# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Shanemist Pty Ltd v Denmac Nominees Pty Ltd* [2003] QSC 373 |
| PARTIES: | **SHANEMIST PTY LTD (ACN 011 052 825)**<br>(applicant)<br>**v**<br>**DENMAC NOMINEES PTY LTD (ACN 009 863 825)**<br>(respondent) |
| FILE NO: | S8703 of 2003 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 3 November 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 21 October 2003 |
| JUDGE: | Chesterman J |
| ORDER: | **1. Application dismissed.** |
| CATCHWORDS: | ESTOPPEL – ESTOPPEL BY CONVENTION – Nature and effect of – where option to extend the term of a lease – where applicant seeks an injunction to protect its rights to occupy premises on the basis of the estoppel – whether deed gives rise to the convention by which the parties acted<br><br>CONTRACTS - CONSTRUCTION – Whether antecedent agreement may be relied upon in interpreting a later instrument made pursuant to the agreement- Where deed relied upon is an adjunct to the lease<br><br>*Property Law Act* (1974) (QLD), s. 124, s. 131<br><br>*Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* (1982) QB 84<br>*Carpenter v Buller* (1841)151 ER 1013<br>*Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985-1986) 160 CLR 2<br>*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. 26<br>*Foran v Wight* (1989) 168 CLR 385<br>*General Finance Co v Liberator Society* [1878] 10 Ch D 15<br>*Greer v Kettle* [1938] AC 156<br>*Grundt v Great Boulder Proprietary Gold Mines Pty Ltd* |

(1937) 59 CLR 641
*McCathie v McCathie* (1971) NZLR 58
*Queensland Independent Wholesalers Limited v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40
*Re: Patrick Corporation Ltd & The Companies Act* (1981) 2 NSWLR 328
*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387
*Right v Bucknell* (1831) 2 B & Ad 278

COUNSEL: Mr J.M. Horton for the applicant
Mr P.J. Dunning for the respondent

SOLICITORS: Tavoularis & Company for the applicant
Hopgood Ganim for the respondent

[1] By a lease dated 28 August 1996 the respondent demised to the applicant part of the ground floor of a building in Moorooka from which it has conducted its business of supplying automotive parts. The lease was for a term of four years, from 1 January 1996 to 31 December 1999. Clause 16 provided:

> 'If the (applicant) shall be desirous of taking a renewed lease of the … premises for a further term of three years (… 'the first option term') … (commencing upon the expiration of the initial term hereby granted) and shall not more than six months and not less than three months prior to the expiration of the initial term … signify such desire by notice in writing to the (respondent) …'

Clause 17 provided for a second extension to the term of the lease. It read:

> 'If the (applicant) shall be desirous of taking a further renewed lease of the … premises for a further term of three years … (commencing upon the expiration of the first option term …) and shall not more than six months and not less than three months prior to the expiration of the first option term signify such desire by notice in writing to the lessor …'

[2] Clause 12.09 made provision for the eventuality that the applicant might remain in possession after the expiration of the lease or either of the extensions to it. It provided:

> '12.09 <u>HOLDING OVER</u>
> If the (applicant) shall with the consent of the (respondent) remain in occupation of the … premises after the expiration of the term hereof the (applicant) shall (in the absence of any express agreement to the contrary) be deemed to hold the … premises as lessee from month to month at a monthly rent equal to the aggregate of the monthly instalments on account of the rent at the date of the expiration of the said term … but otherwise on the terms and conditions of this lease so far as they can be applied to a monthly tenancy.'

[3] On 5 August 1999 the applicant's solicitors wrote to the respondent's then solicitors:

> 'We note the current (first) term of the lease is due to expire on 31 December 1999.
>
> In accordance with item 17 of the lease we hereby give notice of our client's intention to exercise the further option period of three years provided in the lease …'

The reference to item 17 is, presumably, erroneous. Clause 16 granted the option to extend the term of the lease for the first time. The respondent was sent a copy of that letter by its solicitors. Despite several further letters from the applicant's solicitors to the respondent's solicitors requesting a response to the notice exercising the option given by Clause 16 no substantial reply was received until 30 March 2000 when the respondent's present solicitors wrote to say that they had been instructed to prepare 'the necessary extension documentation in relation to the option exercised by your company pursuant to the … lease late last year. Our client apologises for the delay …'

[4] There followed a negotiation by correspondence as to the rent to be paid for the extended term. No agreement had been reached when by letter of 28 April 2000 from the respondent's solicitors to the applicant's solicitors the respondent enclosed a draft deed of extension and variation 'for … perusal.' The enclosed draft deed contained five recitals, the second of which was:

> 'B. The (applicant) has exercised the option contained in Clause 16 of the lease ('the option clause') to extend the lease term for a further term of three years commencing on the 1 January 2000 ('the date of commencement') and expiring on the 31 December 2003 ('the further term').'

[5] It will be noted that the recital contains an inconsistency, or an ambiguity. A term of three years commencing on 1 January 2000 would expire on 31 December 2002, not 2003. The dates mentioned in the recital describe a four year term, not one of three years.

[6] On 9 May 2000 the respondent's solicitors wrote to the applicant's solicitors to inform them that the respondent had perused the Deed of Extension and was satisfied with its terms. The letter requested the applicant to execute the deed and return it 'as soon as possible.' On 11 May the applicant's solicitors spoke to the respondent's solicitors to indicate that the applicant was 'happy with the terms of the agreement.' It was not, however, executed by the applicant until 5 July 2000. The respondent did not execute the Deed of Extension until about 15 December 2000. Recital B in the final, executed deed, was in the same terms as the draft.

[7] On 29 January 2001 the respondent's solicitor wrote to the respondent to confirm that the Deed of Extension had been stamped and the applicant sent a copy. The letter went on:

> 'As the term of the extension is only three years we trust that you do not require the extension to be registered. We will … need to … contain [*sic*] the consent of your mortgagee … The cost of obtaining … consent will be borne by the (applicant) …'

[8] On 15 July 2003 the applicant's solicitors wrote to the respondent's solicitors:

> 'In accordance with Clause 17 of the abovementioned registered lease we give you notice of our client's intention to exercise the further option renewal regarding the second option term of three years.
>
> Please acknowledge our client's due exercise of the second option term …'

On the same day the applicant's solicitors wrote a second letter headed 'Without Prejudice'. It followed a telephone conversation between the solicitors. Mr Tavoularis deposed that he obtained instructions from the applicant in early July 2003 to notify the respondent of the applicant's intention to exercise a second option to extend the lease. In the course of reviewing the file pursuant to those instructions he 'noticed the parties had apparently been under a mutual misapprehension as to the operation and effect of the Deed of Extension …' He wrote, in his second letter:

> 'I … think the following has occurred.
>
> The lease has an initial term of four years plus two options of three years each. Expressed in chronological terms, the lease works like this:
> …
> Fourth year 1 January 1999 to 31 December 1999
>
> On 5 August 1999 our client validly exercised its option for the first option term of three years. In the early part of 2000 a Deed of Extension was prepared pursuant to Clause 16 … please look at Recitals A and B … it purports to renew the lease for a period of three years pursuant to … Clause 16 … Recital B actually extends the term from 1 January 2000 until 31 December 2003. This extension actually comprises four years instead of three. … It seems both parties have been operating under the same misapprehension. … My client … understands that but for the … misapprehension the second term would operate as follows …
>
> Third year 1 January 2005 to 31 December 2005
>
> It is not (the applicant's) intention to unfairly 'steal' a further year of possession by adding three years to the expiry date appearing in Recital B … my client wants to reserve his right to remain in possession until 31 December 2005 … I think the best solution is for our client to 'exercise' the second option term for 'three' years but that two things be addressed in the Deed of Renewal …
>
> 2. The parties agree that the second further option period run … until 31 December 2005 …'

[9] By letter dated 29 July 2003 the respondent's solicitors wrote to the applicant and to its solicitors:

> 'We refer to the purported notice of exercise of an option for renewal of the lease dated 15 July 2003 … We point out that (the applicant) holds over as a monthly tenant pursuant to an original registered lease. We note that the first option was exercised with the term being for three years from 1 January 2000 to 31 December 2002. Any option purported to be exercised should have been exercised during the term of the extended lease some time between 1 July 2002 and 30 September 2002. No notice exercising an option was received and accordingly our client has treated (the applicant) as a monthly tenant since 1 January 2003. We note (the) 'Without Prejudice' letter dated 15 July 2003 and make the following comments …
>
> 1. Recital B states that the further term is three years commencing 1 January 2000. That being the case the term ended on 31 December 2002. It is clearly a typographical error that resulted in the expiry date being expressed as 31 December 2003.
>
> 2. The parties' intention at the time as evidenced by the correspondence, was that (the applicant) exercise their option … for a further term of three years and it was not the intention of the parties that the term was to be four years.
>
> … In the event that the court does not grant an order for rectification of the variation of the lease document and holds that the term was indeed for four years … and the option was validly exercised, then we enclose by way of service and notice under s. 128 of the *Property Law Act* precluding (the applicant) for exercising its option on account of breaches of the lease …'

The notice specified 16 breaches of the lease being non-payment or late payment of rent and other moneys due under the lease. Five were breaches that occurred subsequent to 31 December 2002.

[10] On 16 September 2003 the respondent served on the applicant a notice in Form 8 under the *Property Law Act* (1974) Qld requiring it to deliver up possession of the premises on or before 31 October 2003. The notice was given pursuant to s 131. It is accepted that if the applicant occupies the premises as a tenant from month to month the notice was good and will determine the tenancy.

[11] On 16 December 2002 the respondent's solicitors wrote to the applicant to inform it that it had fallen behind in paying rent and other moneys due under the lease. The letter demanded immediate payment of the sum of $4,561.45 and threatened that, if payment was not paid within 14 days, legal proceedings would be instituted. Enclosed with the letter was a notice given pursuant to s 124 of the *Property Law Act* requiring the applicant to remedy the breaches, specified in the notice, by paying the amount due and warning that if the breach were not remedied the respondent would be entitled to re-enter or forfeit the lease.

[12] The applicant's controlling director, Mr Frawley, deposed that he assumed, from the Deed of Extension, that the term created by the exercise of the first option extended from 1 January 2000 to 31 December 2003 and that he 'was always operating under the assumption that the second option had to be exercised during the period

1 July 2003 until 30 September 2003.' It was because of this assumption that he instructed the applicant's solicitor to exercise the second option in July 2003.

[13] The respondent did not tell the applicant that it had become a monthly tenant after 31 December 2002. In April or May 2003 Mr Frawley spoke to the respondent's property agent. He knew that the respondent had been negotiating to sell the building in which the premises were located. He asked how the negotiations were proceeding because he wanted to make sure he was 'solid and safe in (his) lease because in this term … (he had) got until December …'. Mr Frawley recalls the agent replying:

> '… I think your lease finishes in December … I'll have to check it out and let you know.'

He did not do so.

[14] The applicant seeks:

1. A declaration that the option for renewal of the lease exercised on 15 July 2003 is valid.

2. The lease be rectified to substitute 'four years' for 'three years' in Clause 17.

3. The Deed of Extension be rectified to substitute 'four years' for 'three years' in Recital B.

4. An injunction restraining the respondent from ejecting the applicant from the premises.

The applicant did not persist with the relief sought in paragraph's 2 and 3. It did, however, seek a declaration that on the true construction of the Deed of Extension the second term of the lease expires on 31 December 2003. Alternatively it claims that the respondent is estopped from denying the contrary and from denying that the second exercise of the option on 15 July 2003 was valid. It seeks an injunction to protect its right to occupy the premises on the basis of the estoppel.

[15] The applicant's first argument is that the Deed of Extension, on its proper construction, extended the term of the lease not for three years but to 31 December 2003.

The argument is untenable.

The object of construction is to ascertain the intention of the contracting parties, not, of course, their subjective intention but their objective, presumed intention gathered from the terms of the contract itself and the surrounding circumstances to which it is permissible to have regard.

[16] The deed is an adjunct to the lease. It cannot be understood without reference to the terms of the lease. Some of its provisions make this clear.

> "3. Extension of the lease term and new rent

> The (respondent) extends the lease term and leases the … premises to the (applicant) as tenant for the further term:-
>
> (b) Upon and subject to the same covenants and conditions contained in the lease but with the exception of the option clause (Clause 16).
>
> 4. The (respondent) and the (applicant) shall each perform and observe during the further term all the covenants and conditions contained in the lease and in this deed and which are on their respective parts required to be performed and observed.
>
> 5. Lease to be binding as varied.
>
> Subject only to the variations contained in this deed and such other alterations (if any) as may be necessary to make the lease consistent with this deed, the lease shall remain in full force and effect and shall be read and construed and be enforceable as if the terms of this deed were inserted in the lease by way of addition or substitution as the case may be.'

[17] According to the *Interpretation of Contracts* 2nd ed by Lewison (p. 35):

> '… A concluded antecedent agreement may be relied upon in interpreting a later instrument made pursuant to the agreement.'

No particular authority is cited but the proposition is surely right. The lease is an antecedent agreement to the deed. It was pursuant to that earlier agreement that the Deed of Extension was made. It is identified in Recital A and referred to in Recital B as the source of the applicant's right to extend the term. It is obviously permissible to consult the terms of the lease to resolve the ambiguity which appears in the subsequent Deed of Extension. The most cursory glance at Clause 16 shows that the parties must have intended to extend the term for three years and no more.

[18] The applicant's second argument is founded upon an estoppel by convention. It submits that 'the parties are bound by the conventional basis upon which they conducted their affairs.' That conventional basis is said to be that the term was extended for four years as evidenced by Recital B.

[19] The applicant did not argue that the facts gave rise to an estoppel by representation and its restraint in that regard appears correct. It would, I think, be impossible to prove that Recital B amounted to a representation where the facts were that the applicant exercised its right to extend the lease for three years, the respondent's solicitors drafted a deed, which included the recital, to give effect to that election and submitted the draft deed to the applicant with an invitation that it make such changes as it thought appropriate.

[20] The High Court explained estoppel by convention in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985-1986) 160 CLR 226 at 244-5:

> 'estoppel by convention is a form of estoppel founded not on a representation of fact … but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying … There is no estoppel unless it can be shown that the alleged assumption has in fact been adopted by the parties as the conventional basis of the relationship … Secondly, just as estoppel by representation requires the representation to be of fact, so too estoppel by convention requires the assumed state of affairs to be an assumed state of fact …'

[21] The second requirement has disappeared. The doctrine now extends to assumptions of law. The cases which have wrought the change are collected in *Equity: Doctrines and Remedies* 4th ed. by Meagher, Hayden and Leeming, paras. 17-020. They are principally *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 415-416, 432, 452, 458; *Foran v Wight* (1989) 168 CLR 385 at 435, 457; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

[22] The applicant relies upon the terms of Recital B itself as giving rise to the convention by which the parties acted, i.e. that the first extension of the lease was for four years and upon the acts of the parties themselves as showing that that was the basis on which they dealt with each other.

[23] It is clear that:

> 'There is a form of estoppel, generally known as estoppel by deed, according to which a solemn and unambiguous statement in a deed, including in a recital, must be taken as binding as between the parties to it … and therefore as not admitting any contradictory proof.'

The quote is from *Estoppel by Convention* by Dr Derham (1997) 71 ALJ 860 at 863. According to Dr Derham and Spencer Bower & Turner *Estoppel by Representation* 3rd ed., estoppel by deed is a sub-class of estoppel by convention. It will be noted that the estoppel depends upon an unambiguous statement in the deed. That term appears in Lord Maugham's formulation of the principle in *Greer v Kettle* [1938] AC 156 at 171. There are passages in *Norton on Deeds* 2nd ed., to the same effect. According to the authors:

> 'A misrecital may operate by way of estoppel … subject to the following qualifications …
>
> 1. That every estoppel because it concludeth a man to allege the truth, must be certain to every intent and not to be taken by argument or inference (relying upon co. Litt. 352(b) … Generally there is no estoppel if the allegations sought to be set up by estoppel is negatived on the face of the instrument itself … "nor shall a man be estopped where the truth appears by the same instrument": per Lord Tenterden C.J., *Right v Bucknell* (1831) 2 B & Ad 278 at 281 …'

[24] Applying these principles to the terms of Recital B I conclude that it did not give rise to a convention between the applicant and the respondent that the lease had been

extended for four years. The recital is not unambiguous, or 'precise, clear and unambiguous' as Jessel MR required in *General Finance Co v Liberator Society* [1878] 10 Ch D 15 at 23. The recital is patently ambiguous. It acknowledges the extension of the lease term by three years and then describes the extension by dates which postulate a term of four years. Moreover, the ambiguity is capable of immediate solution by reference to the terms of the lease which are referred to in the recital and the terms of the deed.

[25] The recital contains an obvious mistake. Its literal meaning is that the term was extended for three years and for four years. It therefore contains two statements of fact which are mutually exclusive. The statement is explicitly uncertain and is, for that reason, incapable of giving rise to a statement of fact binding on the parties to the deed. Moreover the lease to which one is naturally led by the recital shows the true state of affairs. It is a case where the statement said to give rise to the estoppel is disproved if not in the face of the instrument itself then at least by the terms of the lease to which the deed is a supplement.

[26] There is another reason why the recital would not give rise to an estoppel precluding the respondent from denying that the second option had to be exercised between June and September 2002. It is that estoppel by deed arises only when an action is brought to enforce rights arising out of the deed and not on some collateral document or transaction:

> 'If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital … but there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, and dispute the facts so admitted, though the recitals would certainly be evidence.'
>
> Per Parke B in *Carpenter v Buller* (1841) 151 ER 1013 at 1014-5.

[27] The point is illustrated by the decision in *McCathie v McCathie* (1971) NZLR 58 in which the defendant's father sold him a farm by contract under which the defendant had to pay his father the sum of £7,462. Contemporaneous with the contract a document was prepared, in form of deed, which expressed the father's desire to forgive the son £3,500 of the purchase price. The document was signed by the son but his signature was not witnessed. The father did not sign at all. About a year later a properly executed deed forgave and released the son from the obligation "to pay the sum of £3,962 being the balance of the aforesaid sum of £7,462 …". After the father's death the executors claimed that the defendant owed the estate £3,500. The defendant resisted the claim on the basis that the recital in the second deed showed that the original debt of £3,500 had been discharged. The claim failed because the executors sued on the contract of sale and did not rely upon the deed which contained the recital that might have given rise to the estoppel.

[28] North P approved a statement in *Halsbury's Laws of England* 3rd ed, Vol 15, para 416:

> "There can be no estoppel arising out of a deed where the action is not founded on the deed, but is wholly collateral to it".

Turner J said (69, 70):

> "The basis of estoppel by deed is that either party to a deed, when sued in respect of his obligations under the operative parts of that deed, may defend himself by contending that by virtue of some fact recited in the deed, the truth of which the parties have agreed to accept as the basis of their transaction, he is discharged or excused from liability. … Estoppel by deed binds parties only on claims under that deed. As Martin B said, in the excerpt from *Horton v Westminster Improvement Commissioners* … "so far as regards to *that transaction* there shall be no question …". Here the claim of the executors is not made under the deed. The executors set up, not the deed, but the agreement for sale and purchase; it is the son who must set up the deed, and he cannot make a submission of estoppel there under unless he is sued upon it …".

[29] The point is also discussed by Needham J in *Re: Patrick Corporation Ltd & The Companies Act* (1981) 2 NSWLR 328 at 332-333.

[30] This principle presents an immediate problem for the applicant. Any estoppel to which Recital B gives rise is limited to disputes between the parties arising out of the transaction evidenced by the deed. What is in question, however, is the applicant's right to extend the term of the lease for a second time and that right is given and circumscribed by the lease, not the deed of extension. Clause 17 provides that the applicant had to give notice of its desire to extend the term for a further period of three years in the third quarter of the seventh year of the term. This follows from Clause 17 which requires that notice be given "not more than six months and not less than three months prior to the expiration of the first option term". The "first option term" was specified in Clause 16 to be a term of three years following the expiration of the initial term of four years.

[31] Even if the respondent were precluded by estoppel from denying that the lease had been extended for four years on the first occasion, the estoppel would have no effect in relation to the exercise of the second option conferred by Clause 17.

[32] The applicant did not give notice of its desire to extend the term for a second time within the time allowed by Clause 17. No estoppel with respect to the length of the term given by the first extension can affect the applicant's failure to comply with the terms of the lease.

[33] The applicant relies also on the respondent's conduct as giving rise to an assumed state of fact, namely that the lease had been extended for four years from 1 January 2000. The evidence relied upon to establish this "convention" was:

(a) The terms of recital B.
(b) The notice given by the respondent to the applicant in December 2002 in respect of the non-payment of rent.

(c) The conversation between Mr Frawley and the respondent's agent in April 2003.

(d) The notice given on 29 July 2003 denying the applicant's right to exercise the option by reason of its breaches of the lease.

[34] For the reasons just discussed it is not right that an estoppel as to the length of the first extension would operate to preclude the respondent from relying upon the applicant's failure to comply with Clause 17. The point can be made clearer by reference to the applicant's submission which was that:

> "The parties are bound by the conventional basis upon which they conducted their affairs. Both proceeded on the assumption the second option need not be exercised until before 31 September 2003."

[35] This mis-states the only estoppel which could be contended for; one relating to the duration of the term of the first extension. It does not go further and import a variation to the terms of Clause 17 so as to extend by 12 months the time for the exercise of the option. The applicant can succeed only if it can demonstrate an estoppel affecting the operation of that clause and it does not do so merely by showing (if it could) that the respondent could not deny that the first extension of the lease was for four years. To say that is to say nothing about when the applicant had to give notice of its intention to extend the lease for a second time.

[36] In any event the circumstances relied on are insufficient to make out the common assumption between applicant and respondent which is said to found the estoppel.

[37] The principle was described by Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* (1982) QB 84 at 121 in a passage approved by the full court of this court in *Queensland Independent Wholesalers Limited v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 45. The Master of the Rolls said:

> "If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it – on the faith of which each of them – to the knowledge of the other – acts or conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to enquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and it cannot be allowed to go back on it. To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Proprietary Gold Mines Pty Ltd* (1937) 59 CLR 641, 657, 677, the parties by their course of dealing adopted a "conventional basis" for the governance of the relations between them and are bound by it".

[38] McPherson J (in whose judgment Andrews CJ and Demack J agreed) noted (46):

> "… The principle invoked first requires that evidence be identified which establishes the conventional basis for the assumption relied upon. The word "conventional" in this context carries connotations of agreement, not necessarily expressed but to be inferred, or at least a demonstrable acceptance of a particular state of things, as the foundation for the dealings of the parties. There must .. be acts or conduct which impinge upon .. "their mutual affairs".

[39] The judgment makes it clear that the acts relied upon as giving rise to the convention must be unequivocally referable to it. Activities which are explicable by reference to some assumption other than the alleged convention will not establish that the parties accepted the convention as the basis of their relationship. In particular if the matters relied on to prove the assumption are in accordance with the express terms of a written agreement made between the parties an attempt to establish that their conduct proves a variation to that contract will fail.

[40] An examination of the four circumstances identified by the applicant shows them to be inadequate to establish the alleged convention. The recital is, as I have mentioned, ambiguous. The ambiguity is readily removed. Even if it remained ambiguous the recital and the deed in which it appears does not affect the express agreement between the parties by which the exercise of the option was regulated.

[41] The notice given in December 2002 is explicable by reference to the existence of the lease extended for a term of three years to expire on 31 December 2002. The notice might be thought unnecessary in circumstances where the lease was to expire anyway by the effluxion of time on the same date as that specified in the notice for making good the breaches of the lease, but the terms of the notice are not evidence that the respondent regarded the lease as extending beyond 31 December 2002.

[42] The conversation between Mr Frawley and the agent is too equivocal in its terms to point to the existence of an assumption between applicant and respondent that the lease subsisted. It was no more than a tentative expression of opinion about which the agent was not confident. It cannot be construed as a representation that the applicant could regard the lease as subsisting unless he heard to the contrary. It does not constitute an act by the respondent pointing inexorably to the existence of the assumed state of facts.

[43] The notice of July 2003 is of the same character. It is not a recognition of the existence of the lease beyond 2002. It was given on the express basis that the respondent believed the lease had come to an end on 31 December 2002 without the applicant having exercised its option for a second extension. It is clearly not the manifestation of an assumption that the lease was on foot. It was given on the contingency that the applicant's arguments would be upheld. On that hypothesis the respondent indicated it would contend that the applicant had no right to exercise the option by reason of its breaches of the lease.

[44] The applicant did not rely upon its continued occupation of the premises and the payment and receipt of rent no doubt for the reason that that course of conduct is explicable by reference to cl 12.09 of the lease which made the applicant a monthly tenant obliged to pay rent in the same sum as the lease had specified.

[45] The applicant has not made out any basis for relief. It did not exercise its second option within time and the lease had expired. The application must be dismissed.