

Article Information

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Exercising an option out of time - tips for landlords

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An option to renew or extend a lease for a further term is a common feature in retail and commercial leases. Options usually require the tenant to provide the landlord with written notice requesting the renewal within a prescribed timeframe. Generally, if the tenant issues the notice within the prescribed time frame and complies with any other conditions pertaining to the exercise of the option, the tenant will be entitled to a renewal of the lease for the relevant option period.

The recent Queensland Court of Appeal of *Tripple A Pty Ltd v WIN Television Qld Pty Ltd* [2018] QCA 246 deals with the scenario of where a tenant has not exercised the option in time and the parties proceed on the basis that the option has been exercised. The case is authority for the proposition that landlords cannot waive the requirement for a tenant to exercise an option within the timeframe specified in the lease where the timeframe has lapsed. The implications of this decision are that in circumstances where a tenant has not validly exercised its option to renew the lease within the timeframe required by the lease:

- the landlord's conduct and statements will have bearing in the characterisation of any agreement reached in relation to ongoing tenure; and
- any agreement between the landlord and tenant will be treated as a new lease as opposed to the exercise of an option under the existing lease.

The Case

In this case, WIN Television Qld Pty Ltd (**WIN**) leased a premises in Rockhampton, Queensland from Tripple A Pty Ltd (**Tripple A**) for a five year term which commenced on 1 November 2012 with two options each of five years. WIN exercised the first option of five years albeit out of time. For the option to be validly exercised, notice had to be given by WIN to Tripple A by 31 July 2017 which did not occur. Tripple A's agent issued a letter to WIN on 8 August 2017 seeking confirmation as to whether WIN intended to exercise its option to renew. On 10 August 2017, WIN responded in the affirmative. On 28 August 2017, Tripple A issued a letter of offer to WIN for the option term and the letter stipulated that the Tripple A would not adjust rent and would waive the next rent review.

WIN argued that Tripple A had waived the time limit which required notice of the exercise of the option to be provided at least three months before the expiry date. The parties reached an agreement for a new lease with all terms agreed except for rent. WIN contended that a market rent review applied whereas Tripple A contended that the parties entered into an agreement for a new lease with rent to remain as is with no adjustment.

On 20 September 2017, Tripple A's solicitor subsequently issued a form 13 amendment to the lease to accord with Tripple A's offer on 28 August 2017. WIN did not sign the form 13. On 11 October 2017, WIN made a request for the rent to be reviewed identifying cheaper comparable sites. Tripple A responded by saying that WIN was outside of the timeframe stipulated in the market rent review provisions in the lease to object to rent.

Subsequent correspondence had been exchanged between the parties' solicitors. WIN's solicitor, by letter of 15 December 2017, stated that the letter of 28 August 2017 did not constitute a valid or effectual notice of reviewed rent for the purposes of the lease with an invitation for Tripple A to provide such a notice. On 22 December 2017, Tripple A's solicitor responded by saying that WIN was out of time to dispute the rent pursuant to the lease and in support of this Tripple A's

solicitor asserted that WIN had accepted Tripple A's offer contained in the letter of 28 August 2017 which provided for there to be no adjustment to rent.

The Court of Appeal considered the proper characterisation of the agreement for lease between the parties as a result of the correspondence exchanged in August 2017 which depended upon an analysis of the correct legal characterisation of the option. The Court of Appeal considered various authorities dealing with the competing characterisations as to whether an option amounts to a conditional contract or an irrevocable offer. This consideration was necessary as it would be relevant if the doctrine of waiver applied (noting that it would be possible to waive a time stipulation if an option is categorised as an irrevocable offer whereas under the conditional contract analysis the coming into acceptance of a fresh agreement depends upon acceptance of a counter-offer constituted by an offer to exercise the option out of time). However, in this case the doctrine of waiver was not relevant as "*once the time for performance of the stipulated condition(s) for exercise of the option has passed (whether in the irrevocable offer or conditional contract analysis), there is nothing to waive.*"^[1] On this basis, the Court of Appeal concluded that the exchange of correspondence in August 2017 was not an exercise of an option but was a negotiation of a new lease in accordance with the rules of offer and acceptance.

The only dispute concerned the payment of rent. The Court of Appeal applied the relevant general law principles of construction in determining what had been agreed in that regard stating that "*[t]he agreement is to be construed objectively, by reference to what a reasonable person in the position of each of the lessor and lessee would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to them at the time of the transaction and the commercial purpose or objects to be secured by the agreement.*"^[2]

The Court of Appeal held that the objective framework of facts were as follows:

- the parties were commercial entities under a lease of commercial premises;
- the lease provided for a market rent review upon exercise of the option;
- time was not of the essence with respect to the market rent review process in the lease - it could be instigated 90 days after the commencement of the new term or even later;
- although WIN failed to exercise the option to renew in time, both parties were proceeding on the basis that in agreeing to renew the lease, they were doing so by way of exercise of option;
- not all terms were agreed in correspondence between the parties and were based on the lease;
- whilst the form 13 did not adjust rent, it did not delete or amend the market rent review provisions which were expressed to apply upon the exercise of the option.

Taking into account the aforementioned objective framework of facts, the Court of Appeal held that the parties agreed to a further lease of premises, at the current rent, subject to the operation of the market review process provided for in the lease. The primary judge found that the market review process had not been properly instigated and that the rent would be subject to a market rent review pursuant to the lease (with there being no appeal from that conclusion). This was the case even though the parties had agreed (in correspondence) that the commencing rent would not alter.

Key Considerations

From a landlord's perspective, the main considerations arising from this case are as follows:

- landlords cannot waive the requirement for a tenant to exercise an option within the timeframe specified in the lease where the timeframe has lapsed;
- courts will interpret the timeframe to exercise the option strictly and if the timeframe is missed the parties will be treated as having entered into a new lease (in other words, the late exercise of a renewal will not effect a renewal in law);
- the landlord's conduct and statements will have bearing in the characterisation of any new lease and if the parties have proceeded on the basis that the option had been properly exercised this will impact on the parties rights under the new lease including with respect to the arrangements pertaining to the commencing rent payable under the new lease; and
- landlords should exercise a degree of caution and carefully consider the legal consequences before embarking on a course of conduct to extend a tenant's tenure in the circumstances outlined above as the landlord may make statements or engage in conduct which might give effect to a new lease which does not accord with intended arrangements.

[1] *Tripple A Pty Ltd v WIN Television Qld Pty Ltd* [2018] QCA 246 at [50].

[2] *Ibid* at [57].