

# SUPREME COURT OF QUEENSLAND

CITATION: *JV Pub Group Pty Ltd v Red Carpet Real Estate Pty Ltd & Ors* [2014] QSC 232

PARTIES: **JV PUB GROUP PTY LTD (ACN 157 746 597)**  
**(applicant)**  
**v**  
**RED CARPET REAL ESTATE PTY LTD (ACN 097 048 587), CHANTAY TOO PTY LTD (ACN 099 086 521) AND TRISTAR ACCUMULATION PTY LTD (ACN 100 776 583) AS TRUSTEES UNDER INSTRUMENT NUMBER 710 924 775 AS TENANTS IN COMMON**  
**(respondents)**

FILE NO: BS8335 of 2014

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 22 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2014

JUDGE: Mullins J

ORDER: **It is declared that there is an agreement for lease between the respondents as lessor and the applicant as lessee for a term of five years from 1 March 2014 of the premises described as shop 7, 88 Surf Parade, Broadbeach in the State of Queensland on the same terms and conditions as if the applicant had exercised within time the option to renew contained in clause 2.3 of registered lease number 713344562, by virtue of the applicant's acceptance by letter dated 19 December 2013 of the respondents' offer in the respondents' agent's letter dated 26 November 2013 sent to the applicant.**

CATCHWORDS: LANDLORD AND TENANT – RENEWALS AND OPTIONS – EXERCISE OF OPTION – VALIDITY OF EXERCISE – where the option lapsed as the time for exercising the option to renew the lease had expired – where the lessor by its agent gave notice by letter of the option date for renewal of the lease to the lessee referring to s 46 Retail Shop Leases Act 1994 (Qld) after the option lapsed – where the lessee purported to exercise the option for the renewal of the lease after the specified time for exercising the option had expired – where the parties disputed whether the exercise of the option was valid – whether the lessor's agent's letter constituted an offer to lease the premises on the same terms

as if the option were exercised – whether the acceptance by the lessee of the offer in the letter resulted in an agreement to lease the premises

*Retail Shop Leases Act 1994 (Qld), s 46*

*Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101, followed

*Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122, followed

*Topbeach Pty Ltd v Seafarer Investments Pty Ltd* [2010] QSC 459, considered

COUNSEL: T Matthews QC for the applicant  
S McNeil for the respondents

SOLICITORS: Ramsden Lawyers for the applicant  
Short Punch & Greatorix for the respondents

- [1] The respondents as trustees are the registered owners as tenants in common of retail premises at Broadbeach that include shop 7 leased to Fisherman’s Wharf Tavern Pty Ltd by registered lease for a term of four years that commenced on 1 March 2010 with an option to renew for a further term of five years.
- [2] During 2012 the applicant negotiated the purchase of the business that included that conducted at shop 7. Pursuant to a deed of assignment dated 14 February 2013 between Fisherman’s Wharf Tavern Pty Ltd as assignor, the applicant as assignee and the respondents as lessor, the transfer of the interest of the lessee under the registered lease (including the benefit of the option to renew) to the applicant was effected.
- [3] The applicant went into occupation of shop 7 to conduct business on or about 14 February 2013 and continues to do so.

#### **Option to renew the lease**

- [4] Clause 2.3 of the lease provides:
  - “(a) If the Lessee-
    - (i) wishes to have a lease of the Premises granted to it for the Further Term to commence immediately after the Expiry Date;
    - (ii) gives a notice to the Lessor not more than nine months’ nor less than six months’ before the Expiry Date; and
    - (iii) at the time of exercising the option and at the Expiry Date, is not in default under this Lease,
 the Lessor will grant to the Lessee a lease of the Premises for the Further Term upon the same provisions as are contained in this lease, including any guarantee by the Guarantor (who must sign the further lease as a condition of the grant of the further lease), except that:-
    - (iv) the initial Rent shall be determined by applying the Method of Review for the relevant date referred to in the Particulars;
    - (v) the next Further Term (if any) shall be renumbered in the Particulars and any subsequent Further Terms shall be renumbered appropriately; and

(vi) if there is only one Further Term, this sub-clause shall be deleted from the lease for that Further Term.”

[5] The Method of Review set out in the Particulars of the lease for 1 March 2014 (the commencement of the first year of the extended term) is market review and for each of the years thereafter, if the option were exercised, it is percentage review. The percentage rent increase was specified in the Particulars of the lease as 4 per cent.

[6] The option had to be exercised by the applicant between 31 May and 31 August 2013. (The reference to “months” in clause 2.3 is construed as calendar months, as the context does not otherwise require: s 48 *Property Law Act* 1974 (Qld).) It was not exercised during that period.

[7] Ms Tooma is the sole director, secretary and shareholder of one of the respondents, Red Carpet Real Estate Pty Ltd. Ms Tooma is also a director and the shareholder of Retail & Corporate Property Services Pty Ltd which trades as LJ Hooker Surfers Paradise. LJ Hooker Surfers Paradise manages shop 7 for the respondents.

[8] On 26 November 2013 LJ Hooker Surfers Paradise sent a letter to the applicant in respect of its lease of shop 7 in the following terms:

“We refer to your Lease and note that it is due to expire on 28/02/2014

In accordance with the terms and conditions of your Lease you have a further lease option of 5 years with a Rental Review to Market.

Please advise in writing on or before 28/12/2013 whether you will be exercising your option for the further term

Please be advised that this notice is given under Section 46 of the Retail Shop Leases Act.

Should you have any queries please do not hesitate to contact the undersigned.”

[9] Section 46 of the *Retail Shop Leases Act* 1994 (Qld) (the Act) provides:

“(1) This section applies if a retail shop lease provides for an option on the lessee’s part to renew or extend the lease.

(2) At least 2 months, but not longer than 6 months, before the option date, the lessor must give the lessee written notice of the option date.

Maximum penalty-40 penalty units.

(3) In this section-

**option date** means the date stated in the lease as the date by which the lessee, if the lessee intends to exercise the option, must exercise it.”

[10] Section 46(2) of the Act creates a penalty for non-compliance by the lessor with the giving of notice to the lessee of the option date. There are no consequences prescribed that affect the operation between the parties of the option to renew the lease where the lessor fails to comply with s 46 of the Act: *Topbeach Pty Ltd v Seafarer Investments Pty Ltd* [2010] QSC 459 at p 7.

[11] Although the letter dated 26 November 2013 purported to be a notice under s 46 of the Act, the time for giving such a notice in compliance with s 46 of the Act had also passed.

[12] The applicant through its ultimate holding company sent a letter to the respondents on 19 December 2013 in terms which included the following:

“We refer you your letter dated 26 November 2013 granting an extension of time for the exercise of lease option over the above premises.

Pursuant to clause 2.3a of the Lease, JV Pub Group Pty Ltd, a wholly owned subsidiary of Metcash Trading Limited, hereby exercises its option to a further lease term of five (5) years, commencing 1<sup>st</sup> March 2014.”

The letter requested that all lease documentation be forwarded directly to the relevant Deputy General Counsel of the holding company and provided the name of an employee who could be contacted by telephone, if there were any queries in relation to the notice of exercise of option.

[13] The applicant also appointed Kronos International Investments to manage the process of renewing the lease on behalf of the applicant. Mr Hall of Kronos sent an email on 20 December 2013 to LJ Hooker Surfers Paradise advising of the applicant’s exercise of the option and the appointment of Kronos. Mr Hall sent another email to LJ Hooker Surfers Paradise on 31 December 2013 requesting the submission of the lessor’s proposed rental for the new lease. Ms Hanrahan of LJ Hooker Surfers Paradise responded by email to Mr Hall on 2 January 2014 advising that the lessor was happy “to keep the rent for the new lease year the same as the previous year” and that the “4% annual rent increases would apply from 01/03/2015 to 28/02/2019”. On 22 January 2014 Mr Hall advised that the applicant declined the lessor’s offer and elected to use the standard process to have the rent for the premises determined and requested the lessor to submit acceptable valuers as soon as possible.

[14] The applicant’s former solicitors received a letter dated 29 January 2014 from the respondents’ solicitors advising that the notice purporting to exercise the option was out of time and that they were instructed to advise that the option terms do not apply. The letter then stated:

“We understand an offer was made by our clients advising of the rental that would apply for a further period, however this has been rejected by your client; and as such the lease will expire on the 28th of February and your client will become a tenant from month to month.”

[15] Clause 2.2 of the lease provides that if the lessor consents to the lessee continuing to occupy the premises after the expiry date of the term of the lease, the lessee shall do so on the terms of the lease for a fixed term of one month and then for successive periods of one month each with either party able to end the tenancy by giving one month’s notice to the other.

[16] A letter from the applicant’s holding company dated 4 February 2014 was sent in response, making the point that the applicant accepted the extension of time offered

for exercising the option in LJ Hooker Surfers Paradise's letter dated 19 December 2013 before the date set out in that notice of 28 December 2013. The applicant's position was asserted as having validly exercised its option to renew.

- [17] The parties had been unable to resolve their dispute as to the basis on which the applicant remains in possession of the premises and pays rent at the same rate that was being paid by the applicant at the expiration of the lease on 28 February 2014.

### **Issues**

- [18] The applicant seeks a declaration that the applicant validly exercised its option to renew the lease for a period of five years from 1 March 2014. The applicant's alternative contention is that LJ Hooker Surfers Paradise's letter of 26 November 2013 constituted an offer on behalf of the respondents to enter into a new lease on exactly the same terms of the existing lease, as if the option had been exercised, and that offer was accepted by the applicant before the date specified for its acceptance of 28 December 2013.

### **Effect of failure of the applicant to exercise the option by 31 August 2013**

- [19] Under clause 19.3 of the lease, time was of the essence in respect of all covenants, agreements and stipulations on the part of the lessee under the lease.
- [20] An option for renewal may be accepted only where the lessee performs the conditions prescribed for acceptance: *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122, 123-124. The effect of the failure of the applicant to exercise the option during the time period specified in clause 2.3(a) of the lease resulted in the option lapsing completely with the consequence that there was no room for the operation of the doctrine of waiver: *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101, 103.

### **Did the parties agree to a new lease, as if the option were exercised within time?**

- [21] Subject to dealing with the objection of the applicant, leave was given to the respondents to read and file the affidavits of Ms Tooma and Mr George both sworn on 10 September 2014. Mr George is the solicitor in the firm acting for the respondents who has had carriage of the matter on behalf of the respondents. He deposes from information provided by Ms Tooma, which he believes, as to the intention of the respondents in instructing LJ Hooker Surfers Paradise to send a letter to the applicant regarding the option to renew the lease which resulted in the letter dated 26 November 2013. Ms Tooma confirms that Mr George correctly records her instructions. It is irrelevant what the respondents' intention was in sending this letter to the extent that it is not reflected by the terms of the letter. What is relevant in the context of the dealings between the respondents and the applicant is what was communicated by the respondents to the applicant. I therefore uphold the applicant's objection to paragraphs 10, 12 to 14 and 16 of Mr George's affidavit.
- [22] Where an option to renew a lease has lapsed, if the parties thereafter agree to the lessee exercising the option, as if it were still available to be exercised, the correct characterisation of that further agreement (despite the parties' description of what

they have done) is that the parties have agreed to a new lease, rather than a renewed term arising from the exercise of the option: *Duncan Properties* at 104.

- [23] LJ Hooker Surfers Paradise was wrong in law in suggesting to the applicant in the letter of 26 November 2013 that it could still exercise the option under the lease *per se*. The letter was, however, clearly an invitation to the applicant to exercise the option. In these circumstances, the letter from the agent can be characterised only as an offer from the respondents to the applicant to lease the premises on the same terms as if the option were exercised. The effect of the letter sent on behalf of the applicant dated 19 December 2013 to the respondents was to accept the respondents' offer of a new lease. All the terms of that lease were agreed, as the offer and acceptance were by reference to the terms of a lease that would have come into existence had the option under the lease been exercised within the time for exercise of the option. That includes a mechanism for determining the market rent that the parties were unable to agree upon in the initial negotiations between LJ Hooker Surfers Paradise and Kronos.
- [24] The parties' dispute about the effect of the relevant exchange of correspondence has meant that the determination of market rent has not progressed. The fact that in the meantime the applicant has continued to pay rent at the rate it was paying when the lease expired on 28 February 2014 (which is also consistent with a monthly tenancy under clause 2.2 of the lease) does not modify the legal effect of the relevant exchange of correspondence.

### **Order**

- [25] It follows that the applicant is entitled to a declaration in the following terms:  
 "It is declared that there is an agreement for lease between the respondents as lessor and the applicant as lessee for a term of five years from 1 March 2014 of the premises described as shop 7, 88 Surf Parade, Broadbeach in the State of Queensland on the same terms and conditions as if the applicant had exercised within time the option to renew contained in clause 2.3 of registered lease number 713344562, by virtue of the applicant's acceptance by letter dated 19 December 2013 of the respondents' offer in the respondents' agent's letter dated 26 November 2013 sent to the applicant."
- [26] That declaration does not reflect the terms of the declaration sought in the originating application which was premised on the basis that the applicant had validly exercised its option to renew the lease. If there is any issue about the jurisdiction of the court to make a declaration in the terms proposed by these reasons, I would be amenable to hearing an application to amend the relief sought in the originating application.
- [27] The applicant has succeeded on its alternative contention which has the same commercial consequences for it, as if it had succeeded in its primary argument. Subject to hearing submissions from the parties on the issue of costs, I am inclined to the view that, as the applicant has succeeded in substance to obtain the relief it was seeking, it should have an order for costs in its favour.