

Right of first refusal – in lease document

Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:

**203 Castlereagh Pty Ltd v Payce Properties Pty Ltd and Skybloo Holdings Pty Ltd
[2017] NSWCATCD 20**

Hearing dates:

22 September 2016

Decision date:

20 April 2017

Jurisdiction:

Consumer and Commercial Division

Before:

D Bluth, Senior Member

Decision:

1. Castlereagh can lodge its retail tenancy claim in these proceedings notwithstanding it is more than 3 years after the liability or obligation that is the subject of the claim arose.
2. Payce breached Special Condition 1 by not offering the purchase of the premises to Castlereagh.
3. The matter is relisted in the first directions hearing 14 days after publication of these orders for determination of damages for breach.

Catchwords:

Breach of clause in the lease granting right of first refusal for sale of property, application under s71B of the Retail Leases Act, the doctrine of waiver, waiver

Legislation Cited:

Retail Leases Act 1994

Cases Cited:

203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Limited (No. 2) [2015] NSWCATAP170

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) HCA 57

Bischof & Anor v Werncog Pty Ltd [2004] NSWADT

Glencore Grain Ltd v Flacker Shipping Co. Lit (The Happy Day) [2002] 2 Lloyds Rep. 487

Panache Salons Pty Ltd v Kent Street Pty Ltd [2009] NSW ADT 247

Polylux Pty Ltd v Corpers (No. 5) Pty Ltd [2009] NSWADT 284

Rye v Rye [1952] AC 496

Texts Cited:

Cheshire and Fifoot's Law of Contract 9th Aus Ed.

Category:

Principal judgment

Parties:

203 Castlereagh Pty Ltd (Applicant)
Payce Properties Pty Ltd (1st Respondent)
Skybloo Holdings Pty Ltd (2nd Respondent)

Representation:

Counsel: Leo Gorr (1st Respondent)
Mr J Salama (2nd Respondent)
Solicitors: Colin Biggers Paisley (1st Respondent)
Osbornes (2nd Respondent)
Agent: Retail Leases Doctor (Applicant)

File Number(s):

COM 14/36505

Publication restriction:

Nil

REASONS FOR DECISION

1. The applicant, 203 Castlereagh Pty Ltd (**Castlereagh**), entered into an agreement for lease and subsequently a lease with the first respondent, Payce Properties Pty Ltd (**Payce**), in respect of premises at shop [***] Road, Homebush Bay (**the premises**) on or about 25 January 2010 (**the Lease**).
2. Subsequently, Payce sold the premises to the second respondent, Skybloo Holdings Pty Ltd (**Skybloo**). Special Condition 1 in Item 14 of the Lease provided that Payce must not sell, transfer or otherwise dispose of the premises during the period 18 July 2010 to 17 July 2011 unless Payce first offered to sell the premises to Castlereagh (**Special Condition 1**).
3. Payce and Skybloo exchanged contracts on or about 6 or 7 June 2011 and settlement was effected on 7 June 2011. Therefore, the sale of the premises occurred within the relevant period referred to in Special Condition 1. Payce did not offer the premises for sale to Castlereagh.
4. Castlereagh filed an Application for Original Decision seeking certain orders in relation to the consequence of the sale of the premises to Skybloo, being the transfer of the premises from Skybloo to Castlereagh as if the offer to purchase was made and accepted, and in the alternate, damages and costs.
5. There has been a significant amount of litigation between the parties. This particular claim was heard by the Tribunal on 22 September 2016. Mr Haney Soltan, lay advocate, appeared on behalf of Castlereagh, Mr Leo Gor of Counsel appeared on behalf of Payce and Mr J Salama of Counsel appeared on behalf of Skybloo.

Background

6. The Directors at the relevant time were then Mr Usama Maqableh and Mr Hassan Ali Maqableh. Sometime in 2010, Castlereagh and Payce entered into an agreement for lease for the premises. The agreement for lease identified Mr Tim Breene of Breene & Breene,

solicitors, as solicitors for Castlereagh and Mr Mark Morgan and Rebecca Breene of Morgan Lewis Pty Limited, as solicitors for Payce.

7. Shortly thereafter Castlereagh and Payce executed the Lease for the premises. At the time of execution, the commencing and terminating dates were left incomplete. There was a dispute between the parties regarding these dates and the issue was resolved by the Tribunal determining that the commencing date was 18 July 2010 (*203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Limited (No.2)* [2015] NSW CATAP)
8. The Tribunal notes the following items from a reading of the Lease:
 1. The address for Castlereagh is PO Box 4089, Sydney 2001.
 2. The Lease granted Castlereagh an option to extend for a further 4 years.
 3. Mr Usama Maqableh is described as the covenantor in Item 13 of Annexure A.
 4. There was a requirement to provide a bank guarantee in favour of Payce, as lessor.
 5. Item 14 of Annexure A contains Special Condition 1 which is on the following terms:

Special Condition 1 Right of First Refusal

- (a) the lessor must not sell, transfer or otherwise dispose of the premises during the period commencing on the commencing date and expiring on the first anniversary of the commencing date unless the lessor first offers to sell the premises to the lessee by executing and delivering to the lessee a contract detailing the price, and the terms and conditions on which the lessor intends to sell, transfer or dispose of the premises;
- (b) if the lessee does not accept the lessor's offer to sell the premises by delivering to the lessor within 15 business days after receipt of the contract executed by the lessor:
 - (i) the contract executed by the lessee; and
 - (ii) a cheque for the deposit made payable to the lessor;then:
 - (iii) the lessee will be deemed to have rejected the lessor's offer to sell the premises;
 - (iv) the lessor's offer to sell the premises will be deemed to have been withdrawn; and
 - (v) the lessor will be free to sell the premises to any other person.

6. Clause 14.3 of the Lease provides:

14.3 Waiver

Any right by, or arising upon, default under this lease, or upon an event of default, is not waived by:

- (1) a failure to exercise;
- (2) a delay in exercising, or
- (3) a partial exercise of that right.

7. Clause 14.6 provides that any notices that are to be served on a party should be served at the registered office of the party.
8. The Lease is signed by Mr Basil Klevansky as a director of Payce. Mr Klevansky is also the director and the owner of Skybloo.
9. As the commencing date, and consequently the terminating date, of the Lease has now been established by the Tribunal, it is agreed that Castlereagh could only be entitled to exercise the right of first refusal in Special Condition 1 between 18 July 2010 and 17 July 2011 (*203 Castlereagh (No. 2)*).
10. It is acknowledged by Castlereagh that it was always in arrears in rent during this period and also for the period thereafter for the time of its occupancy.
11. On 6 or 7 June 2011, Payce and Skybloo exchanged contracts for the sale and purchase of a number of properties between the parties which included the premises. Completion occurred on 7 June 2011 (**the Contract**).
12. On 7 June 2011, Payce's solicitors notified Castlereagh in writing of the sale of the premises to Skybloo. It should be noted there is a dispute on the evidence as to whether Castlereagh actually received this letter.
13. Payce's then managing agent also notified Castlereagh of the sale by letter and email. These are acknowledged as received by Castlereagh. As noted, the parties do not dispute that Payce did not offer to sell the premises to Castlereagh for the price and on the terms and conditions set out in the Contract.
14. At the time of the notice of sale, a request was made to Mr Hassan Maqableh (the second director of Castlereagh) to replace the bank guarantee because it had been misplaced. There were a number of emails passing between the agent and Mr Hassan Maqableh regarding the replacing of the lost bank guarantee. There is disagreement that the effect of this request meant that Mr Hassan Maqableh and consequently Castlereagh actually then knew, at that particular time, of the sale and therefore the breach of Special Condition 1 by Payce. Mr Hassan Maqableh was not available to give evidence and did not provide any statement.
15. Mr Gor makes the submission that, notwithstanding these requests (and on the assumption that Castlereagh knew of the sale) Castlereagh did not complain, protest or otherwise assert a breach of Special Condition 1. Mr Gor suggests that the failure to complain, protest or otherwise assert was not surprising because the business of Castlereagh in the premises was trading poorly and it was constantly in arrears of rent. This leads Mr Gor to make the assertion that Castlereagh was in no position to acquire the premises, especially as Mr Usama Maqableh incessantly complained to the managing agent about how poorly his business was trading.
16. Mr Usama Maqableh gave evidence that he was informed by the then managing agents of the premises that a sale had occurred and this information was provided to him in 2012. Again Mr Gor makes the submission that there was no complaint, protest or other assertion of a breach of Special Condition 1 at that time either. It is only much later that Castlereagh agitates on this issue.

17. Mr Gor's submission is that the real objective of Castlereagh was to renew the term of the Lease even though it had not complied with the terms of the renewal of the Lease.
18. On 7 July 2014, Castlereagh commenced an application in this Tribunal against Skybloo in respect of the refusal by Skybloo to renew the Lease for a further four year term and for prejudicing Castlereagh's ability to sell its business as the Lease term approached termination. The Tribunal held that Castlereagh had not validly exercised its option to renew and therefore was only a month to month tenant (*203 Castlereagh (No. 2)*).
19. On 31 July 2014, Payce's solicitors wrote to Mr Haney Soltan on behalf of Castlereagh pointing out that the application is out of time. Consequently, on 5 August 2014, this Tribunal made orders for determination of this jurisdictional issue. Castlereagh was directed to file and serve its evidence for an extension of time by 5 September 2014.
20. On 22 September 2014, Castlereagh filed an amended application. The primary relief sought against Skybloo is for the actual transfer of the premises from Skybloo to Castlereagh. Only in the alternative does Castlereagh seek damages against Payce to the jurisdictional limit of this Tribunal in the sum of \$400,000.00.
21. Further, this application of Castlereagh was stayed by the Tribunal on 23 September 2014 to await the judgment of related proceedings, in particular the determination of the commencing and terminating dates of the Lease (*203 Castlereagh (No. 2)*).
22. The parties appeared at the directions hearing before Principal Member D Patten on 22 March 2016. On that occasion Principal Member Patten ordered that there be a separate trial of the issues as follows:
 1. Whether there was a breach of Special Condition 1.
 2. If so, when did that breach occur.
 3. Were the proceedings commenced in time in accordance with s72(2) of the *Retail Leases Act 1994 (RLA)*.
23. It was further noted by Principal Member Patten at paragraph 4 of the directions that Castlereagh did not intend to make an application under s71B of the RLA.

Witness Statement

24. A witness statement was provided by Mr William Charles Morgan. Mr Morgan is the sole director of Payce, now known as Palermo (9 Hill Road NSW) Pty Ltd. He states that on 7 June 2011, Payce's then lawyers Morgan Lewis sent a letter to Castlereagh which stated as follows:

203 Castlereagh Street Pty Ltd

Shop 120a, Sorrento Wentworth Point NSW 2127

Dear Sirs

Notice pursuant to s12 of the Conveyancing Act 1919 (NSW) re Payce lease to 203, property:
Shop 120a Sorrento, The Piazza, Wentworth Point NSW 2127

Payce today sold the above property to Skybloo ...

Payce is the favouree under a bank guarantee given by Westpac ... at the request of Castlereagh pursuant to the lease. A copy of the bank guarantee is attached for your reference.

We note that the whereabouts of the original bank guarantee is unknown. It is considered misplaced.

Payce gives notice that, to the fullest extent possible, it has assigned its right, title, interests and benefit in the bank guarantee to Skybloo from the date of this Notice. Under the terms of the lease you are required to obtain a replacement bank guarantee in favour of Skybloo. In this regard please direct all future correspondence to Osbornes Lawyers.

25. Mr Usama Maqableh provided a witness statement dated 30 June 2016. He said as follows:

1. I am a director/secretary of Castlereagh the applicant in these proceedings. I have the carriage of the operations of Castlereagh on a day-to-day basis.
7. I have seen the first page of the contract of sale of land behind tab 3 of the filed witness statement of William Morgan. At no time before 7 June 2011 did anyone informed (sic) Castlereagh that Payce proposes to sell the premises.
8. Castlereagh did not receive the letter (stated by William Morgan as sent).
9. Since Castlereagh first occupied the premises until late 2012, the managing agent for Payce was RetailSpace Aus. Troy Deviesseux from RetailSpace Aus was the main person I had usual contact with. I recall that during 2012 Troy told me orally that I could have purchased the premises before it was sold to a new owner.
10. Castlereagh continued to pay the rent to RetailSpace Aus throughout 2011 and most of 2012. From late 2012 a new managing agent started managing the premises. His name is John Wurth from Basix. Castlereagh paid the rent into Basix trust account from late 2012.
11. At no time after 7 June 2011 did anyone informed (sic) Castlereagh that Payce sold the premises to ... Skybloo for the price of \$446,250.00 with Payce paying stamp duty.

26. In a further statement dated 23 August 2016, Mr Usama Maqableh stated that he did not see the letter dated 10 June 2011 from RetailSpace Aus. Further, he says that he did not receive any emails from RetailSpace advising of the sale.

27. Mr Basil Klevansky, a director of Skybloo provided a witness statement. He said as follows:

1. In 2009 I was General Manager for Payce. Payce is a developer of large residential and mixed residential and retail projects. As General Manager I had planning and marketing responsibilities in respect of developments carried out by Payce...
2. In 2009 I was appointed a director of Payce and other Payce subsidiary companies. Payce... owned a Development in or around Hill Road, Homebush Bay (development).
3. As General Manager of Payce I reported to Payce's board of directors.
4. ...

5. In the capacity of director or secretary I was asked to sign documents on behalf of those companies. In respect to Payce this included signing leases of commercial and retail property in the Development.
6. I did not have any negotiations with third parties in respect of commercial or retail tenancies in the Development. I do not recall appointing any agent to manage the commercial or retail tenancies of the Development.
7. As a director of Payce I signed the agreement to lease and lease with Castlereagh in respect of shop premises which were developed known as Shop 120a Sorrento, 19 Hill Road, Homebush Bay.
8. At the time of signing the agreement to lease and the lease I had no knowledge of the terms of the lease I was signing including any terms of negotiations for a first right of refusal granted to the tenant in the lease. I did not know or meet with the tenant.
9. I did not sign the disclosure statement in respect of the lease...
10. In early 2011 I left Payce. When I left Payce I was asked by Payce to acquire a number of properties in the Development... Payce prepared a schedule of the properties in the Development with a price and I was asked to buy the properties in accordance with the schedule of prices.
11. The properties were a mix of residential, commercial and retail properties.
12. The prices were obtained by valuations carried out by Payce.
13. In or around May 2011, I agreed to buy the properties.
14. At the time of the agreement to buy the properties, I was not informed by Payce of any matter concerning the leases or tenancies in the properties.
15. The properties were purchased in company or trust entities I was involved in or had incorporated.
16. On 16 May 2011 Skybloo Holdings Pty Ltd was incorporated and I and my wife are the directors. Skybloo is custodian for SkyGlow Pty Ltd as trustee of the Klevansky Family Trust.
17. ...
18. ...
19. I was not involved in the acquisitions of properties other than to sign the contracts and to arrange for payment. I did not see or review any leases. I instructed Osbornes Lawyers to act for purchasing entities and attend to the settlement of the purchases.
20. The contracts in relation to the purchases of the properties were exchanged 6 June 2011 and settled on 7 June 2011.
21. From the time of the agreement to buy the properties, until the settlement of the purchases, I was never informed by Payce concerning a right of first refusal granted to the tenant in the lease or whether Payce had complied as regards that obligation.
22. My instructions to Osbornes Lawyers were to carry out only a limited review of the leases in so far as the execution and registration status of the leases only.

23. After settlement RetailSpace through their agency which was previously provided to Payce continued to manage the commercial and retail properties and collect the rent on behalf of the Skybloo entities until John Wurth was appointed the managing agent for the commercial and retail property during 2012.

28. Mr Jeremy Deviesseux of RetailSpace prepared a witness statement dated 19 August 2016.

In that statement he says relevantly:

1. 'I am a Co-Principal, Licensee and Property Manager of RetailSpace...
2. On 10 July 2011 I sent an email to Usama Maqableh attaching a letter dated 10 June 2011. This email was sent to the email address shown in the accounts as belonging to Mr Usama Maqableh.

The relevant letter stated as follows:

Dear Sam Maqableh

120 Strombolli Strait, The Waterfront, Wentworth Point NSW 2127

As the managing agent for the Lessor, we advise that the property you operate from as a tenant has been sold.

Your new landlord is SkyGlow Pty Ltd.

RetailSpace Aus has been appointed by the new lessor to continue managing the property. Therefore we ask if you continue to pay rent to us as normal and in accordance with your lease agreement.

29. Mr Deviesseux also stated that on 14 June 2011 he personally signed and sent a signed copy of the letter dated 10 June 2011 to Castlereagh, however he has been unable to locate a copy of that signed letter. He says his mail book records indicate that in fact such a letter was sent.

30. Mr Deviesseux also gave evidence by telephone of the contact he had with Mr Hassan Maqableh to replace the bank guarantee. Mr Deviesseux insisted that he told Mr Hassan Maqableh that the bank guarantee was to be replaced because there was a new owner of the shop.

Has there been a breach of Special Condition 1?

31. Payce asserts that in fact there has been no breach of Special Condition 1. Mr Gor submitted that if one were to look critically at the terms under which Payce was required to offer the premises in sub clause 1(a) of Special Condition 1, it is noted that Payce was first to offer the premises to Castlereagh for *purchase on the terms and conditions on which the lessor was prepared to sell*. This was to be undertaken by delivery by Payce to Castlereagh of an executed contract detailing the terms and conditions.

32. Mr Gor then submitted that if one were to look at the terms and conditions of the Contract, they fall outside the actual offer that could be made under Special Condition 1 in that one of the terms of the Contract was to maintain the Lease and honour its terms and conditions. Such an offer was incapable of acceptance by Castlereagh because at law, Castlereagh would have been incapable of keeping the Lease on foot or honouring its terms and conditions as it would become both the lessor and lessee and consequently the estates would merge (that is

leasehold and freehold would merge and there would be a disruption of the leasehold estate and therefore the Lease (see *Rye v Rye* [1952] AC 496)).

Contract of sale

33. Mr Gor directs the Tribunal to pay particular attention to the terms and conditions of the Contract. He specifically notes general condition 17.2 and special conditions 31.1(a), 31.3(b), 33.2, 34.1(a), 34.2, 35.2 and 40.2.

34. General condition 17.2 simply states that the property is sold subject to any leases disclosed.

35. The Special conditions are as follows:

31.1(a) states as follows:

The vendor sells and the purchaser buys the property and the goods for the price subject to the leases and all rights and benefits in favour of and obligations binding on the vendor created under the leases.

Special condition 31.3(b) relates to encroachments and consequently cannot be relevant.

33.2 states as follows:

From settlement the purchaser must observe and perform all of the vendor's obligations contained or implied in the leases (sic) referable to the period after settlement (including the obligation to grant any lease under an option to renew)

34.1(a) deals with the assignment of the benefits under the Lease to a purchaser.

34.2 is of the usual special condition dealing with leases and notices, such as an attornment notice and the assignment of bank guarantees.

35.2 relates to the purchaser's obligations to adjust any rent received after settlement relating to the period before settlement.

40.2 states that the sale is subject to the Lease (repeat of Special Condition 31.1(a)).

36. Mr Gor then submits that because the terms of the Contract require a purchaser to retain the Lease, if Castlereagh were the purchaser, then the leasehold estate and the freehold estate would merge thereby eliminating the Lease and consequently the terms of the Contract could not be performed. The proposed offer as set out in Special Condition 1 was, using the specific words of Mr Gor in his submissions, 'incapable of acceptance' by Castlereagh. This is because at law, Castlereagh was incapable, once becoming registered proprietor, of keeping the Lease on foot or honouring its terms and conditions in accordance with the requirements of the Contract.

37. The second reason that Payce says Special Condition 1 has not been breached is that Castlereagh made an unequivocal and irrevocable election between two inconsistent rights by remaining in the premises as lessee. That is, it has elected to affirm the Lease rather than terminating it and suing for breach by not immediately issuing proceedings. It did so according to Mr Gor with knowledge and consequently cannot now resile from the election.

38. Mr Gor states that the Lease grants the lessee rights in rem but it is also a contract. Accordingly contractual principles apply including the election between two inconsistent rights. Mr Gor states that the election arose in the following manner. Castlereagh was informed of the sale to Skybloo in June 2011. Further, Mr Hassan Maqableh was aware of the sale from late November 2011 in the context of the requests for a replacement bank guarantee in favour of the new owner and landlord, Skybloo. Further, Mr Usama Maqableh gave evidence that he became aware of the sale in 2012. Castlereagh continued to pay rent to 2014, albeit late and in breach of the Lease, thereby electing to affirm the Lease.

39. The third submission made by Mr Gor on behalf of Payce was that there was a unilateral waiver of the rights of Castlereagh (in the sense of abandonment) of the contractual right of a first refusal under Special Condition 1. Mr Gor refers to *Glencore Grain Ltd v Flacker Shipping Co. Lit (The Happy Day)* [2002] 2L1.Rep.487 at [64 ff] (Potter LJ delivering the judgment of the Court of Appeal) applied in *Orchard Capital Investments Ltd v Ross Neilson Properties Pty Ltd* [2010] QSC340. See also the discussion of Kirby J in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) HCA 57 at [118 - 145].

40. Mr Gor submitted that the requirements for a unilateral waiver may be broadly summarised as follows:

1. the notion of waiver is only applicable where a contractual right is available for the benefit of one contract counterparty only;
2. the beneficiary of that right unilaterally decides not to exercise the right or to forego the benefit conferred by the contractual provision; and
3. it requires a clear unequivocal representation either by word or conduct, the test being what a reasonable person in the position of the contract counterparty would understand.

41. Consequently in this case, according to Mr Gor, the evidence clearly establishes that:

1. Castlereagh received notice of the sale and assignment to Skybloo in June 2011 and certainly no later than late November 2011 through the request of a new bank guarantee and its subsequent issue to Skybloo;
2. Castlereagh made no complaint, protest or assertion of any breach of Special Condition 1;
3. Castlereagh continued to pay rent and otherwise comply with the Lease rather than assert a right to damages for breach of Special Condition 1;
4. throughout 2013-2014 Castlereagh at all times sought to extend the term of the Lease. This was the major dispute before this Tribunal in *203 Castlereagh (No. 2)*; and
5. to the extent it treated with Skybloo for the purchase of the premises it did so without any assertion of breach, but rather as potentially a wholly independent bargain.

42. Accordingly, the submission by Mr Gor is that Castlereagh was aware of the breach of Payce of Special Condition 1 and unequivocally and irrevocably abandoned its rights thereunder from June 2011 and certainly by no later than November 2011.

When did the breach of Special Condition 1 occur?

43. Payce and Skybloo exchanged the Contract on 6 or 7 June 2011 and completed the sale and purchase of the premises on 7 June 2011. Mr Gor submits that the Contract is the best evidence of the terms and conditions on which Payce was obliged to offer the premises for sale to Castlereagh, that is, to exchange and settle on the same day.

44. Consequently, the breach occurred on 7 June 2011 or at best 15 business days after the date of the offer that should have been made in accordance with Special Condition 1(b) namely, by 28 June 2011 being the 15 business days.

Should the Tribunal exercise its discretion to grant the application by Castlereagh under s71B(3) of the RLA?

45. Sections 71(2) and 71B of the RLA provide:

- s71(2) (A retail tenancy) claim may not be lodged more than 3 years after the liability or obligation that is the subject of the claim arose.
- s71B(1) A retail tenancy claim may be lodged more than 3 years but no later than 6 years after the liability or obligation that is the subject of the claim arose, if the Tribunal orders that the claim may be lodged with the Tribunal.
- 71B(3) The Tribunal may make an order under this section
 1. on application by the party or former party concerned; and
 2. after hearing such of the persons likely to be affected by the application as it sees fit, and
 3. if the applicant satisfies the Tribunal that it is just and reasonable to make the order.
- 4. Mr Gor said that as far back as 2014 the solicitors for Payce drew the attention of Castlereagh to the issue that the application is out of time. The Tribunal gave Castlereagh in early September 2014 an opportunity to make an application for an extension of time and Castlereagh declined to do so.

46. In 2016, Castlereagh was again invited to make an application and expressly disavowed to do so as noted by Principal Member Patten at paragraph 4 of the directions made on 22 March 2016.

Submissions from the applicant

47. Mr Soltan in his submissions in chief of 11 August 2006 states at paragraph 41:

For avoidance of doubt, Castlereagh withdraws its intention not to make an application under s71B. This intention was stated as to Castlereagh is of the strong opinion that it is not necessary as its claim was lodged within three years from when Payce's liability or Skybloo's obligation arose.

48. Mr Soltan submits that Castlereagh did not become aware of the sale of the premises until 2012 as stated by Mr Usama Maqableh in his witness statement. The letter from Payce's

solicitors upon which Payce relies as grounding the knowledge of Castlereagh of the sale of the premises has the following faults:

1. it was not addressed to the registered office of Castlereagh as required under clause 14.6 of the Lease;
2. it was not addressed correctly to the correct premises address; and
3. a copy was not tendered signed by the solicitor who allegedly wrote it with no other evidence from that solicitor that he actually sent it.

49. Mr Soltan then says Castlereagh is within the three years of when Castlereagh became aware of the breach of Special Condition 1, which was in 2012 when Mr Usama Maqableh was informed of the sale by the agent. Castlereagh lodged its claim in 2014, within 3 years of it knowing of the breach.

50. Consequently, if the Tribunal is of the view that Castlereagh lodged its claim out of time, then it seeks the Tribunal to exercise its jurisdiction under s71B(1) on the basis that it is just and reasonable for the Tribunal to make such an order. The Tribunal should follow the test in *Polylux Pty Ltd v Corpers (No. 5) Pty Ltd* [2009] NSWADT 284 whether there can be a fair trial of the issues between the parties before the Tribunal. The factual matrix and the issues raised are not complicated and the respondents will suffer no prejudice on the basis that the litigation is in the Tribunal and not in the Supreme Court as in fact the parties are fully familiar with all the issues in any event.

51. It would be unjust to force the applicant to the Supreme Court in view of the expense and costs associated. There is evidentiary and other procedural advantages of bringing proceedings before the Tribunal (see *Panache Salons Pty Ltd v Kent Street Pty Ltd* [2009] NSW ADT 247 at [38-39]).

Submissions from the first respondent

52. Mr Gor submits that the Tribunal should not exercise its discretion to allow Castlereagh to proceed with its claim because justice delayed is justice denied. The application for an extension of time should not be granted because the delay amounts to injustice to the first and second respondents and Castlereagh's failure to make the application earlier or provide an explanation makes it unreasonable.

53. Section 71(2) of the RLA refers to *three years after the liability or obligation arose*. There is a difference between *liability* and *obligation*. In *Bischof & Anor v Werncog Pty Ltd* [2004] NSWADT the Tribunal noted that an obligation with respect to a permitted use is an ongoing obligation (at [87]).

54. Mr Gor submitted that the right of first refusal operated during the period 18 July 2010 to 17 July 2011 and there was no temporal restriction during this period when Payce might decide to sell and therefore be compelled to offer the premises to Castlereagh before disposing of the premises to a third party (if Castlereagh declined to take up the offer). Consequently Payce might decide to sell at any time during that period.

55. In fact, Payce chose to sell on 7 June 2011 and this is the date on which it was obliged to offer the premises first to Castlereagh. It failed to do so. Consequently, the breach of the obligation to sell to Castlereagh arose on 7 June 2011.

56. If one allowed for the 15 business day period prescribed in Special Condition 1(b) as the period the offer should have remained open to Castlereagh for acceptance, then the date of breach is extended to 28 June 2011. Further, the right of Castlereagh to have 15 business days to accept the offer does not affect Payce's right to stipulate as a condition that exchange and settlement occur on the same day. Castlereagh lodged its Application for Original Decision with the Tribunal on 15 July 2014 (that is, more than three years after the liability arose) and absent an extension of time under s71B(b), the Tribunal has no jurisdiction to hear the application (see *Mirvac Funds Ltd v Frost* [2009] NSWADT 94 at [17-18]).

Submissions from the second respondent

57. Mr Salama on behalf of Skybloo also submitted that the Tribunal should not exercise its jurisdiction to grant permission to Castlereagh to lodge its application out of time. These submissions follow those by Mr Gor on behalf of Payce that it was always the intention of Castlereagh to only renew the Lease rather than exercise the right of first refusal (even if it had the opportunity to do so) because it specifically retained the assistance of the franchisor to represent it in securing a new lease for it. Mr Salama says that if it was the intention of Castlereagh to raise complaints in relation to the denial of its rights in respect of the right of first refusal it would have taken up that opportunity also to engage the assistance of its franchisor to raise such a complaint. This was clearly not done and by inference undoubtedly evinces the intention of Castlereagh to only elect to affirm the Lease as well as to attempt to renew the Lease and not necessarily purchase the premises.

58. Mr Salama further submitted that even if the Tribunal grants leave to Castlereagh in respect of its application being out of time, the facts of the case warrant dismissal for the following reasons:

1. The application brought by Castlereagh must fail because of its continued delay in respect of commencing and bringing the matter for determination by the Tribunal. Further, the fact that Castlereagh failed and refused to make complaint in relation to its reported and alleged denial of its right of first refusal would substantiate a finding that its true intention was to elect or only affirm the Lease in its continuation rather than exercise a right to purchase the premises.
2. The conduct of Castlereagh assessed as a whole would suggest to the Tribunal an inference that it had abandoned its rights in respect of the right of first refusal in Special Condition 1.

59. Mr Salama, further asserted that an estoppel arises against Castlereagh in respect of its conduct generally. Castlereagh continued as lessee for a number of years under the Lease from 2011, when it first became aware of the sale of the premises to Skybloo and consequently its only primary intention was to continue the Lease and that it never had an intention to purchase the premises. There were in fact offers passing between Mr Usama Maqobleh and Skybloo's managing agent Mr John Wurth in around 2013. Notwithstanding

these offers, no sale came to fruition due to the financial inadequacies of Castlereagh at the time.

60. Mr Salama further submitted that although Skybloo purchased the premises in breach of Special Condition 1, it should be noted that Skybloo is a separate corporate entity to both Castlereagh and to Payce. The alleged fact that there was a common director between Skybloo and Payce at the time of the sale, Mr Klevansky, is undoubtedly a point of contention for Castlereagh, however Skybloo was formed after Mr Klevansky left Payce. What is important to note is notwithstanding the issue of the directorship at various times, the evidence of Mr Klevansky on this issue was that he did not read the Lease at the time he executed it on behalf of Payce nor did he read the Contract which was after he left Payce and, in addition, he relied on the expertise of those advising him at the time. Consequently, the real issue is that Castlereagh's failure and admissions at the time of and after it was notified of the sale is indicative of its election by waiver of its rights as argued.

Resolution by the Tribunal

Has there been a breach of Special Condition 1?

61. The first submission from Mr Gor is that if Castlereagh bought the premises, then on the transfer of the premises to Castlereagh the leasehold and freehold state will merge, (in that the same owner will hold both) has the consequence that Special Condition 1 could never be breached because it could never work.

62. That could not be the intention of the parties at the time the Lease was entered into, otherwise, a lessee could never have a valid right of first refusal. Further, the Tribunal is not satisfied that because the premises are sold subject to the Lease and there are conditions in the Contract requiring the purchaser to perform the lessor's covenants under the Lease, it does not follow that this of itself is a reason for the first right of refusal to be inoperative.

63. Firstly, the special conditions in the Contract are in addition to the general provisions of the standard contract and need not be included in the Contract. Even if they are included, all they do is ensure that if the Lease is on foot, then the incoming purchaser will continue to perform the obligations of the lessor under the Lease. Merger of estates is really no different to the situation when a lease is surrendered after settlement of the sale and then there would be no lease at a point in time. The fact that a purchaser covenanted to uphold the Lease would of course only apply whilst the Lease was operative. Therefore, absent the Lease, the ongoing obligations under the Contract would fall away.

64. If the Lease were to be removed, in relation to the doctrine of waiver, Mr Gor asserts on behalf of Payce that upon the breach of the Special Condition 1, then the lessee, Castlereagh, had an election between two inconsistent rights. Whether in fact an election arose is a matter to be considered later by Payce.

65. However, the Tribunal will now address the question of knowledge of Castlereagh, that is, when did the directors of Castlereagh become aware of the sale of the premises. In this regard, the Tribunal is not convinced that the directors of Castlereagh were properly

informed by the then lawyers for Payce about the sale. There is considerable doubt that the letter was sent. It refers to an alternate premises address, not 19 Hill Road, Homebush, and it was not sent to the registered office as required under clause 14.6 of the Lease. The letter required the lessee to provide a fresh bank guarantee as a replacement for a lost bank guarantee, not because of the sale but because the bank guarantee document was lost. The emphasis of the letter, to a reader, was that a replacement bank guarantee was required.

66. The correspondence from the agents RetailSpace is even less informative. It mentions the incorrect buyer and a different address to that in the Lease. Castlereagh acknowledged receipt of this correspondence. Another problem with the letter is the direction to continue to pay rent to the agent does not assist in conveying any material change in ownership of the premises and Mr Klevansky was associated with the old owner, Payce and now the new owner Skybloo.

67. It is evident from the statement of Mr Usama Maqableh that Castlereagh did not appreciate that the premises were sold and that consequently Payce had breached Special Condition 1 at that time. It is quite reasonable, in the view of the Tribunal, that a lay person on receipt of the correspondence from the agent would not comprehend that in fact a sale to an independent party had occurred in circumstances where the agent collecting the rent did not change and the purchaser appeared to be related to the vendor/lessor. All that was really pressed by the agent on behalf of Skybloo was the replacement of a lost bank guarantee. The Tribunal notes that Mr Usama Maqableh says he was informed of the sale in 2012 but also accepts that Castlereagh only became aware of the real consequence of the sale to Skybloo when the price was revealed by the agent John Wurth, in the context of the parties negotiating for the sale of the premises sometime in 2014.

68. Further, the Tribunal is not persuaded, even if the time of the breach was on 7 June 2011 or 15 business days thereafter, that Castlereagh had an election between two inconsistent rights and chose by continuing to stay in the premises and try to meet the obligations to pay rent that it waived its rights consequent upon the breach by Payce. A lessee that has the right to sue for breach of covenant and yet continues to remain in the premises and perform the obligations under the Lease is in the opinion of the Tribunal, not acting inconsistently. Just because a lessor has breached a provision of a lease does not of itself mean that immediately the lessee must exercise its rights to either seek specific performance or terminate the lease. On the contrary, I would have thought that it was quite feasible that Castlereagh would continue to occupy the premises and at the same time seek specific performance, especially, as the purpose of the right of first refusal was to provide Castlereagh with certainty of tenure in those premises.

69. In relation to waiver in general and particularly unilateral waiver, Mr Gor, supported by Mr J Salama, referred the Tribunal to a number of cases. The primary case is *Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA57* a joint judgment of the Justices of the High Court Gummow, Hayne and Kiefel and the following paragraphs are relevant to this discussion [58], [131], [132], [135] and [142]:

58. The doctrine of election is long established common law. As Jordan CJ pointed out in *O'Connor v SP Bray Ltd (1936) NSWLR* 'since the days of the Year Books it has been recognised

that you cannot have the egg and the halfpenny too' if, then something happens which gives rise to the existence of two alternative rights, and one of those rights is satisfied, the other is no longer available. A breach of contract by one party always gives the other party a right to recover damages for the breach. If serious, the breach will give the innocent party the right to treat the contract as at an end. But the innocent party need not accept the repudiatory breach and avoid the contract; the innocent party may choose to insist upon further performance.

131. Against unilateral 'waiver': To determine the ambit of any freestanding of unilateral legal principle of 'waiver', it is important to notice the conflicting views expressed, both in this court and by respective commentators.

132. In *Verwayen* [1990] 170CLR 394 Mason CJ took a very narrow view of 'waiver'. He did not accept that one party to an agreement could unilaterally waive its legal rights so that the contract would become unenforceable (absent estoppel or election, if that party related to change its mind [165]):

...generally speaking ... an existing legal right is not destroyed by mere waiver in the sense of an express or implied intimation with the person in whom the right is vested does not intend to enforce it. In these cases, unless consideration is present, something of the nature of an election or an estoppel.

135. This also appears to be the preferred position of Dr Seddon and Associate Prof Ellinghaus in their much respected Australian edition of Cheshire and Fifoot's *Law of Contract* 9th Aus ed (2008) at 90-91.

As with any promise, there are only three ways in which it can be legally enforceable: by contract, deed or estoppel. Therefore it is incorrect to assert that, by itself, non-enforcement of a contractual right, or even a positive promise not to enforce the right, amounts to a waiver in the sense of being precluded from enforcing that right. Only if the limitation period has expired is it correct to say the right has been given up (in the absence of contract, deed or estoppel), and, even then, it is still substantively in existence.

142. Nevertheless in *Glencore Potter LJ* delivering the reasons of the Court pressed the modern conceptualisations of 'waiver' a little further [paragraph 64].

Broadly speaking, there are two types of waiver strictly so called: unilateral waiver and waiver by election. Unilateral waiver arises where X alone has the benefit of a particular clause of a contract and decides unilaterally not to exercise the right or to forego the benefit conferred by that particular clause ... in such a case, X may expressly or by his conduct suggest that Y need not perform an obligation under the contract, no question of an election by X between two remedies or courses of action being involved. Waiver by election on the other hand is concerned with the reaction of X when faced with conduct by Y, or a particular factual situation which has arisen, which entitles X to exercise or refrain from exercising a particular right to the prejudice of Y. Both types of waiver may be distinguished from estoppel. The former looks principally to the position and conduct of the person who is said to have waived his rights. The latter looks chiefly at the position of the person relying on the estoppel. In waiver by election, unlike estoppel, it is not necessary to demonstrate that Y has acted in reliance upon X's representation.

70. The High Court summarised its understanding of the doctrine of waiver as follows at [145]:

145. However, for the doctrine of waiver to find a sure footing amongst the categories of legal relief, the circumstances of the waiver must be clear in the first place. To be binding, the parties must be subject to no relevant disability or disadvantage. Further, as to the parties to, and the circumstances of, the waiver, the facts must be such that it would be manifestly unfair for the party which had earlier waived its legal rights later to adopt an inconsistent position and to seek to enforce them. Cases of estoppel and binding election are the clearest examples of such a manifest unfairness. However, I would accept a residual category of manifest unfairness at common law that is distinct from estoppel and election. The law will provide relief by upholding a waiver in circumstances where not to do so would be manifestly unfair to the beneficiary of the waiver.

And the High Court then determined that a waiver was not established on the evidence.

71. However, The Tribunal is not satisfied that the application of these cases supports the submissions of the first and second respondents. Each case obviously ultimately turns on its own facts and evidence. As noted, even in *Agricultural and Rural Finance Pty Ltd v Gardiner*, the High Court found no waiver. In the present case it cannot be said that Castlereagh decided not to exercise a right. There is no evidence for this, there is only a question of delay. Further, there is no clear unequivocal representation by word and none by conduct that would allow Payce and Skybloo to understand that the right to sue was abandoned by Castlereagh. The Tribunal finds there is no estoppel as there is no prejudice to the respondents - where have the respondents altered their respective positions because of the alleged inaction by Castlereagh? The Tribunal could find no evidence that it would be manifestly unfair to the respondents to hold the inaction of the applicant to pursue its rights consequent upon the breach as not constituting waiver.

72. Furthermore, the Tribunal is of the view that clause 14.3(c) of the Lease is determinative of the issue. The parties had concluded in a written agreement, namely the Lease, that any right arising upon a default is not waived by a failure to exercise or a delay in exercising that right. This is the case here in that Castlereagh delayed exercising its right to sue for breach of Special Condition 1. In these circumstances there is no waiver by Castlereagh. The only issue to be determined is whether Castlereagh commenced its claim within the time it requires for the Tribunal to exercise its discretion under s71B of RLA.

73. The Tribunal notes the evidence from Mr Klevansky that he says that when he executed the Agreement for Lease and the Contract he did not read these documents and did not appreciate that a right of first refusal was granted to the applicant. Presumably Mr Klevansky is a busy person and did not have the time to read them. In fact he says he relied on his professional advisors, but then only required of them limited and general advice. However, the respondents in the submissions from their respective Counsel ask the Tribunal to determine that the applicant after receiving the correspondence from the agent (and possibly from the lawyers for Payce) that the premises were sold had an immediate right of election that had to be exercised and the failure to do so constituted a waiver of this right. The Tribunal is prepared to grant to the applicant the same commercial reality that operated around Mr Klevansky that it is excusable to not read or comprehend the substance of

documents or communication and such failure to comprehend the significance of what is being told to you does not constitute a waiver of any right.

74. As noted, the Tribunal is not persuaded that Castlereagh knew at the time of the breach of Special Condition 1 that it had a right to seek enforcement of the right of first refusal. The attainment of such knowledge from Payce and Skybloo is very unsatisfactory, to say the least. Using the test propounded by Mr Gor for unilateral waiver, the Tribunal holds that no reasonable person in the position of the directors of Castlereagh would have understood that a sale had taken place, all that seemed to have occurred is perhaps an internal change of lessor and the need for a new bank guarantee. The actual time when the directors became aware is sometime in 2012 and more probably in 2014 when the price was revealed. However, the 2012 date is sufficient to allow the Application for Original Decision to be filed in time.

75. If the Tribunal is incorrect in its assessment of when Castlereagh first became aware of the breach of Special Condition 1, then the Tribunal will consider the application by the applicant to exercise its discretion under s71B(3).

76. As acknowledged, Castlereagh, pursuant to s7B(3)(c) must satisfy the Tribunal that it is just and reasonable to allow the filing out of the 3 year period. As stated in PolyLux at [44]:

the primary test for determination as to whether or not an extension of time should be granted is whether there can be a fair trial of the issues between the parties... in other words, whether there is prejudice to be suffered by the defendant if the extension is granted.

77. As noted, the parties have been in dispute and litigation about the Lease for some 3 years at least. The facts of this dispute are fully known to the parties. I can see no prejudice to the respondents. Mr Gor mentions justice delayed is justice denied. However, while there might be delay it is not the situation that this dispute has arisen suddenly, it has been the contention of Castlereagh for many years that it wanted to remain in the premises. Further, it is not just Payce that overlooked the rights in Special Condition 1, Skybloo also did so. The unsatisfactory circumstances surrounding the giving of formal and proper notice to Castlereagh of the sale also suggests to the Tribunal to exercise its discretion.

78. A further submission was made by the respondents to the effect the Tribunal should not grant the extension because it would be futile for Castlereagh to proceed as at the time of the sale, Castlereagh was constantly in arrears of rent and did not have the capacity to pay for the premises, even if offered. No real evidence was led on this point and the Tribunal was asked to draw the necessary inference. The Tribunal does not accept the proposition put that just because a party is in arrears of rent means that it did not have the capacity to borrow money in order to secure the purchase of the premises if offered.

79. The Tribunal is satisfied that it is just and reasonable to allow Castlereagh to lodge its retail tenancy claim in these proceedings.

80. The Tribunal orders:

1. Castlereagh can lodge its retail tenancy claim in these proceedings notwithstanding it is more than 3 years after the liability or obligation that is the subject of the claim arose.

2. Payce breached Special Condition 1 by not offering the purchase of the premises to Castlereagh.
3. The matter is relisted in the first directions hearing 14 days after publication of these orders for determination of damages for breach.

D Bluth

Senior Member

Civil and Administrative Tribunal of New South Wales

20 April 2017

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar