SUPREME COURT OF QUEENSLAND

CITATION:	*NightOwl Properties Pty Ltd v Replay Australia Pty Ltd* [2022] QSC 204
PARTIES:	**NIGHTOWL PROPERTIES PTY LTD** (plaintiff) **v** **REPLAY AUSTRALIA PTY LTD** (defendant)
FILE NO/S:	BS 8260 of 2021
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 September 2022
DELIVERED AT:	Brisbane
HEARING DATES:	16 June and 4 July 2022
JUDGE:	Bradley J

ORDER: **The Court declares that:**

1. **The plaintiff validly exercised the option in cl 7.2 of registered lease No 715779923, as amended by registered amendment No 716557560, (the "Lease") for the grant of a further lease of the premises the subject of the Lease (the "Option"), by written notice to the defendant on 22 January 2020; and**

2. **The covenant by the defendant to grant to the plaintiff a further lease of those premises, in cl 7.2(B) of the Lease, ought to be specifically performed.**

The order of the Court is that:

3. **The plaintiff is relieved from the forfeiture of the Option by reason of its failure to punctually pay to the defendant the rent reserved by the Lease, without any deduction whatsoever and without prior demand, in April, May, June, July and August 2020.**

4. **The defendant specifically perform the covenant in cl 7.2(B) of the Lease by granting to the plaintiff a further lease of the premises for the period from 14**

October 2020 to 13 October 2025 upon the same terms as are contained in the Lease, with the necessary changes, except that:

(a) cl 7.2 of the Lease is to be omitted;

(b) the Base Rent is to be determined under the provisions contained in cl 18.2(A), and the Appendix, of the Lease; and

(c) any other alterations and additions which the defendant may reasonably require.

Each party has liberty to apply on not less than three business days' notice in writing to the other party.

CATCHWORDS: LANDLORD AND TENANT – RENEWALS AND OPTIONS – EXERCISE OF OPTION – WHERE LESSEE IN BREACH OF COVENANT – where the lease was for a term of ten years, commencing 14 October 2010 and expiring on 13 October 2020 – where the tenant gave notice of exercise of the option in January 2020 - where the tenant failed to pay part of the rent due in April, May, June and July 2020 – where the tenant paid rent reduced in accordance with turnover during the COVID-19 pandemic – where the landlord later served an notice to remedy the breach – where the tenant remedied the breach by payment of outstanding rent - where the tenant asserts that the landlord had waived the breach - where, in the alternative, the tenant seeks relief against forfeiture of the option under s 124(2) of the *Property Law Act 1974* (Qld) or as an equitable remedy – where the landlord asserts it was not obliged to grant a new lease as the tenant was in breach at the expiry of the lease - where the landlord denies waiver – where the landlord denies relief under s 124(2) is available because there is no lease - whether the tenant validly exercised the option to renew the lease – whether the tenant should have equitable relief against forfeiture of the option – whether the covenant to grant a new lease ought to be specifically performed

Property Law Act 1974 (Qld), s 124(2)
Retail Shop Leases Act 1994 (Qld)
Retail Shop Leases and Other Commercial leases (COVID-19 Emergency Response) Regulation 2020 (Qld)

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570, cited.
Barrow v Isaacs & Son [1891] 1 QB 417, cited

Bowser v Colby (1841) 1 Hare 109, cited.
Dering v Earl of Winchelsea (1787) 1 Cox 317, cited
Duncan Properties Pty Ltd v Hunter [1991] 1 Qd R 101, cited.
Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Pty Ltd (1957) 76 WN (NSW) 72, cited.
Grepo & Anor v Jam-Cal Bundaberg Pty Ltd [2015] QCA 131, cited.
Hack v Leonard (1724) 9 Mod Rep 90, cited
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57, cited.
Mercantile Credits Ltd v Shell Co of Australia Ltd (1975-1976) 136 CLR 326, cited.
Muller v Trafford Muller v. Trafford is at [1901] 1 Ch. 54, cited.
Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq) [2020] NSWCA 23, cited
Owendale Pty Ltd v Anthony (1967) 117 CLR 539, cited.
Shiloh Spinners v Harding [1973] AC 691, cited.
Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd [2020] NSWSC 996, cited.
Symonds Plains Pastoral Holdings Pty Ltd v Tasmanian Motor Racing Co Pty Ltd (1996) 6 Tas R 284, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315, cited.
Thomas v Porter (1668) 1 Chan Cas 95, cited.
Tripple A Pty Ltd v WIN Television Qld Pty Ltd [2018] QCA 246, cited.
Wadman v Calcraft (1804) 10 Ves 67, cited.
Wagners Cement Pty Ltd & Anor v Boral Resources (Qld) Pty Limited & Anor [2020] QCA 289, cited.
Weg Motors Ltd v Hales [1962] Ch 49, cited.
Wilkinson v S & S Gikas Pty Ltd [2006] NSWSC 1314, cited.

COUNSEL: M Jonsson QC for the plaintiff
R A Quirk for the defendant

SOLICITORS: Preston Law for the plaintiff
Clinton Mohr Lawyers for the defendant

[1] A tenant (**NightOwl**) is in dispute with its landlord (**Replay**) about the exercise of an option for a new lease of a retail shop in the Brisbane central business district. For the following reasons, NightOwl should have substantially the relief it seeks, including an order that Replay perform a covenant to grant NightOwl a further lease of the premises for a term of five years from 14 October 2020 to 13 October 2025.

The lease and the amendment

[2] Replay owns the land at 132 Albert Street, Brisbane.[1] On 14 February 2014, Replay executed a lease granting NightOwl a leasehold estate in an area of 126 m^2 with a frontage to Albert Street, on the ground floor of the building on the land. The lease was for a term of ten years, commencing 14 October 2010 and expiring on 13 October 2020.[2] The lease was in registerable form, and, on 20 May 2014, it was registered over the title to the land.[3]

[3] By the lease, NightOwl, as lessee, covenanted that it would punctually and regularly pay to Replay, as lessor, "the rent reserved by the lease, without any deduction whatsoever and without prior demand, calendar monthly in advance" during the term and afterwards so long as it occupied the premises.[4] By cl 7.1, the lease permitted NightOwl to ask for a renewal of the lease and required Replay to inform NightOwl, whether or not it offers NightOwl "an option to renew the existing Lease." If Replay did not propose to offer an option to renew, then NightOwl was obliged to vacate the premises on 13 October 2020.

[4] On 12 June 2015, Replay executed an amendment to the lease.[5] By the amendment the parties deleted an existing clause 7.1 from the lease and inserted a new clause 7.2 (providing for a "first option for renewal") and a new clause 7.3 (providing for a "second option for renewal").

[5] They also inserted a new clause 18.2 providing for the base rent to be reviewed on each "Market Rent Review Date" (being 14 October 2020 and 14 October 2025) to an amount that is the "Market Current Rent" as agreed or determined by a specialist retail valuer under the *Retail Shop Leases Act 1994* (Qld) (**RSLA**) in accordance with the matters required to be taken into account in determining current market rent under the RSLA. The were some other amendments.[6]

[6] The parties otherwise ratified the terms and covenants of the lease and agreed to be bound by them. The amendment was in registerable form. On 16 June 2015, it was registered over the title.[7]

[7] Both the lease and the amendment were executed by John Sophios, as sole director of Replay, and by Adam Paul Adams as the sole director of NightOwl. From registration, the lease and the amendment have each operated as a deed.[8]

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1 It is the registered proprietor of the fee simple in Lot 21 on RP 214198, County of Stanley, Parish of North Brisbane, Title Reference 13619220. Replay holds that estate as trustee of a trust.

2 Replay executed the Lease three years and four months after the tenancy began. NightOwl had executed it on 23 January 2014.

3 As lease no. 715779923.

4 The lease seemed to set the 14th day of the month as the date for payment of rent. However, at the trial, the parties agreed it was not in issue that the rent payments for April 2020 to August 2020 were due on the 7th day of each of those months.

5 NightOwl had executed the amendment on 9 April 2015.

6 The parties inserted definitions in clause 35.1, a new clause 36, and new items 8 to 15 in the Appendix.

7 As amendment no. 716557560.

8 *Land Title Act 1994* (Qld) (**LTA**), s 161.

[8] On registration of the amendment, the registered lease was amended.[9] In these reasons it is convenient to refer to the registered lease as amended by the registered amendment as the **Lease**.

The option provisions

[9] By clause 7.2 of the Lease, Replay and NightOwl agreed:

> "**7.2 FIRST OPTION FOR RENEWAL**
>
> **7.2(A) Conditions of Exercise of First Option**
>
> If the Lessee desires a further lease of the Demised Premises for the First Option Term, clause 7.2(B) and 7.2(C) shall apply if:
>
> (a) the Lessee gives written notice of exercise of option to the Lessor during the Option Exercise Period;
>
> (b) this Lease has not been terminated or surrendered;
>
> (c) there is not at the time of giving the notice under clause 7.2(A)(a) or thereafter prior to the Expiry Date any unremedied beach of the provisions of the Lease on the Lessee's part which has not been waived by the Lessor; and
>
> (d) the Lessee has at all times during the term strictly observed and performed the provisions of the Lease on the Lessee's part.
>
> **7.2(B) Grant of First Option Term**
>
> Subject to clauses 7.2(A) and 7.2(E) the Lessor shall grant to the Lessee and the Lessee shall accept from the Lessor a further lease of the Demised Premises for the First Option Term upon the same terms, with necessary changes, as are contained in this Lease except for:
>
> (a) this clause 7.2 which shall be omitted;
>
> (b) the Base Rent payable during the First Option Term which shall be determined under the provisions contained in clause 18.2(A) and the Appendix; and
>
> (c) any other alterations and additions which the Lessor may reasonably require.
>
> **7.2(C) Execution of Lease for First Option**
>
> If the Lease for the First Option Term is granted the Lessee shall execute and deliver to the Lessor or the Lessor's solicitors a new lease … within 20 Business Days of the delivery of such lease … by the Lessor or the Lessor's solicitors to the Lessee or the Lessee's solicitors. Such

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9 LTA, s 67(1).

lease … shall be prepared, stamped and (…) registered by the Lessor's solicitors at the cost of the Lessee. If the Base Rent for the First Option Term has not been determined by the commencement date of the First Option Term the Lessee shall pending such determination and the execution of the lease … be bound by the terms of the lease for the First Option Term on the Lessee's part. Subject to the provisions contained in Clause 18.2(A) and the Appendix, if the Base Rent for the First Option Term has not been determined by the commencement date of the First Option Term then pending such determination the Lessee shall pay Base Rent at the rate payable as at the Expiry Date. Upon such determination the Lessor and the Lessee shall promptly make any necessary adjustment.

7.2(D) Power of Attorney for First Option

The Lessee irrevocably nominates and appoints the Lessor and each and every one of the Lessor's directors, secretaries, managers and nominees in Queensland jointly and severally as the attorney of the Lessee to:

(a) execute, stamp and, if necessary, register the lease for the First Option Term;

(b) appoint substitutes and, at the discretion of the Lessor or its directors, secretaries, managers and nominees in Queensland, to revoke such appointment and to appoint others;

(c) use the name of the Lessee; and

(d) generally do, execute and perform any act, deed

7.2(E) Guarantee and Indemnity for First Option

If a person had guaranteed the Lessee's performance of the provisions of the Lease … If the Lessee does not procure the execution of such guarantee and indemnity the notice given under clause 7.2(A)(a) shall, at the election of the Lessor, be of no effect. In the event of such election the Lessee shall not be entitled to any lease for the First Option Term."

[10] By reference to the other changes the parties made by the amendment, the expressions used in clause 7.2 are to be understood in this way:

(a) Expiry Date is 13 October 2020;

(b) The Option Exercise Period means not less than six months and not more than nine months prior to the Expiry Date, and so it is the period from 13 January to 13 April 2020; and

(c) The First Option Term is the five years commencing on 14 October 2020 and expiring on 13 October 2025.

[11] By clause 7.3, Replay and NightOwl agreed to the grant and acceptance of a further lease for the Second Option Term of five years commencing on 14 October 2025 and expiring on 13 October 2030, otherwise in terms relevantly and materially the same as clause 7.2.

Breaches before 2020

[12] Between March 2018 and April 2019, NightOwl failed to perform some obligations under the Lease about the payment of monthly rent and outgoings. By 18 April 2019, NightOwl had remedied these breaches.

[13] There were other breaches. NightOwl failed to provide a bank guarantee for three months' rent and had failed to provide Replay with a copy of an air-conditioning maintenance agreement when requested. By 15 July 2019, NightOwl had provided the bank guarantee and the maintenance agreement, and so had remedied these breaches.

Notice of exercise of option

[14] On 22 January 2020, Alan Minshull of NightOwl gave Replay a written notice of exercise of the first option by an email to Mr Sophios. In his email, Mr Minshull suggested "a review downward" of the rent would be reasonable in "the current retail climate, and general market conditions". He asked Mr Sophios to send "your rental proposal … on the basis we have exercised our option to renew."

[15] The email concluded:

> "NightOwl is more than happy to discuss a new rental offer and amicably reach an agreed rental figure, rather than having to consider going down the market review and rental determination process.
>
> I would appreciate your response as a matter of importance."

[16] There was no evidence before the court of any substantive response from Replay to the notice of exercise of the option. Indeed, the next communication from Replay about it in evidence is dated 9 December 2020, more than ten months later, and after the expiry of the initial term of the Lease. See: [33] below.

COVID-19

[17] On 20 March 2020, Australia closed its international border to non-citizens. On 24 March 2020, Queensland announced the closure of State border to interstate residents with effect from 1 April 2020.

[18] On 26 March 2020, NightOwl wrote to Replay requesting rent relief due to the COVID-19 pandemic and government restrictions on many businesses.

[19] On 2 April 2020, Replay responded by requesting further information from NightOwl.

[20] On 3 April 2020, the National Cabinet agreed to a set of principles to guide a Mandatory Code of Conduct to impose a set of good faith leasing principles for application to commercial tenancies between landlords and tenants.

[21] These good faith leasing principles included: a prohibition on landlords terminating leases due to non-payment of rent during the COVID-19 pandemic period or a reasonable subsequent recovery period; a requirement that landlords offer tenants proportionate reductions in rent in the form of waivers and deferrals of up to 100% of the amount ordinarily payable, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a reasonable recovery period; a requirement that rent waivers constitute no less than 50% of the total reduction in rent; a requirement that rent deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties; and a requirement for landlords to provide each tenant with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period.

[22] On 17 April 2020, NightOwl provided Replay with store turnover figures for "Albert St" and advised it would adjust the rent payment for April 2020 in line with the reduction of turnover.

[23] On 13 May 2020, Replay requested further information "to consider whether rent relief would be granted" and "confirmed" NightOwl "was required to continue to comply with its lease obligations until such time as an agreement on rent relief had been reached."

[24] On 21 May 2020, NightOwl provided trading figures for NightOwl (QLD) Pty Ltd.[10]

[25] On 28 May 2020, Replay requested a copy of NightOwl's Business Activity Statement (**BAS**). On 1 June 2020, NightOwl provided a copy of the BAS for NightOwl (QLD) Pty Ltd.

[26] On 28 May 2020, the *Retail Shop Leases and Other Commercial leases (COVID-19 Emergency Response) Regulation 2020* (Qld) (the **COVID Regulation**) was made. It provided for a party to an affected lease to ask in writing for the other party to negotiate the rent payable under the lease. Once a request was made, the regulation required the parties to give each other information relating to the request as soon as practicable. It required the parties to the affected lease to negotiate the conditions of the lease and comply with section 15. That provision is in these terms:

> "**15 Negotiating rent payable and other conditions**
>
> (1) Within 30 days after a party receives sufficient information about a request under section 14(2), the lessor must offer the lessee a reduction in the amount of rent payable under the lease, and any proposed changes to other stated conditions.
>
> (2) The offer must—
>
> (a) relate to any or all of the rent payable under the affected lease during the response period; and

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10 The relationship between NightOwl and NightOwl (QLD) Pty Ltd is not clear.

(b) provide for no less than 50% of the rent reduction offered to be in the form of a waiver of rent; and

(c) have regard to—

(i) all the circumstances of the lessee and the affected lease, including the reduction in turnover of the business carried on at the leased premises during the response period; and

(ii) the extent to which a failure to reduce the rent payable under the lease would compromise the lessee's ability to comply with the lessee's obligations under the lease, including the payment of rent; and

(iii) the lessor's financial position, including any financial relief provided to the lessor as a COVID-19 response measure; and

(iv) if a portion of rent or another amount payable under the lease represents an amount for land tax, local government rates, statutory charges, insurance premiums or other outgoings—any reduction in, or waiver of, the amount payable.

(3) On receiving the lessor's offer, the lessee and lessor must cooperate and act reasonably and in good faith in negotiating a reduction in the amount of rent payable under the lease for the response period, including any conditions relating to the reduction in rent.

(4) The reduction in rent and any conditions relating to the reduction in rent may be given effect by—

(a) a variation to the lease; or

(b) another agreement between the parties that gives effect to the matters agreed to under subsection (3)."

[27] On 10 July 2020, Queensland opened the State border to interstate residents, except those from Victoria.

[28] Between April and August 2020, NightOwl paid reduced amounts for the rent and outgoings under the Lease. Replay gave no notice to remedy any breach during this period, including during the remaining initial term of the Lease.

[29] In September and October 2020, NightOwl resumed paying the full rent and outgoings due under the Lease.

[30] On 1 December 2020, Queensland opened the State border to residents of Victoria.

[31] Australia's international border would not reopen until November 2021.

Conduct after 13 October 2020

[32] On 13 October 2020, at 8:59 am, NightOwl sent an email to Replay:

> "On 22nd January 2022 we exercised our option to renew our lease … via email and requested your rental proposal for the new term.
>
> You have had discussions with Stephen from our office and informed him that your proposal was for a continuation of the rent on the same amount as is current.
>
> Considering the extent of the disruption to trade caused by both the Covid 19 restrictions and the Cross River Rail construction on both sides of the store as well as disruptions to the street as a whole including closures and pedestrian access restrictions that will be ongoing until late 2024 we undertook an independent valuation of the market rent for the store for the next 5 years.
>
> Please find attached a copy of this report and we submit that the new base rent be set at the attached market rental valuation of $81,270 + Outgoings + GST.
>
> As our current period finishes on 13/10/2020 and our new 5 year period commences on 14/10/2020, please confirm your acceptance of the independent valuers appraisal and forward the new form 13 for signing or advise of your position."

[33] The initial term of the Lease expired at midnight that day.

[34] On 22 October 2020, Mr Sophios of Replay responded by email advising, "I have passed this matter to my solicitor who will be in contact with you soon."

[35] On 17 November 2020, Craig Turrell of NightOwl sent an email to Replay's solicitor:

> "I note that you are acting for [Replay] with regards to the proposed new rental amount for our Store located at 132 Albert St, Brisbane.
>
> Can you please advise when we can expect a response with regards to the landlords position on the new rental effective from the 13/10/2020 in accordance with the lease."

[36] On 30 November 2020, Libby Fitzgerald, an In-House Solicitor of NightOwl, sent another email to Replay's solicitor, referring to the earlier emails of 13 October 2020 and 17 November 2020, and noting no reply had been received. The email continued:

> "As you would be aware, NightOwl has been attempting to negotiate the rent with your client since January 2020. As this has been unsuccessful and one month has now passed since the review date, NightOwl is now exercising its right to a market determination pursuant to the *Retail Shop Leases Act 1994*."[11]

[37] NightOwl nominated three specialist retail valuers and asked Replay's solicitors to advise which valuer was acceptable to Replay by 2 December 2020.

[38] On 3 December 2020, Ms Fitzgerald of NightOwl sent a further email to Replay's solicitor, noting no response had been received to the 30 November 2020 email (or any of the earlier communications) and asking politely for "an update".

[39] On 9 December 2020, Replay's solicitors responded to NightOwl's email of 30 November 2020. The letter acknowledged that NightOwl had exercised the option in clause 7.2 on 22 January 2020. The solicitors then stated that Replay was "not obliged to grant a renewal of the lease" because NightOwl "has failed to comply with the prerequisites for the grant of the option (per clause 7.2A of the Amendment)".

[40] As best this part of the letter may be understood, it proceeded on Replay's instructions to its solicitors that:

> "1. Night Owl has, on more than one occasion, been in breach of the lease during the term;
>
> 2. Night Owl is currently in breach of the lease (refer to our comments below); and
>
> 3. our client has in no way waived any of its rights under the lease with respect to breaches by Night Owl of its obligations under the Lease."

[41] The "comments below" concerned the application of the COVID Regulation. The solicitors stated they were instructed that Replay was of the view that the Lease "is not affected" by the COVID Regulation, and, on that basis, NightOwl was $57,821.52 in arrears of rent.

[42] Replay's solicitors enclosed a Form 7 Notice to Remedy Breach of Covenant. It was in the form required by s 124 of the *Property Law Act 1974* (Qld) (**PLA**). It included the notice that:

> "The Lessor will be entitled to re-enter or forfeit the Lease in the event of the Lessee failing to comply with this notice within a reasonable time".[12]

[43] The letter concluded with advice that Replay "reserves its rights in all respects."

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11 It is common ground that the rent beyond the Expiry Date was not agreed and that the Lease is a "Retail Shop Lease" for the purposes of the RSLA. By s 28, the RSLA relevantly provides that where the lessor and lessee cannot agree on the current market rent within one month after the review date, the current market rental is to be determined by a specialist retail valuer agreed by the lessor and lessee, or failing agreement appointed by the chief executive.

12 By the notice, Replay gave NightOwl 21 days to remedy the underpayment of rent.

[44] On 10 December 2020, after receiving the letter and the enclosed notice to remedy breach, NightOwl paid $57,821.52 to Replay, being the full amount claimed in the notice. It is common ground that Replay received and accepted this payment.

[45] On 18 December 2020, NightOwl's solicitor rejected the contention by Replay's solicitor that NightOwl had not validly exercised the option. No response to that letter is in evidence.

[46] On 28 May 2021, NightOwl's solicitor wrote again, noting the absence of a fulsome response to the 18 December 2020 letter. NightOwl's solicitor called on Replay to nominate a specialist retail valuer to determine the market rent for the premises, and to deliver a new lease in accordance with cl 7.2(C) of the Lease.

[47] On 9 June 2021, Replay's solicitor responded. In this letter, expressly written on instructions, Replay asserted it "was not obliged to grant [NightOwl] a renewal of the lease due to [NightOwl's] failure to strictly comply with clause 7.2A of the Lease". These were identified as "pre option breaches" and "post option breaches". Only the post option breaches were explained. These were the payment of reduced rent between April and August 2020 "in line with the reduction of turnover."

[48] According to Replay's solicitor: Replay "never received sufficient information in order to make an offer to reduce the rent in line with the COVID Regulation"; and "The COVID Regulation does not operate to relieve [NightOwl] from paying rent when no agreement had been reached in relation to rent relief." The letter contended:

> "Your client, through its unilateral decision to pay reduced rent from the period 1 April to 31 August 2021 [sic] was in breach of an essential term of the lease during the period after it exercised its option to renew the lease and prior to the lease expiry on 13 October 2020."

[49] Since December 2020, Replay has received and accepted from NightOwl continuing monthly payments of the rental that applied under the Lease at the Expiry Date.

[50] The most current material, from a few days before the trial, confirmed that NightOwl was not indebted to Replay for rent on account of the occupancy of the premises the subject of the Lease, had provided the bank guarantee for three months' rent plus GST, and had put in place a service agreement, to satisfy other complaints previously raised by Replay.

[51] At the hearing, NightOwl did not assert that it was entitled to a reduced rent under the COVID Regulation. NightOwl accepted that, at the expiry of the original term of the Lease, it was in breach of the Lease by failing to pay rent totalling $57,821.52.

[52] Replay has refused to grant NightOwl a new lease of the premises the subject of the Lease.

The parties' respective cases

[53] NightOwl seeks a declaration that it has validly exercised the option to renew the Lease. It also seeks an order for specific performance of the Lease by the grant of a new lease, or an order for specific performance of an agreement to lease, and costs.

[54] Replay defends on the basis that the Lease ended on 13 October 2020, and Replay was not obliged to grant a new lease because on that date NightOwl was in breach of the Lease by failing to pay part of the rent due in April, May, June and July 2020.

[55] In its reply to Replay's defence, NightOwl asserts Replay had waived the breaches and, in the alternative, sought relief against forfeiture under s 124(2) of the *Property Law Act 1974* (Qld) (**PLA**) or as an equitable remedy.

[56] In a rejoinder, Replay denies it waived any rights. It contends that waiver was not available after the term of the Lease expired. At the trial, Counsel for Replay submitted that the option clause in the Lease "requires performance of stipulated conditions" and if "not strictly complied with when the time for performance passes, … the option is lost and there is nothing to waive after that."

[57] Replay says relief is not available under s 124(2) of the PLA because there is no "lease" within the meaning of that provision. It says there is no jurisdiction in equity to relieve NightOwl from the loss of the option, or the court should refuse to exercise its power to grant equitable relief, because NightOwl failed to meet the conditions for the grant of a new lease, Replay did not cause or contribute to NightOwl's breaches between April and August 2020, supervening events and relevant circumstances are not sufficient to justify granting relief, and relief is limited under the PLA.

Interpretation of the Lease

[58] There are four conditions in cl 7.2(A)(a) to (d) of the Lease for the application of cl 7.2(B).

The first and second conditions

[59] No issue arises about the first and second conditions. On 22 January 2020, NightOwl gave the notice of exercise of option. This was during the Option Exercise Period. It is common ground that the Lease had not been terminated or surrendered at that time.

The third condition – no unremedied breach

[60] The third condition relevantly requires that "there is not … any unremedied breach" of the Lease by NightOwl "which has not been waived" by Replay. There must not be such an unremedied breach at the time the notice exercising the option is given "or thereafter prior to the Expiry Date". Both parties' submissions assumed the "or" should be read as "and".

[61] The parties were content to proceed on the basis that an unremedied breach at a particular time was a breach that had occurred and not been remedied at that time, whether or not it had been the subject of a notice to remedy.

[62] It is common ground that there was no unremedied breach of the provisions of the Lease on NightOwl's part on 22 January 2020 when notice was given. All the earlier breaches had been remedied before that time.

[63] There were unremedied breaches between 7 April 2020 and 13 October 2020, because NightOwl failed to pay the full amount of rent due on 7 April, 7 May, 7 June, 7 July and 7 August 2020. [13]

[64] On this basis, NightOwl did not satisfy the third condition for the application of cl 7.2(B) of the Lease. It follows that the outcome of NightOwl's claim depends on whether Replay waived its right to rely on these unremedied breaches or whether the court may grant relief against forfeiture of the option, due to these breaches, under s 124 of the PLA or in equity.

The fourth condition - strictly observed and performed the provisions of the Lease

[65] The fourth and final condition is that "the Lessee has at all times during the term strictly observed and performed the provisions of the Lease." Like the second condition, and unlike the first and third, it is expressed in the past tense.

[66] It is not disputed that, like the second condition, the fourth condition applied as at the time NightOwl gave the notice of exercise of option. At that time NightOwl had not at all times during the term strictly performed the provision of the Lease. There was no unremedied breach, but there had been a failure to strictly observe and perform the Lease provisions. See [12] and [13] above.

[67] At the trial, it was common ground that NightOwl's breaches before 22 January 2020 did not result in NightOwl losing the right to require Replay to grant it a new lease under cl 7.2(B). By s 128(4) of the PLA, each of NightOwl's earlier breaches was deemed not to have the effect of precluding NightOwl from exercising the option. So, despite the fourth condition, no failure to strictly perform and observe the provisions of the Lease before 22 January 2020 is relevant for the outcome.

[68] At the expiry of the Lease, the same unremedied breaches of the Lease were also failures by NightOwl to strictly perform its obligation under the Lease to pay the full amount of the monthly rent between 7 April 2020 and 7 August 2020.

[69] In the present case, by the fourth condition, the parties agreed the requirement was that NightOwl "has at all times during the term strictly observed and performed the [relevant] provisions of the Lease". This is not explicitly prospective, in the way the lease provision in *Grepo & Anor v Jam-Cal Bundaberg Pty Ltd* was, which required that the tenant "has at all times up to the date of expiration of the term of this Lease complied punctually with its obligations under this Lease".

[70] Replay contends that the fourth condition applied prospectively, after NightOwl gave its notice and until the expiry of the term of the Lease on 13 October 2020. If this is so, NightOwl did not satisfy the fourth condition and so a condition for the application of cl 7.2(B) is not met.

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[13] These breaches were the subject of Replay's notice to remedy breach issued on 9 December 2020. NightOwl remedied them on 10 December 2020.

[71] The prospective operation of the fourth condition raises some issues about consistency between it and the third condition. According to the third condition, an unremedied breach can be waived by Replay as lessor, so as not to have any consequence under the third condition. The same waived unremedied breach would remain a failure to observe or perform under the fourth condition.

[72] These interpretation questions remained unresolved at the end of the hearing. However, NightOwl did not cavil with Replay's submission that the fourth condition applied until the Expiry Date. NightOwl relied on its contentions that Replay had waived this noncompliance. In the alternative, NightOwl sought relief against the loss of the new lease pursuant to s 124(2) of the PLA or in equity.

[73] Owing to the conclusions I have reached on the last of those matters, the outcome is not altered by the fourth condition operating prospectively. It would be the same if the phrase "has at all times during the term" has the same meaning as "has at all times up to the date of expiration of the term". Nor is it affected by whether NightOwl is deemed to have admitted a failure to satisfy the third and fourth conditions, which Replay raised as a further point at the resumed hearing on 4 July 2022.

Waiver

[74] NightOwl alleges that Replay waived the breaches by NightOwl - or waived the benefit of the conditions in cl 7(A)(c) and (d) of the Lease:

(a) receiving, without substantive comment or demur, the correspondence sent by NightOwl on 22 October 2020, 17 November 2020 and 30 November 2020;

(b) serving the notice to remedy breach on 9 December 2020;

(c) receiving and accepting the $57,821.52 paid in response to that notice to remedy; and

(d) receiving and accepting rent paid by NightOwl since 10 December 2020.

[75] A waiver of a right is "an intentional act, done with knowledge, whereby a person abandons a right by acting in a manner inconsistent with that right".[14] It is convenient to consider the conduct relied on to identify whether there was such a waiver.

Correspondence in October and November 2020

[76] Replay's receipt of correspondence in October and November 2020, without providing any substantive or businesslike response, lacked courtesy. It was not inconsistent with Replay having a right to rely on a breach by NightOwl as a basis to refuse to grant a new lease. I reject NightOwl's submission that it was a waiver of rights.

[77] Replay also relied on cl 4.9 of the Lease. It is relevantly in these terms:

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14 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [56] (Gummow, Hayne and Kiefel JJ).

> "The failure for any period whatsoever of the Lessor to exercise any right … under these presents in the event of the breach of any covenant on the part of the Lessee herein contained or implied shall not be deemed by law to be an abandonment or waiver of any rights or remedies for damages forfeiture injunction or otherwise which the Lessor may have or could put in force against the Lessee … in respect of any such breach or any other breach at anytime whatsoever committed or suffered of any of the covenants or agreements on the part of the Lessee contained or implied in this Lease."

[78] I accept Replay's submission that by cl 4.9 Replay's silence is not to be taken as a waiver of its right to rely on NightOwl's breaches to avoid the obligation to grant a new lease or otherwise to take the benefit of the third or fourth condition in cl 7.2(A).

Notice to remedy breach

[79] By giving the 9 December 2020 notice to remedy breach, Replay asserted that it would have a right to terminate or re-enter, if NightOwl failed to remedy the breach within a reasonable time. It was an intentional act. It was inconsistent with the Lease having been terminated or with Replay having re-entered. The notice was conduct affirming the continued existence of the Lease.

[80] NightOwl would make more of the notice. It submits that by issuing the notice to remedy breach, Replay was "tacitly recognising" an "agreement to lease on foot" and that the relationship between Replay and NightOwl had "progressed to a situation" in which NightOwl was "entitled to have the [new] lease granted". NightOwl submits the notice "amounted to a demand for performance coupled with an intimation that payment … would render the agreement to lease unconditional and enforceable."

[81] Replay did not issue the notice to remedy breach under a new lease or under an agreement to grant a new lease. It did so expressly under the existing Lease. By the covering letter, enclosing the notice, Replay stated that it was "not obliged to grant a renewal of the lease" because NightOwl had "failed to comply with the prerequisites for the grant of the option" in cl 7.2(A). Replay was asserting that there was neither a new lease nor an agreement to grant a new lease. It attributed the loss of the option to NightOwl being "on more than one occasion … in breach of the lease during the term" and being "currently in breach of the lease". The only breach detailed in the letter is the payment of "reduced rent over the period from 1 April 2020 to 31 August 2020".

[82] I accept NightOwl's submission that Replay could have given NightOwl a notice to quit, rather than a notice to remedy breach, if the term of the Lease had expired and NightOwl was holding over on a monthly tenancy (as Replay contends). However, Replay was not seeking to recover possession of the premises. It was seeking to recover outstanding rent. By the notice to remedy breach, Replay used the threat of re-entry and termination as a form of security to cause NightOwl to pay the outstanding rent. The denial of any right to the option may also have been deployed to this effect in the covering letter.

[83] Replay's conduct was not inconsistent with Replay having a right to rely on past and current breaches by NightOwl to avoid the obligation to grant a new lease. Indeed, by the letter of 9 December 2020, Replay asserted the option had been lost in this way. I am unable to accept NightOwl's contrary submission.

Acceptance of rent payment

[84] On 10 December 2020, when Replay accepted the payment of the outstanding rent, it was acting consistently with its earlier conduct in giving the notice to remedy breach.

[85] A landlord who receives and accepts rent payments from a tenant, after the tenant has committed a breach entitling the landlord to re-enter, may be taken to have recognised that a tenancy was subsisting and to have waived its right to re-enter for the breach. This is because the acceptance of the rent is inconsistent with a right to terminate the lease for the earlier failure to pay. Such a waiver does not put the tenant in a position as if there had been no breach of the lease. It renders the breach one that does not entitle the landlord to re-enter.[15]

[86] The receipt by Replay of the post-10 December 2020 rent was a waiver by Replay of the right to re-enter in reliance on NightOwl's earlier failure to pay the rent in full. It was not conduct inconsistent with Replay having a right to rely on the earlier breach by NightOwl as a basis to refuse to grant a new lease.

Conclusion on waiver

[87] By the conduct identified in NightOwl's pleading and submissions, Replay did not waive the breaches by NightOwl. Nor did it waive the benefit of the conditions in cl 7.2(A)(c) and (d) of the Lease.

Relief under s 124(2) of the Property Law Act

[88] NightOwl seeks relief against the forfeiture under s 124(2) of the PLA. It provides:

> "Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action (if any) or in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit."

[89] A lessor's right of re-entry or forfeiture, which can be the subject of relief under s 124(2), is a right "under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease".[16]

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15 *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539, 556 (Windeyer J).

16 s 124(1).

[90] By s 123, "lease" is defined as including:

> "an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted".

[91] Replay submits relief is not available to NightOwl under s 124(2). Replay is not proceeding by action or otherwise to enforce any right of re-entry or forfeiture under the Lease. Replay has not re-entered. The option for a new lease in cl 7.2 is not a lease. It is merely a provision in the Lease. The option provision is not an agreement for a lease where NightOwl "has become entitled to have the lease granted". On this basis, the option is not a "lease" within the meaning in s 124(2).

[92] NightOwl sought to meet these submissions by proving that it had exercised the option, and that the option "progressed to the point of being an unconditional agreement to lease." This part of NightOwl's case depended on the court accepting that Replay had waived what Replay had called the "post-option breaches" that comprised unremedied breaches and a failure to strictly comply with the provisions of the Lease between 7 April 2020 and 13 October 2020. As NightOwl's waiver submissions have been rejected, this part of its case must also fail.

Characterisation of the option provision

[93] At the trial, the parties advanced competing submissions about the characterisation of the option provision in cl 7.2 of the Lease. NightOwl considered it important to show the option provision was a conditional agreement to grant the new lease, because this would assist NightOwl's case that Replay had waived the unremedied breaches and failures to comply. Replay sought to persuade the court that the option provision was an irrevocable offer to grant a new lease that could only be accepted by NightOwl if its satisfied each of the four conditions in cl 7.2(A), so that Replay could not waive any of those conditions. Replay cited *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Pty Ltd*[17] as authority for that proposition. Replay also submitted that equity could not relieve against the forfeiture of an option in the form of an irrevocable offer, if the offeree had failed to accept the offer on its express and unmodifiable terms. That proposition is not found in *McCaul*.

[94] In *Grepo*, the Court of Appeal considered the nature of an option clause in the lease before it, but found that, for the purpose of resolving the issues in the appeal, it was unnecessary to decide whether the option was an irrevocable offer or a conditional contract.[18] A similar conclusion was reached by the court in *Tripple A*.[19]

[95] The covenant in cl 7.2(B) binds Replay to grant a new lease and NightOwl to accept it. It applies if the conditions in cl 7.2(A) are met. The obligation to grant and accept the new lease did not depend upon the exchange of executed lease documents.[20] Unlike terms in options to purchase freehold estates in land, by cl 7.2 the parties did not provide for any new agreement (for lease) to arise on the exercise

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17 (1957) 76 WN (NSW) 72, 74 (Owen J, Roper CJ in Eq and Herron J).
18 [2015] QCA 131, [64] (Holmes JA).
19 [2018] QCA 246, [37] (Bowskill J).
20 *Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq)* [2020] NSWCA 23, [71] (Leeming JA).

of the option.[21] All that needed to be agreed had been made the subject of covenants in the Lease. These conditional, mutual, and bilateral obligations were binding on the parties from the time of delivery, or at latest from registration, of the amendment inserting them in the Lease. The express agreement that Replay could waive unremedied breaches, reflected in cl 7.2(A)(c), is consistent with the option being a conditional agreement, rather than an irrevocable offer.[22]

[96] If it were necessary to resolve this characterisation issue, I would find that the option in cl 7.2 was a covenant by Replay to grant a new lease to NightOwl in accordance with cl 7.2(B), subject to NightOwl giving of notice under cl 7.2(A)(a), and fulfilment of the conditions in the three following sub-paragraphs of the clause. I would not characterise the provision, in form or in substance, as an offer with a contract not to revoke it.

[97] I accept Replay's submission that it is not necessary to resolve this issue. NightOwl's waiver case has failed for other reasons. Also, cl 7.2, like each other provision in the Lease, is a covenant in a deed creating an estate or interest in land. For the reason below, the court's power, in appropriate circumstances, to relieve NightOwl from the forfeiture of the option as a property interest does not depend on the contractual option provision being characterised as a conditional agreement.

Equitable relief against the loss of the option

[98] This leaves NightOwl with its application for equitable relief against the loss of the option.

[99] The relationship between landlord and tenant is not simply contractual. The grant of a lease is a conveyance of real property. The relationship involves both privity of contract and privity of estate. The grant of a leasehold estate entitles the tenant to possession, even if the tenant fails to pay the rent reserved by the conveyance. Any right of a landlord to re-enter and forfeit a leasehold estate is purely contractual. It exists only if it is found in the lease instrument. The contractual alteration of the co-owner relationship, to allow a landlord to forfeit the real property it had conveyed, may explain why it is sometimes said that equity abhors a forfeiture. By looking to intent rather than form, equity reads an instrument through the lens of the relationship between the parties to a covenant or condition to achieve the purpose of the provision.

[100] It was once thought that equity assumed a general jurisdiction to relieve against the forfeiture of a leasehold estate for breach of any covenant in a lease.[23] By the early 19th Century, it was established that relief was available in established categories. Among these was relief against forfeiture for the breach of a covenant to pay rent.[24] It is a long-standing practice of courts exercising equitable jurisdiction to intervene

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21 See, e.g., cl 2 of the "Option to Purchase" in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 66.

22 As is cl 7.2(E), where Replay has a right to elect to render a notice exercising the option under cl 7.2(A)(a) "of no effect", if Replay required NightOwl to procure the execution by Mr Adams of a guarantee of the performance of NightOwl's obligations under the new lease, and NightOwl did not do so.

23 *Hack v Leonard* (1724) 9 Mod Rep 90 (Lord Macclesfield).

24 The others are fraud, accident, surprise or mistake: *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 335 [58].

to do justice between parties by granting relief against forfeiture of leasehold estates where an instrument seems to require strict observance of formalities that, in truth, were included as mere formalities to the exercise of important rights, or as security to ensure the performance of important obligations, such as payment of rent.[25]

[101] In equity, a proviso in a lease for re-entry on a failure to pay rent is regarded as merely a security for the rent. Where the landlord can be restored to the position it was in before such a breach, then the tenant is entitled to equitable relief against forfeiture, if the tenant has remedied the breach or undertaken to do so.[26] In this way the intention of the provision is achieved, and the seemingly drastic consequence of the breach is avoided. This head of relief was well-established before the first identified statutory regulation.[27]

[102] In *Mercantile Credits Ltd v Shell Co of Australia Ltd*, Gibbs J (as his Honour then was) explained:

> "It is well settled that such a covenant runs both with the land and with the reversion. In *Muller v Trafford* Farwell J, in the course of explaining why a covenant for renewal is not void for remoteness, described the effect of such a covenant in the following words:
>
> > 'It must bind the land from its inception, because it would otherwise be an executory interest in land arising *in futuro*, and therefore obnoxious to the rules against perpetuity. Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application.'
>
> It follows from this statement that the right of renewal is an incident of the lease and directly affects the nature of the term itself. However, it is clear that when the right is exercised 'a new lease, a new demise' comes into being.
>
> …The right of renewal is so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains

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25 *Wadman v Calcraft* (1804) 10 Ves 67, 69 (Grant MR), 70-71 (Eldon LC) ; 32 ER 768.

26 *Symonds Plains Pastoral Holdings Pty Ltd v Tasmanian Motor Racing Co Pty Ltd* (1996) 6 Tas R 284, 289 (Zeeman J), citing *Wadman v Calcraft* (op cit).

27 *Barrow v Isaacs & Son* [1891] 1 QB 417, 425 (Kay LJ), referring to the *Landlord and Tenant Act 1739* (4 Geo 2, c 28).

> under the lease, and on registration is entitled to the same priority as the term itself."[28]

Whether equitable relief is available

[103] Replay put various arguments about the nature of the option in cl 7.2, and whether, the term of the Lease having expired with NightOwl in breach, there is any remaining right that might be the subject of an order for specific performance. There is a simple answer to these arguments.[29]

[104] Commonly, equitable relief against forfeiture is granted after a landlord had re-entered and terminated the lease. There is a circularity in the submission that the loss of an interest is a basis on which relief against its forfeiture should be refused.[30] The loss of contractual rights under a lease is not a bar to a suit for equitable relief against the forfeiture of an estate or interest in property.

[105] Replay's submissions were said to be supported by authority to the effect that the conditions of an option must be strictly complied with and, once the time for performance of a stipulated condition for the exercise of the option has passed, there is nothing to waive.[31]

[106] These authorities concern failures to exercise options within the time period (or in the manner) stipulated in the relevant option clause.[32] There is binding authority to the effect that a right to the grant of a new lease conferred by an option clause may be lost completely if the lessee fails to exercise the option by failing to give notice within the agreed time period or in the agreed manner.[33]

[107] NightOwl did give the notice of exercise the option within the stipulated time. No issue arises about its timing, manner or form.

[108] Replay's submissions seek to extend this analysis of a failure to give notice of exercise of an option[34] and apply it to conditions relating to conduct after a tenant has given notice. Replay does so by referring to compliance with the post-option notice conditions as being "the exercise of the option". In Replay's formulation, a tenant who fails to comply with a post-option notice condition has failed to exercise the option. There are decisions that use similar language and appear to equate a tenant's failure to give notice of exercise of an option with a failure to comply with other conditions (e.g. to strictly perform and observe the provisions in the lease). These decisions concern waiver by a landlord of such post-option notice contractual

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28 (1975-1976) 136 CLR 326, 344-345 (references and citations omitted). The passage extracted by Gibbs J is from the judgment of Farwell J in *Muller v. Trafford* is at [1901] 1 Ch. 54, 61. As his Honour noted, it had been quoted with approval by Lord Evershed MR and Harmon LJ in *Weg Motors Ltd v Hales* [1962] Ch 49, 72.

29 *Bowser v Colby* (1841) 1 Hare 109 (Baron Lyndhurst LC).

30 See: *Tanwar Enterprises Pty Ltd v Cauchi* 217 CLR 315, 332-333 [53] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

31 See, e.g., *Tripple A Pty Limited v WIN Television Qld Pty Ltd* [2018] QCA 246 (***Tripple A***), [50] (Bowskill J), [1], [2] (Morrison and Philippides JJA agreeing).

32 *Tripple A*, [15], [58](d).

33 *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101, 103-104 (de Jersey J), citing *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122, 124.

34 *Grepo*; *Gilbert J McCaul* and, by analogy with a notice to extend a long-term concrete supply contract, *Wagners*.

conditions and its effect on the availability of statutory relief against forfeiture. They were decided, no doubt correctly, on the construction of the instruments involved and the relevant statutory provisions such as s 124(2) of the PLA. They did not involve a claim for equitable relief against forfeiture. Nor do they exclude the availability of equitable relief.[35]

[109] There is good reason to require strict compliance with conditions for the exercise of an option by advance notice to the landlord.[36] It may be assumed that the parties have an interest in knowing whether they are bound by a lease for a further term. The giving of notice, in an agreed time frame and manner, gives practical effect to those interests. Where the agreed period of notice of exercise of an option is reasonable and appears to reflect the legitimate interests of the parties, a court would be hesitant to grant equitable relief for the loss of an option arising from a failure to give the agreed notice. The giving of such a notice is an act a tenant might or might not perform, as it thought fit. The landlord could not insist upon the notice being given.

[110] The position is not the same for post-option breaches of conditions. If, for example, conditions like those in cl 7.2(A)(c) and (d) were treated as part of the exercise of the option, then the tenant would not exercise the option until that compliance was rendered at the expiry of the lease term. The parties to such a lease would not know whether they were bound by a new lease until the existing lease term had expired. It seems unlikely that reasonable businesspeople in the position of Replay and NightOwl would have understood and intended cl 7.2 of the Lease to operate in that way. It is clear from the communications referred to at [14], [32], [47] and [48] above that the parties understood NightOwl to have exercised the option on 22 January 2020.

[111] On Replay's case, after giving a notice of exercise of the option, NightOwl could avoid being bound to accept a new lease by the simple expedient of terminating its insurance policy for plate glass in the demised premises at 5:00pm on the last day of the Lease term. This would be a breach of cl 1.11 of the Lease. Replay says it could not waive the benefit of the strict compliance condition in cl 7.2(A)(d) once the term had expired, because, on Replay's case, the option would not have been exercised and there would be nothing to waive.

[112] NightOwl is not a purchaser with an essentially contractual relationship with the vendor giving it rights to acquire an interest in the premises.[37] It is a leaseholder with equitable interest in the land arising from the option provision and attached to its leasehold estate. The court is not being asked "to reshape contractual relations

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35 For example, *Grepo*, [107] (Morrison JA). No disrespect is intended by noting the awkwardness of language that characterises a tenant's performance and observance of general lease provisions, after it has given notice of exercise of an option, up to the end of the lease term as "exercising an option" or as an "acceptance of an offer" to grant a new lease. The giving of a notice of exercise of an option has a specific and deliberate character, which the subsequent performance or observance of lease conditions in general does not. There may be similar, if less obvious, concerns about describing a condition that operates after a notice of exercise of an option is given as a "condition precedent to the exercise of an option". Sub-paragraphs 7.2(A)(c) and (d) of the Lease are conditions precedent to the application of cl 7.2(B) and so might be more clearly understood as conditions precedent to the grant of a further lease.

36 Or the giving of a price notice under a commercial supply contract, as in *Wagners*.

37 *Chang v Registrar of Titles* (1976) 137 CLR 177, 190 (Jacobs J).

into a form the court thinks more reasonable or fair where subsequent events have rendered one side's situation more favourable".[38] It is being asked to relieve against the loss of the proprietary interest.

[113] I reject Replay's submission that the court is unable to grant equitable relief against the forfeiture of an option in a registered lease where the circumstances would otherwise make relief appropriate. As Lord Wilberforce put it:

> ''The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.''[39]

Consideration of whether to grant equitable relief

[114] NightOwl was a long-standing tenant of Replay. It had held a leasehold estate in the land since 14 October 2010. The loss of a right to be granted a new lease for the first option period would occasion also the loss of a right to be granted a new lease for the second option period.

[115] Replay had not executed the original lease instrument until about three years and four months after the tenancy began. By cl 7.2(C), Replay was responsible for preparing the new lease and delivering it to NightOwl for execution. In the circumstances, Replay's failure to proffer a new lease by 9 December 2020 did not signal any refusal to grant a new lease for the first option period.

[116] At all times after 22 January 2020, Replay knew that NightOwl was proceeding on the basis that it had exercised the option and was entitled to a lease for a further five years and to the second option for another five year term. On giving notice of exercise of the option, NightOwl preserved (or created) certain equitable rights in respect of the option. Replay was completely silent until 22 October 2020. Replay's response that its solicitor would "be in contact with you soon" proved to be quite untrue. There was no response until 9 December 2020. So, Replay's discourtesy was succeeded by, at best, careless deception.

[117] NightOwl had asserted a right to a rent reduction due to the COVID-19 pandemic. Replay accepted that during the peak of the pandemic restrictions NightOwl had paid a reduced rent "in line with the reduction of turnover." The period has been described as a once in a century public health crisis.[40] The prevailing circumstances of the pandemic, the economic impact resulting from statutory regulations restricting travel, work and social contact, and the speed with which such regulations were introduced and changed, would have created uncertainty for the parties as to their respective obligations. Replay does not seem to have formed a definitive view that NightOwl had no entitlement to pay reduced rent until about 9 December 2020. In the circumstances, I would not characterise NightOwl's breach as a wilful forfeiture,[41] a wilful or grave breach,[42] or find it was improper in a legal sense.[43]

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38 *Stern v McArthur* (1988) 165 CLR 489, 503

39 *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722-724.

40 *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd* [2020] NSWSC 996, [66] (Robb J).

41 *Thomas v Porter* (1668) 1 Chan Cas 95 (Bridgeman LK).

[118] Replay served no notice to remedy breach during the balance of the initial term of the Lease; or for nearly two months afterwards. When Replay served the notice, NightOwl promptly remedied the breach by paying the rent claimed. Had Replay served the notice to remedy before 13 October 2020, it is likely NightOwl would have acted in the same way. There is no outstanding claim by Replay for any interest or other expenses relating to NightOwl's failure to pay the rent in full. Replay was at all times secured by a bank guarantee for three months' full rent.

[119] No submission was put that NightOwl is unable to pay future rent or might reasonably be expected to become unable to do so.[44]

[120] There is no evidence that any breaches by NightOwl affected the value of the premises or otherwise caused any prejudice to Replay. There is no evidence that the rights of any other person would be affected by an exercise of discretion to relieve NightOwl from the loss of the option, and of the second option.

[121] NightOwl has remained in possession of the premises. There is no allegation of any subsequent breach or failure to observe and perform its obligations under the Lease provisions.

[122] Although Replay's conduct might be thought unsatisfactory in some sense, it was not unconscientious conduct. Replay did not cause NightOwl's breaches that engaged cl 7.2(A)(c) and (d). What Replay refers to as supervening events and relevant circumstances, being the COVID-19 pandemic and the associated restrictions on travel, work and freedom, are the independent cause. NightOwl having given notice of exercise of the option, it might have been put that Replay lulled NightOwl into the belief that the new lease would be granted by its failure to raise any breach or noncompliance as a basis for avoiding that obligation.[45] NightOwl did not put such a case. In the circumstances, Replay's insistence on its legal rights does not found any claim on the part of NightOwl to equitable relief on that basis. This is not to say that in equity it might be unconscionable for Replay to insist on its legal right to forfeit the option once Replay has received all that, in equity's eyes, the forfeiture provision was intended to secure.[46] NightOwl does not seek relief on that basis, as the applicant purchaser did in *Tanwar Enterprises Pty Ltd v Cauchi*.[47] NightOwl's suit is within a category where equity may grant relief.

[123] Replay also submitted that the court should refuse equitable relief because relief against the forfeiture of the option is not available under s 128(4) of the PLA. This is because s 128(4) is not directed at breaches which occur after a lessee gives notice of exercise of an option and prior to the end of the term of the lease. This was the conclusion reached by the Court of Appeal in *Grepo v Jam-Cal*

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42 *Shiloh Spinners v Harding* [1973] AC 691, 723-724 (Lord Wilberforce).

43 *Dering v Earl of Winchelsea* (1787) 1 Cox 318 (Eyre CB).

44 *Sneakerboy* op cit, [24] (Campbell J), citing *Direct Food Supplies Victoria Pty Ltd v DLV Pty Ltd* [1975] VR 358 and *Tannous v Cipolla Bros Holdings Pty Ltd* [2001] NSWSC 236 at [38].

45 See the consideration of *Ciavarella* (1983) 153 CLR 438, 453 in *Tanwar*, 335 [61] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

46 *Wilkinson v S & S Gikas Pty Ltd* [2006] NSWSC 1314; (2006) 12 BPR 23,685 [23] (Campbell J).

47 (2003) 217 CLR 315 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

Bundaberg,[48] after considering the competing interpretations of the equivalent provision in the *Conveyancing Act 1919* (NSW) advanced by Young J,[49] Hodgson J,[50] Windeyer J,[51] and Bryson J.[52] I am bound by that authority. NightOwl is not able to obtain relief under s 128(4).

[124] NightOwl does not seek relief under s 128(4). I have considered the limit on relief available under the statute. It is a relevant circumstance. I do not regard it as excluding the availability of equitable relief.[53]

[125] No other relevant circumstances were identified by the parties.

[126] NightOwl's breaches are not such as would deny it relief against the loss of the leasehold interest.[54] The loss of the equitable interest conveyed by the option provision is a lesser proprietary interest than the leasehold to which it is was attached. However, it is an interest capable of yielding an equivalent leasehold estate. The loss of the two options is disproportionate to any temporary harm occasioned by NightOwl's failure to pay the full amount of the rent during the first five months of the COVID-19 "lockdown". I am satisfied that the supervening events and the circumstances then prevailing justify granting equitable relief. The Lease provisions, by which NightOwl would lose the option, have served their intended object and essential purpose of securing the payment of the rent in full.

[127] In all the circumstances, it is necessary to intervene to avoid injustice and relieve NightOwl from the effect of Replay's reliance on NightOwl's failure to punctually pay the rent reserved by the Lease, without deduction and without prior demand, in April, May, June, July and August 2020.

Specific performance

[128] NightOwl's leasehold estate and interest is in specific land, which it has possessed since 14 October 2010 and operated as a retail shop. It may readily be accepted that damages would be difficult to assess and would not be an adequate remedy in lieu of a decree for specific performance. In the circumstances, the covenant in cl 7.2(B) of the Lease ought to be specifically performed.

Final disposition

[129] The court should declare that NightOwl validly exercised the option in cl 7.2 of the Lease by giving written notice to Replay on 22 January 2020.

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48 [2015] QCA 131, [53]-[57], [67] (Holmes JA), [93]-[95], [100] (Morrison JA), [109] (Douglas J agreeing).

49 *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1989) 4 BPR 9575; *Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd* (1998) NSW ConvR 55-861; *Reilly v Liangis Investments Pty Ltd* (2000) 9 BPR 17,509.

50 *Nessmine Pty Ltd v Devuzo Pty Ltd* (1989) NSW ConvR 55-496.

51 *Flagstaff Investments Pty Ltd v Cross Street Investments Pty Ltd* (1999) 9 BPR 1700, and 17,067.

52 *Rethmeier v Pioneer House Pty Ltd* (1990) 6 BPR 13, 245.

53 For example, *Grepo*, [107] (Morrison JA).

54 *Symmons Plains Pastoral Holdings Pty Ltd v Tasmanian Motor Racing Co Pty Ltd* (1996) 9 Tas R 284 (Zeeman J); *World by Nite Pty Ltd v Michael* (2004) 1 Qd R 338 (Helman J); cf *Roberts v Eckett* [2016] SASC 197 (Hinton J).

[130] The court should relieve NightOwl from the forfeiture of the option by reason of its failure to punctually pay to Replay the rent reserved by the Lease without any deduction whatsoever and without prior demand, in April, May, June, July and August 2020.

[131] The court should order Replay to specifically perform the covenant in cl 7.2(B) of the Lease by granting to NightOwl a further lease of the premises for the period from 14 October 2020 to 13 October 2025 upon the same terms as are contained in the Lease, with the necessary changes, except those agreed in cl 7.2(B) of the Lease.

[132] The parties should have liberty to apply on three business days' notice.

[133] As Replay requested, I will hear the parties about any other orders, including any orders as to costs.