
>
> 4.07 APPURTENANCES
>
> The Lessee shall at its own cost and expense keep and maintain the appurtenances in the demised premises in good and efficient working order and condition and to that end shall employ competent and where necessary licensed tradesmen to effect all necessary repairs to the appurtenances."

[59] Clause 4.06 refers to both "the demised premises" and "all appurtenances therein". Clause 4.07 refers to "the appurtenances in the demised premises". The former contains the exception for fair wear and tear; the latter does not. The respondent says that the lifts are appurtenances and that cl 4.07 prevails. Accordingly, the lessee must maintain them. The applicants say that the lifts are not appurtenances but a part of the demised premises. Clause 4.06 applies, as does the fair wear and tear exception within it.

[60] I accept the applicants' submissions. The lifts are plainly part of the demised premises. They are as much a part of the demised premises as any other part of the hotel building. Clause 4.06 distinguishes between the demised premises and all appurtenances. The term "appurtenances" must be given the same meaning in cl 4.07. Therefore, cl 4.07 does not apply. Because the lift has failed through fair wear and tear, the applicants are not bound to pay for its replacement.

Other issues

[61] Unfortunately this case will resolve only some of the questions between the parties. The evidence indicates other issues which have the potential for further litigation. In particular, the parties are yet to agree, or have determined according to the process set out in the original lease, the base rental to be paid under the renewed term. But neither party asked for any relief in relation to that question.

Relief

[62] The applicants have established that they are entitled to substantially all of the relief which they sought by the amended originating application. One of the declarations sought is that "the applicants are not liable for the costs of repair of the elevator situated on the northern side of the premises constructed on the Land". It is preferable to make some change to make it clearer that this is limited to the costs of the repair which is presently required.

[63] The orders will be as follows:

1. It will be declared that the applicants have validly exercised an option granted under clause 13.01 of Registered Lease 705116939 ("the lease") granted by the respondent as lessor to the applicants as lessees of land described as Lot 1 on RP 612483, County of Livingstone, Parish of Rockhampton, Title Reference 30430174 and are entitled to possession of that land under a further lease in accordance with clause 13.01.
2. The respondent is restrained from taking any steps to:
   (a) terminate (or act on any purported termination of) the lease; and
   (b) recover possession of the land,
   in reliance on:
   (i) any purported failure of the applicants to exercise that option; or
   (ii) either of the documents described as "Notice to Remedy Breach" dated 7 September 2010 and 5 July 2011.
3. It will be declared that the respondent is liable to pay to the applicants pursuant to cl 2.14 of the lease an amount of $43,561.80.
4. It will be declared that:
   (a) the elevators in the premises constructed on the land are not "appurtenances" as that term was defined in the lease; and

(b) the applicants are not liable for the costs of effecting the repair which is now required to be made to the elevator situated on the northern side of the demised premises.