CITATION: *443 Queen Street v Walker* [2008] NTMC 062

PARTIES:	443 QUEEN STREET PTY. LTD.
	v
	JUDITH WALKER
TITLE OF COURT:	Local Court
JURISDICTION:	Business Tenancies (Fair Dealings) Act
FILE NO(s):	20809006
DELIVERED ON:	18.9.08
DELIVERED AT:	Darwin
HEARING DATE(s):	5.9.08 and 17.9.08
JUDGMENT OF:	D TRIGG SM

CATCHWORDS:

Lease – exercise of option to extend
Waiver

REPRESENTATION:

Counsel:

Applicant:	Mr Young
Respondent:	Mr Liveris

Solicitors:

Applicant:	Paul Maher
Respondent:	Clayton Utz Lawyers

Judgment category classification: C
Judgment ID number: [2008] NTMC 062
Number of paragraphs: 75

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20809006

[2008] NTMC 062

BETWEEN:

443 QUEEN STREET PTY. LTD.
Applicant

AND:

JUDITH WALKER
Respondent

REASONS FOR DECISION

(Delivered 18 September 2008)

Mr D TRIGG SM:

1. This proceeding commenced on the 27th day of March 2008 when the applicant filed an application under section 131 of the *Business Tenancies (Fair Dealings) Act* (hereinafter referred to as "the Act") seeking the following Orders:

    1. The applicant, 443 Queen Street Pty Ltd CAN 099 057 539, have possession of the premises situated at shop 10 Rapid Creek Shopping Village, 48 Trower Road, Millner (being part of Lot 1837 Town of Nightcliff).

    2. The respondent pay the applicant's costs.

2. Section 131 of the Act states as follows:

    (1) Where a landlord has given to a tenant a notice to quit which complies with this Division, the landlord or an agent authorised in writing may, at any time within 60 days after the expiry of the term of the notice, apply to the Local Court for a warrant of possession.

(2) The Court must specify the day on which an order for the issue of a warrant of possession takes effect.

3. In support of the Application for the warrant of possession, the applicant pleaded in its Application, the following:

    1. The applicant became registered proprietor of Lot 1837 Town of Nightcliff on 16 November 2007 when it took a transfer from the previous owner, Rapid Creek Investments Pty Ltd ACN 118 558 955.

    2. Prior to 16 November 2007 Rapid Creek Investments Pty Ltd provided to the applicant a copy of a lease of shop 10 Rapid Creek Shopping Village, 48 Trower Road, Millner ("the premises") which commenced on 1 November 2006 and expired on 1 November 2007 ("the original lease").

    3. The original lease provided that the respondent had four (4) successive options for further leases each of one (1) year if the respondent made written request to Rapid Creek Investments Pty Ltd at any time not more than six (6) months nor less than three (3) months before the expiration of the original lease.

    4. At no time prior to 16 November 2007 did the respondent make written request to Rapid Creek Investments Pty Ltd for the grant of a further lease of the premises.

    5. Rapid Creek Investments Pty Ltd did not ever inform the applicant of any purported exercise of the option by the respondent.

    6. From 2 November 2007 the respondent was a tenant from month to month of the premises holding over under the provisions of the original lease.

    7. On 11 January 2008 the applicant served the respondent with a notice to quit requiring that the respondent give up possession within thirty (30) days.

    8. The respondent has refused to give up possession as required by the notice to quit.

4. The respondent filed an Appearance to the Application, but no other pleadings have been filed.

5. The hearing of this matter commenced before me on 5 September 2008. Mr Young (counsel for the applicant) called Mark Sartori (property manager for the applicant) to give evidence in his case. An affidavit sworn by Sartori on 28 April 2008 was tendered without objection and became ExP1. Part of ExP1 comprised annexure "MS2" which purported to be a copy of a lease (hereinafter referred to as "the lease"). An issue arose (it was raised by myself) as to whether this document was a dutiable instrument and accordingly needed to have stamp duty paid on it. Neither Mr Young nor Mr Liveris (counsel for the respondent) were sure of the answer to this question. In my view, this was an issue that needed to be addressed before the lease could be part of the tender. The reason for this is to be found in section 96 of the *Stamp Duty Act*, which states:

> (1) A dutiable instrument that is not duly stamped is not admissible in evidence in any court in support or defence of a civil claim.
>
> (2) However, the court may receive such an instrument in evidence if the party seeking to tender the instrument pays into court the duty payable on the instrument (together with any penalty).
>
> (3) If duty is paid into court under subsection (2):
>
> (a) the proper officer of the court must remit the payment to the Commissioner together with the instrument; and
>
> (b) the Commissioner must stamp the instrument and return it to the proper officer of the court.

6. Accordingly, until this issue was resolved I did not allow the lease to be a part of ExP1. The lease was marked MFIA. I adjourned the question of the admissibility of this document to 17 September 2008 at 0900 before me. When we resumed on 17 September 2008 Mr Liveris advised that he had made enquiries of the Commissioner of Taxes, and Mr Young advised that he had received instructions from

his instructing solicitor. Both counsel submitted that their advice and instructions were that no duty was payable on the lease. Accordingly, the lease (which had been MFIA) became part of ExP1.

7. I will attempt to deal with the facts in this case in chronological order as much as is possible. Whilst there are factual disputes amongst the various affidavits tendered in this matter, a number of these disputes are not relevant to the ultimate issue, and therefore are not necessary for me to resolve. Where there are relevant facts in dispute, these are difficult to resolve because of the way the case proceded. Four witnesses (two from the applicant and two from the respondent) gave evidence by affidavit. Of these four witnesses I only saw Sartori and Miaoudis (the two witnesses on behalf of the applicant) in the witness box. Neither of them resiled from what they said in their affidavits, and neither of them was shown to be unreliable during cross-examination. I would have no reason to reject their evidence. In relation to Wallace and the respondent (the two witnesses in the respondent's case), Mr Young (counsel for the applicant) did not seek to cross-examine them on their affidavits. Accordingly, I have not seen them in the witness box at all and their affidavits were not directly challenged. I have no reason to reject their evidence either.

8. However, there is a clear factual dispute between Sartori and Wallace on the issue pleaded in paragraph 5 of it's Application, namely "Rapid Creek Investments Pty Ltd did not ever inform the applicant of any purported exercise of the option by the respondent". I will return to this issue later in these reasons.

9. In my view, I need to analyse the different versions carefully to see where there is any commonality. I also need to check to see what the witnesses in fact say, and what they don't say.

10. On 17 October 2006 a person purporting to be a director of Rapid Creek Investments Pty Ltd (hereinafter also referred to as "the Lessor") executed the lease as owner.

11. On 12 December 2006 the respondent appears to have executed the lease.

12. The lease stipulated (in addition to other matters not currently relevant) that:

- The premises being leased was "shop 10, being part of the land delineated on the plan annexed hereto (*no plan was in fact annexed)* and containing an area of approximately 100 square metres" – Item 2 of Schedule 1;
- The annual rent was $26,500 (plus GST) to be paid in monthly instalments of $2,208.33 (plus GST) – Item 3 of Schedule 1;
- The initial term of the lease was from 1/11/2006 until 1/11/2007;
- The further term of the lease was 4 x 1 year – Item 4 of Schedule 1;
- Clause 3.2 of the lease stated as follows:

  Further Term

  The Lessor will:

  (a) on the written request of the Lessee made at any time not more than six (6) months nor less than three (3) months before the expiry of the Initial Term; and

  (b) if there shall not at the time of making such request be any outstanding breach or non-observance of

any of the terms and conditions of this Lease by the Lessee and if during the Initial Term the Lessee has duly and punctually paid the Rent,

grant to the Lessee a further lease of the Premises for the term, if any, set out in Item 4 of the Schedule commencing upon the expiration of the Initial Term upon the same terms and conditions as this Lease, or such of them as are capable of taking effect, provided that:

(c) the Rent payable during the Further Term shall be subject to review in accordance with clause 5; and

(d) the Further Term shall not contain an option for the Lessee to review this Lease.

I digress to note that the effect of this clause is that if the respondent made a written request at any time between 1 May 2007 and 1 August 2007 to exercise the option then she was entitled (provided she was not in default under the terms of the lease) to a further term of 12 months on the same terms and conditions, and the Lessor had no right to refuse. It follows that if the respondent did not comply with this clause then no such entitlement to a further 12 months existed under the lease. However, it would always remain open to the Lessor and the respondent to negotiate a further agreement if they wished to do so.

- Clause 9.5 of the lease stated as follows:

Holding Over

If the Lessee shall with the consent of the Lessor remain in occupation of the Premises after the expiration of the Term

then and in such case the Lessee shall be a tenant from month to month from the Lessor of the Premises on the terms of this Lease so far as the same are applicable to such a tenancy PROVIDED THAT such monthly tenancy may be determined by thirty (30) days notice given by either party to the other and expiring on any day. Any notice required to be given to the Lessee may be delivered to the Lessee or sent by post addressed to the Lessee care of the Premises and in the latter case the period of thirty (30) days shall commence from the day following the day when the envelope containing the notice is posted.

- Clause 13.1 of the lease stated as follows:

  Lessee to Peacefully Yield Up

  The Lessee shall at the end or sooner determination of the term of this Lease yield and deliver up peacefully and quietly to the Lessor possession of the Premises in all respects in accordance with the Lessee's obligations hereunder and in the case of any furniture, fitting, fixtures, plant and equipment of the Lessor in the usual situation with the Premises being in a clean and tidy state and in good condition without any damage thereto.

- Clause 14.1 of the lease stated as follows:

  Service of Notices

  (a) Any notices to be given by one party to the other under this Lease must be in writing and sent to the intended recipient at the address it has from time to time notified to the other Party for this purpose. Any notice to be given by the Lessor may be signed

by an officer or solicitor of the Landlord, the Managing Agent or any other person nominated by the Lessor. Notwithstanding the foregoing, any notice required to be given by the Lessor to the Lessee shall be validly given if delivered to and left at the Premises.

(b) Unless a later time is specified in it a notice takes effect from the time it is actually delivered, received or taken to be received. A notice sent by post or facsimile is taken to be received:

(i) in the case of a letter, on the 3rd (7th if outside Australia) Business Day after posting; and

(ii) in the case of a facsimile, on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient notified for the purpose of this clause if produced before 5.00 pm on a Business Day, otherwise on the next Business Day.

(c) The address for service of a notice is as follows:

Lessor	As specified in item 11 of the Schedule
Lessee	As specified in the Panel Form

(and according to Item 11, the address for service for the lessor was "The Directors, Rapid Creek Investments Pty Ltd, 48 Trower Road, Millner NT 0810")

- Clause 14.7 of the lease stated as follows:

Waiver

No waiver by the Lessor of any breach or non-observance by the Lessee of any of the Lessee's covenants conditions or agreements herein contained shall be or be construed to be a general waiver and such waiver shall have the effect only as to the particular breach or non-observance in respect of which it was made.

- Clause 14.8 of the lease stated as follows:

Variation

No variation, modification or wavier of any provision of this Lease nor consent to any departure by any party therefrom shall be of any force or effect unless the same shall be confirmed in writing, signed by the parties, and then such variation, modification, waiver or consent shall be effective only to the extent for which it may be made or given.

13. On 9 August 2007 the applicant entered into a contract to purchase the shopping centre from Rapid Creek Investments Pty Ltd (paragraph 5 of ExP1).

14. It is conceded by the respondent that she never made any written request to extend her lease between the relevant dates, or at all. However, she still contends that she is entitled to a one year extension. In support of that contention she relies entirely upon a single conversation that she says she had with Wallace. The full extent of the respondent's evidence in relation to this alleged conversation appears in paragraph 6 of her affidavit sworn on 12 May 2008 (ExR1), where she states:

> In late August/early September 2007 I recall that I met with Ann Wallace who was the property manager for the former owner to confirm that I intended to remain in the shop for the first option period from 1 November 2007 to 31 October 2008 as the Centre was being sold to new owners. Ann Wallace told me that the new owners would receive all the paper work in relation to the Lease and the discount in rent that I was paying under the Lease. (emphasis added)

15. That is the full extent of what the respondent has to say on this topic. The respondent does not suggest that there was more than one conversation on this topic. There are a number of things which seem to follow from this alleged conversation, namely:

- It purports to be a statement of intention to remain, rather than an exercise of the option;
- On the respondent's own evidence the conversation occurred at a time when the respondent's right to exercise the option was no longer alive (as it was after the 1 August 2007 deadline);
- There is nothing to suggest that there was any express or implied authority created by the Lessor in favour of Wallace to waive any requirements of the respondent's lease;
- There is nothing to suggest that Wallace did or said anything to indicate that she either was, or was not, authorised to receive such an oral request on behalf of the Lessor;
- There is nothing to suggest that Wallace did or said anything to indicate that she either was, or was not, authorised to waive the need for any written option request on behalf of the Lessor;

- There is nothing to suggest that Wallace did or said anything to indicate that she either did, or did not, waive the need for any written option request on behalf of the Lessor;
- There is nothing to suggest that Wallace did or said anything to indicate that she either was, or was not, authorised to waive the need for any option request to be made within the time stipulated in the lease on behalf of the Lessor;
- There is nothing to suggest that Wallace did or said anything to indicate that she either did, or did not, waive the need for any option request to be made within the appropriate time on behalf of the Lessor;
- There is nothing to suggest that the Lessor expressly or impliedly waived the need for any option to extend the lease to be in writing;
- There is nothing to suggest that the Lessor expressly or impliedly waived the need for any option to extend the lease to be made within time; and
- There is nothing to suggest that Wallace actually said anything to the respondent in response to what the respondent said that she said to her (other than "that the new owners would receive all the paper work in relation to the Lease and the discount in rent that I was paying under the Lease").

16. Taking the respondent's evidence as it is (and assuming that it is correct for current purposes), it would not, in my view, be sufficient to enable a finding that the lease had been extended for a further year. It was (on the respondent's evidence) past the time that the respondent had a "right" to an extension. Accordingly, in my view, for any such

extension to be valid there would need to have been evidence of mutuality of understanding (so that the parties were “ad idem”) between the Lessor and the respondent. And, in my view, this mutuality of understanding would need to have been to the effect that the Lessor (either itself or by a duly authorised agent) had expressly or impliedly:

- accepted the alleged oral statement of intention to exercise the option to extend (even though it was made after the time permitted in the lease, and even though it was not in writing as required by the lease).

17. In my view, what the respondent says in her affidavit could not amount to any “express acceptance” by the Lessor. At best it “may” be argued to be an “implied acceptance”, but in my view it is a very weak “may”.

18. What does the other supposed party to this crucial conversation, Wallace have to say about it? And what does the Lessor have to say about it’s position and understanding about the respondent’s lease and any purported extension thereof?

19. Very surprisingly, Wallace, in her affidavit sworn on 9 May 2008 (ExR2) gives no direct evidence of any such conversation between herself and the respondent at any time. If any such conversation did take place I would expect Wallace to have given direct evidence of it. She does not.

20. Further, I would have expected Wallace to give some evidence of what she did as a result of any such alleged conversation. She only refers to a meeting with representatives of the applicant on 10 August 2007. I would have expected a competent and thorough property manager:

- to have recorded such an important event somewhere in writing;
- to have reported such an important event to the Lessor;
- to have sought the Lessor's instructions on it;
- to have conveyed the Lessor's instructions to the respondent; and
- to have acknowledged such an important event in writing with the respondent along with the Lessor's instructions.

21. It is not suggested by Wallace that she did any of these five things. In my view, either the conversation as alleged by the respondent did not occur or Wallace was not a competent and thorough property manager.

22. Wallace does not give any direct evidence of any such conversation with the respondent, but rather gives indirect evidence of it only. In paragraphs 1 to 5 of her affidavit (as sworn on 9 May 2008, (ExR2)), Wallace states:

> 1. My husband and I were the property agents for Rapid Creek Investments Pty Ltd in 2007.
>
> 2. As part of my duties I was responsible for the leasing work for the Rapid Creek Business Village (the Centre).
>
> 3. I had dealings with Judith Walker the tenant in Shop 10 at the Centre (the Shop).
>
> 4. On or around Friday 10 August 2007 I recall that I met with Mark Sartori, Paul Morris and Cameron Delahunty, representatives of the Applicant. We discussed the leases for the Centre. I recall that I told those present at the meeting that there were issues with two of the leases at the Centre, those being:

(a) the Salvation Army lease which did not look like there was a valid lease in place; and

(b) the Disclosure Statement provided to Judith Walker trading as Dragonfly Fabrics was inconsistent with the actual amounts she was paying pursuant to the Lease, but that I had hand amended the Lease Schedule to reflect the actual amount that she was paying for their records. I told those present at the meeting that Judith Walker had said to me that she intended to remain at the Shop for the term of her Lease and any options as she had spent approximately $50,000 to $60,000 on her fit out and had already taken up the first option.

5. During the meeting I told the persons present that I was not present when the two leases were actually prepared and had only returned to assist the owner Adam Perrier (former owner) with the property management until the Centre was sold. I told them that upon settlement my husband and I would no longer be operating as the property managers for the Centre. (emphasis added)

23. I note that the affidavit of the respondent and the affidavit of Wallace were both prepared and filed by the respondent's lawyers.

24. Clearly, Wallace does not give any direct evidence as to what, if any, conversation she had with the respondent about exercising the first one year option, or when any such conversation may have occurred. I find this to be most curious. As such, in my view, what she says she told the applicant's representatives is evidence of what she said to them, but not necessarily evidence as to the truth of what she said.

25. Further, Wallace gives no direct evidence to suggest that she had read the respondent's lease at all at any relevant time. Accordingly, there is no evidence to suggest that Wallace was aware of the terms of clause 3.2 of the lease.

26. There are a number of things that seem to follow from Wallace's affidavit, namely:

- She does not assert that she had any authority from the Lessor to waive any requirements of any tenant's lease;
- She does not assert that she had any authority from the Lessor to waive the need for any notice under a lease (including a notice to take up an option to extend) to be written rather than oral;
- She does not assert that she had any authority from the Lessor to waive the need for any notice under a lease (including a notice to take up an option to extend) to be made out of the time permitted in the lease;
- She does not assert that she ever told the respondent that she did not need to make any exercise of option request in writing;
- She does not assert that she ever told the respondent that she would accept an oral statement of intention as a valid exercise of an option to extend the lease on behalf of the Lessor;
- She does not assert that she ever spoke to the Lessor about any alleged purported exercise of an option;
- She does not assert that the Lessor had ever been aware of (let alone agreed to accept) any oral extension of the lease (made outside of the required dates);
- She does not expressly say that she did speak to the respondent about the option, and if so when (although if she did discuss it with the applicant's representatives on 10 August 2007, then it must have been before this date), or what was said;

- What she allegedly told the applicant's representatives on or around 10 August 2007 is different to what the respondent says she told Wallace (as the respondent makes no mention of any intention to stay for the full five years, and no mention of any alleged costs of fit out).

27. Accordingly, the evidence of the respondent is not directly supported by Wallace.

28. No affidavit or evidence was introduced from any of the directors of Rapid Creek Investments Pty Ltd. Accordingly, there is no evidence that the Lessor:

    - Knew or was aware that the respondent had ever allegedly expressed any intention (and if so, to whom and when) to exercise the option to extend the lease for one year;
    - Ever gave any authority to Wallace to waive any requirements under any existing lease;
    - Ever authorised Wallace to accept oral notices to exercise an option under any lease;
    - Ever authorised Wallace to accept notices to exercise an option under any lease out of time;
    - Had any understanding as to what the respondent may be doing in relation to the lease;
    - Ever agreed to the respondent staying on for a further 12 months (or any period).

29. I would have expected that if what the respondent says is correct then the Lessor would have been aware of the matter in some way. There

is no evidence to suggest that the Lessor had any relevant knowledge.

30. Absent any direct evidence from Wallace, and any evidence from the Lessor on this important issue I am unable to accept the respondent's evidence (in paragraph 6 of her affidavit – ExR1) on the balance of probabilities.

31. Sartori gave evidence. It is clear from his affidavit (ExP1) and his oral evidence that he denies that Wallace ever told him about the respondent exercising the option on her lease.

32. There were two other people present at the meeting of 10 August 2007, namely Morris and Delahunty. Both of these persons appear to have been associated with the applicant. No affidavit or evidence has been forthcoming from either of them, and no explanation was offered for this. They were persons with relevant evidence to give, and I would have expected the applicant to have put forward an affidavit from each of them. In the absence of any such affidavit (and no explanation for this) I infer that their evidence would not have assisted the applicant in relation to whether the respondent's exercise of an option to extend had been mentioned at this meeting by Wallace (*Jones v Dunkel (1958-59) 101 CLR 298 @308).*

33. Wallace's affidavit was sworn some 9 months after the meeting of 10 August 2007. Sartori's affidavit was sworn over 8 months after the meeting. Neither deponent suggested that they had made any contemporaneous note in relation to the meeting. Accordingly, both were relying purely upon their memories.

34. If the respondent is correct in what she asserts in paragraph 6 (as set out above) of her affidavit (ExR1) then Wallace's assertion in

paragraph 4(b) (as set out above) of her affidavit (ExR2) can not be correct as no such conversation had yet occurred.

35. Accordingly, if I were to accept Wallace in this regard then I would need to disbelieve Sartori and find that the respondent was mistaken about the date of the alleged conversation between herself and Wallace, and effectively find that the conversation (of which Wallace gives no direct evidence) did occur, but it occurred about one month before the respondent thought that it did. Absent any direct evidence from Wallace as to a conversation between herself and the respondent on this topic I am unwilling to come to such a conclusion (even allowing for the inference which arises from the lack of any affidavit from Morris and/or Delahunty).

36. The affidavit of the respondent fits in with the affidavit of Sartori. There was no need for Mr Young to cross-examine the respondent as she effectively gives no evidence contrary to the applicant's case. Wallace was at no time the agent of the applicant. The applicant was not present during any alleged conversations between the applicant and Wallace and therefore could not challenge what was allegedly said. The state of the affidavits of Wallace and the respondent concerning any alleged conversation between them (on the topic of exercising an option to extend) was in such an ambiguous state that Mr Young was wise not to have sought to question them about it. If he had done otherwise he ran the risk of possibly helping the respondent's case (which was not his concern).

37. Accordingly, I do not find that there was a conversation between Wallace and the respondent (as Wallace gives no direct evidence of it) in August or September 2007 (or any other time) where the respondent indicated her intention (or desire) to exercise any option to extend the lease. Even if such a conversation did occur (and I do

not find that it did), the respondent no longer had a “right” to an extension of the lease term as the deadline of 1 August 2007 had already passed.

38. Further, I find that Wallace did not mention anything about the respondent exercising her option to extend the lease for a further year at the meeting of 10 August 2007. Sartori had just been handed a bundle of the various documents relating to the various leases for the shopping centre. It makes sense (and I accept his evidence in this regard) that he took these documents away to peruse in detail to ascertain what the situation with each tenancy was.

39. On 15 November 2007 settlement on the purchase of the shopping centre from Rapid Creek Investments Pty ltd and the applicant was completed (paragraph 28 of ExP1).

40. I find that at no time on or before 15 November 2007 was the applicant aware of any purported exercise of an option to extend the lease by the respondent.

41. On 27 December 2007 Sartori sent an email to the respondent (annexure JW4 to ExR1) which stated:

> Hi Judith,
> Without any signed valid documentation, we do consider that you have no lease in place. A signed and registered lease protects the tenure of the Lessee and ensures that the Lessor upholds their obligations under the lease.
> We are willing to offer you a new lease which would be put together by our solicitor and would be registered, if this is what you would like.
> Should you decide not to enter into a new lease, please give us written advice of one months notice to vacate. (It is acceptable for this to be done by email)
> We would allow you to remove your fittings and improvements. Tony will visit you to discuss which direction you would like to move in, and should you wish to vacate, he will discuss with you the improvements you wish to remove.

42. On 28 December 2007 the respondent replied to this email by email (annexure JW5 to ExR1), which stated in part:

> Further to my last email I have a signed lease. It may not be registered……
> ……..
> It is my understanding that the law guarantees me at least five years on a commercial lease made up in this instance of an initial year and four one year extension options. I have made no representations to have that term shortened.
> Further Tony mentioned that I had not taken up the option to extend my term. This is not true. It is true that I received no confirmation from Adam but it is my understanding that my discussions with Ann, her agreement as the recognised centre manager and the issuing of a Tax invoice for a further period constitute a contract in place. (emphasis added)

43. The reference to Wallace's "agreement" is not supported by the respondent's affidavit. There she makes no reference to Wallace saying anything that could, in my view, amount to an agreement.

44. I find that this was the first time the applicant was made aware of any purported exercise of an option to extend the lease. There is no evidence to suggest that the applicant made any inquiries of the former owner in relation to this assertion, or that the respondent offered any further information, nor that the applicant requested any.

45. It appears that the applicant simply chose to disregard the suggestion by the respondent that she had "taken up the option to extend my term" presumably in the absence of anything in writing to this effect. On 2 January 2008 Sartori wrote to the respondent (annexure JW7 to ExR1) to advise:

> We note that the lease over which you hold the subject premises expired 31st October 2007.
>
> You are currently in a holding over position, therefore you will be required to deliver up the premises vacant possession in

thirty days from the date of this notice as per clause 9.5 of the lease.

46. The respondent replied to this correspondence by email on 4 January 2008 (annexure JW8 to ExR1) which stated, in part:

> I do not accept your contention that there is no lease in place.
>
> It clearly states in the lease document it is for a five year term made up of 5 x one year terms renewable each year at the discretion of the lessor. Following discussions with the previous owner in August 2007, prior to the sale of the centre, the option for extension was requested and accepted hence continuing the lease for a further 12 months.
>
> I have contacted previous centre management and been informed that it was communicated prior to and at the time of the sale that this tenancy had a lease in place.
>
> I believe your purchase took place on mid November 2007.
>
> I maintain a lease and common law contract is in place to rent the premises regardless of the status of the ownership of the centre until the end of October 2011 (if I exercise all options) as I have previously discussed with both yourself and Tony on his visits on 24 December 2007 and 2 January 2008.

47. The respondent refers to her meeting with Tony Miaoudis on 24 December 2007 at paragraph 12 of her affidavit (ExR1). However, she makes no reference to having exercised any option or the status of her lease in that paragraph.

48. Likewise, the respondent refers to her meeting with Tony Miaoudis on 2 January 2008 at paragraph 18 of her affidavit (ExR1). However, she again makes no reference to having exercised any option or the status of her lease in that paragraph.

49. The respondent does not refer to any discussion with Sartori about having exercised any option or the status of her lease in ExR1. Sartori

clearly states (paragraph 27 of ExP1) that “I do not believe that I have ever met or spoken with Judith Walker”.

50. I therefore am unable to accept the assertions by the respondent in the last paragraph of her email of 4 January 2008 (as set out above) as being truthful or correct.

51. Mr Young also tendered through Sartori a copy of a letter dated 7 January 2008. This letter became ExP2. It was a written authority to Sartori to sign any notice to quit on behalf of the applicant. The letter included a reference to Lot 1837 Town of Nightcliff, and purported to be signed by TE Morris and Jeffrey Slade who purported to be a director and secretary (respectively) of the applicant.

52. Sartori was cross-examined by Mr Liveris. In cross-examination he stated that he was never aware of any purported exercise of an option by the respondent until around the time that he was issuing the notice to quit. He went on to state that he was not aware of the exercise of the option until January 2008. However, as noted earlier, I find it was mentioned on 28 December 2007 in the respondent’s email. Hence I am unable to accept his evidence that he was not aware of the exercise of the option until January 2008.

53. The next witness called by the applicant was Tony Miaoudis (property manager for Rapid Creek Shopping Village). His affidavit of 9 April 2008 was tendered and became ExP3. Annexure TM1 to this affidavit was a letter purportedly signed by Sartori. This letter is not referred to at all in Sartori’s affidavit (ExP1), and was not shown to Sartori in his evidence. This letter was on TEMA Property Services letterhead and stated as follows:

> Friday, 11th January 2008
>
> Judith Walker By Personal Service

T/A Dragonfly Fabrics
Shop 10
Rapid Creek Business centre,
48 Trower Road, Millner NT 0810

Attn: Judith Walker

Dear Mrs Walker

RE: NOTICE TO QUIT shop 10 Judith Walker T/A Dragonfly Fabrics Rapid Creek Business Centre, 48 Trower Road, Millner NT 0810.

You are currently in a holding over position, therefore you are required to deliver up the premises vacant possession within 30 days from the date of service of this notice on you.

Signed by 443 Queen Street Pty Ltd CAN 099 057 539 as Trustee for Mud Crab Trust by its duly authorised agent Mark Sartori.

Mark Sartori.

54. This letter is hereinafter referred to as the "notice to quit". Miaoudis swears in ExP3 that he personally served the respondent with the notice to quit on 11 January 2008 at 4:10pm. This evidence is unchallenged.

55. The relevant provisions of the Act that deal with notices to quit are sections 125, 129 and 130. These sections are as follows:

> 125. Notice to quit to be in writing
>
> A notice to quit given by a landlord is to be in writing and signed by the landlord or the landlord's agent authorised in writing.
>
> 129. Defective notice

A notice to quit which does not comply with the provisions of this Division does not operate so as to terminate the tenancy in respect of which the notice was given.

130. Notice to quit business premises

(1) Subject to a term of the business lease, a landlord is not required to specify in the notice to quit a ground for the giving of notice in respect of a periodical tenancy.

(2) Subject to the terms of the business lease, if the lease was granted for a fixed term the landlord must specify as a ground for the giving of a notice to quit –

(a) that the tenant has breached or failed to comply with a provision of the lease and that the breach or failure to comply was such that the landlord was justified as treating the lease as at an end; or

(b) that the term of the lease has expired.

(3) The period of a notice to quit premises is the period fixed by the lease or, where the rent is payable at regular intervals, the period of one such interval.

56. I therefore find that the notice to quit was a valid and effective notice to quit.

57. A further affidavit of Miaoudis sworn on 30 April 2008 was also tendered without objection and became ExP4. Miaoudis was also cross-examined by My Liveris.

58. I find that the respondent did not at any time (either within the time permitted or at all) exercise her option to extend the term of her lease for a further year from 1 November 2007.

59. I am unable to find that the respondent did tell Wallace at some time that she “intended to remain in the shop for the first option period”. But, if I am wrong on this and such a conversation did occur, there is no evidence from which I could find that Wallace said anything in response to this.

60. I find that if I am wrong and the respondent did say what she says she did to Wallace, then it still was not a valid exercise of the respondent's right to extend the period of the lease for 12 months from 1 November 2007 as:

- It was not within the time required in clause 3.2(a) of the lease;
- It was not in writing as required by clause 3.2(a) of the lease; and
- It was not served upon the Lessor as required by clause 14.1 and Schedule 11 of the lease.

61. Accordingly, in my view, if the respondent had said what she alleges she did to Wallace, then the Lessor would have had an option to either accept the words of the respondent as a valid exercise of an option or not. But if the Lessor chose to accept them as valid then, in my view, it should also have been done in writing and in accordance with clause 14.8 of the lease (as set out above). I find that this has never occurred.

62. I therefore find that there was no valid or binding exercise of the option to extend the lease for a further year from 1 November 2007.

63. I find that there was never any discussion between the respondent and Wallace about putting anything in writing concerning any possible extension of the lease. I find that Wallace never said anything to the respondent about a written request for an extension of the lease either being required or not required.

64. I do not find that Wallace said anything to the respondent about her being able to stay on in her tenancy after 1 November 2007.

65. The respondent also seeks to rely upon waiver in the event that the respondent did not validly exercise her option to extend (as I have found that she did not).

66. "According to it's strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right": *Craine v Colonial Mutual Fire Insurance Ltd (1920) 28 CLR 305 @ 326.*

67. In *Lifoon Pty Ltd v Gillard and Ors [2006] NSWCA 182,* the trial Judge had found that the tenant in that case had exercised the option to extend a lease orally at a meeting held for that purpose; that the meeting was at a time when five weeks still remained to exercise the option; had discussed whether a letter needed to be sent to confirm this in case Quarmby (the managing director of the owner and the person to whom the oral notice was directed) was "hit by a bus"; and Quarmby had said that it was not necessary for the tenant to exercise the option in writing. Based on those findings Handley JA said at paragraphs 23 and 24:

> The reliance of the representee on the representation, which is an essential element in an estoppel, need only be a contributing cause of his change of position which completes the estoppel: *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 @ 104; The Stolt Loyalty [1993] 2 Lloyds Rep 281 @ 291.*
>
> In the present case the inference that the Gillards relied on the representation of Mr Quarmby is overwhelming. If he had insisted on a written exercise of the option there is every reason for thinking that the necessary notice would have been sent in good time. The solicitor could have written it out, had it signed, and given it to Mr Quarmby on the spot. As it was the solicitor and the Gillards left the meeting without any sense that it was essential for an appropriate notice to be given as a matter of urgency within the time remaining for the exercise of the option.

68. The facts in that case are very different to the instant case. Here there is no suggestion (or evidence from which I could be satisfied) that:

- Any alleged conversation between Wallace and the respondent occurred before the time to validly exercise the option had expired;
- The respondent was ever discouraged from sending a written notice (either by the Lessor or Wallace or the applicant);
- The Lessor ever expressly or impliedly waived the need for a written notice of the exercise of the option to extend the lease;
- The Lessor ever expressly or impliedly waived the need for any written notice of the exercise of the option to extend the lease to be made within the time stipulated in the lease;
- Even if the respondent had sought to exercise her option out of time and in writing that it would have been accepted by the Lessor;
- Even if the respondent did seek to orally extend the lease out of the time permitted (and I am not satisfied that she did) that the Lessor accepted the same;
- The respondent was ever told (or led to believe) that the Lessor accepted that she had validly notified her intention to extend the lease for a further period of one year;
- The respondent was told that the Lessor accepted her oral statement of intention (which Oral statement I do not find was in fact made) to extend the lease for a further period of one year;

- The respondent had somehow altered her position in reliance upon anything said or not said (as there is no evidence that Wallace said anything which I find was relevant to the matter in issue) by Wallace (or the Lessor or the applicant).

69. I therefore find, on the facts of this case, that no estoppel or waiver arises (even if what the respondent asserts was true).

70. The respondent says (paragraph 7 of ExR1) that on 1 November 2007 she "received an invoice from the previous owners for the first month of the new year's rental showing the same rent as the previous 12 months". However, she has chosen not to annexe this document to her affidavit, so I am unable to decide what it does or doesn't say. It appears that she then seeks to rely upon this document (which isn't placed into evidence) to show that she had exercised her option. She has not explained why this document isn't in evidence. If she is seeking to rely upon it (as she appears to be) then, in my view, this was an important document. No explanation for it's non-tendering was offered. I therefore infer that this document would not have supported the respondent's assertion.

71. In my view, without seeing this invoice, it would be equally consistent with a holding over on a month by month basis in accordance with clause 9.5 of the lease.

72. For the reasons set out above I find that the applicant is entitled to the relief as sought.

73. At the conclusion of closing submissions I invited both counsel to address me as to when any warrant of possession should take effect. Both counsel were content for a period of one month from the date of my decision.

74. I also note *section 142(1) of the Law of Property Act* states:

> (1) On the commencement of this Act, if after the term of a lease has determined the lessee continues in possession of the leased premises with the consent of the lessor, the lessee has a right to exercise any option contained in the lease for as long as the lessee's holding over of the premises is lawful.

75. Accordingly, this section would extend the operation of clause 3.2 of the lease. But there is no evidence before me to suggest that the respondent has ever attempted to take advantage of this. Nor is there any explanation as to why she didn't do this.

76. I find that the notice to quit was valid and proper. I find that these proceedings have been brought within the requisite time. Accordingly, the applicant is entitled to the relief that it seeks.

77. I therefore propose to order that a warrant of possession issue for the premises situated at shop 10, Rapid Creek Shopping Village, 48 Trower Road, Millner (being part of Lot 1837 Town of Nightcliff) with effect from 4pm on 17 October 2008.

78. I will hear the parties on the question of costs and any consequential orders.

Dated this 18th day of September 2008.

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D Trigg SM
STIPENDIARY MAGISTRATE