SUPREME COURT OF QUEENSLAND

CITATION:	*Tyrrell & Anor v Jesbro Enterprise Pty Ltd* [2017] QSC 55
PARTIES:	**MICHAEL JAMES TYRRELL AND JAN-MAREE TYRRELL** (Applicants) **v** **JESBRO ENTERPRISE PTY LTD ACN 087 534 030** (Respondent)
FILE NO/S:	S167 of 2017
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 April 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	7 April 2017. Final submissions received 11 April 2017
JUDGE:	McMeekin J
ORDER:	**Application dismissed**
CATCHWORDS:	APPLICATION – TERMINATION OF LEASE – BREACH OF LEASE AGREEMENT – FAILURE TO REMEDY BREACH – NOTICE TO REMEDY BREACH – where the Notice served on the respondent failed to contain the "Note" which appears in the approved form – whether despite the non-compliance with the approved form, the Notice remains valid. *Acts Interpretation Act* 1954 s 48A *Property Law Act* 1974 s 124 *Nashvying P/L & Ors v Giacomi* [2007] QCA 454, cited *Ex parte Taylor* [1980] Qd R 253, cited *Forsyth v Gibbs* [2009] 1 Qd R 403, cited *Re Forest Enterprises Ltd v FEA Plantation Ltd* (2011) 195

FCR 97; [2011] FCAFC 99, cited

COUNSEL: TA Arnold for the applicant

Mr McDonald (Director) for the respondent (self-represented)

SOLICITORS: McCarthy Durie Lawyers for the applicant

Mr McDonald for the respondent (self-represented)

[1] **McMEEKIN J:** The applicants apply for a declaration that the lease between the parties was validly terminated on 13 February 2017 and for consequential orders. Mr McDonald, who is the sole director of the respondent, appeared in person.

[2] The basis of the applicant's claim to be entitled to the declaration that they seek is that the respondent has failed to remedy its breach of the lease (identified as a failure to pay rent and council rates) following service of a Notice to Remedy Breach of Covenant ("the Notice") delivered pursuant to, and purportedly complying with, s 124 of the *Property Law Act* 1974. Section 124(8) provides that "the notice mentioned in this section shall be in the approved form".

[3] After argument in the matter Mr Arnold, counsel for the applicants, provided supplementary submissions in which he brought to my attention that the Notice served on the respondent failed to contain the "Note" which appears in the approved form:

> "[NOTE: The lessor will be entitled to re enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time – see s 124 of *Property Law Act 1974*]"

[4] It has long been accepted that a failure to include the note was fatal to the validity of a notice given under s 124: *Nashvying P/L & Ors v Giacomi* [2007] QCA 454 at [62]-[63] per Muir JA, McMurdo P and Dutney J agreeing; *Ex parte Taylor* [1980] Qd R 253.

[5] In those supplementary submission the applicants argue that despite that non-compliance the Notice remains a valid one. It is contended that the Notice contained the essential information conveyed by the note and that substantial compliance was sufficient. It was pointed out that there had been a change to the *Acts Interpretation Act* 1954 which had the effect of permitting substantial compliance with an approved form – see s 48A.

[6] My attention was drawn to two matters. The Notice contains as part of its narrative, and not in a separate note at the foot of the form: "Should you fail to remedy the breach you may be liable to forfeiture and termination of the lease and an action for damages as a consequence thereof". The covering letter accompanying the Notice also

advised: "Failure to remedy the breach by the time specified in the notice will give the Lessor the right to terminate the lease."

[7] Section 124(1) of the *Property Law Act* 1974 relevantly provides that a right of forfeiture under any provision in a lease for a breach of covenant may not be enforceable by action or otherwise unless the lessor serves on the lessee a notice:

> "(a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) …
>
> and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy …"

[8] In *Nashvying* Muir JA said that the purpose of the note "is to give to the defaulting lessee notice of what may be done to remedy default and of the consequences of failure to remedy".

[9] In my view the information contained in the covering letter can immediately be put to one side. It is not possible to remedy a defective notice by such means. It is the Notice which must be in strict or substantial compliance with the approved form.

[10] The issue then is whether the Notice provides the same substantial information as the approved form. In my view it clearly does not. There are four relevant differences.

[11] The first is that the relevant information is not contained in a note at the foot of the form. The advantage of a note so positioned is that it highlights for the recipient the relevant and important information.

[12] Secondly, there is a substantial difference between advising that the "lessor **will be entitled** to re enter or forfeit the lease" (as the approved form requires) and advising that "you **may be liable** to forfeiture and termination of the lease" (as the Notice here provided).

[13] Thirdly, the information fails to inform the recipient that it is a failure to comply with the notice "within a reasonable time" that is the significant point. There was no reference to "reasonable time" in the Notice delivered.

[14] Fourthly, the Notice does not draw the recipient's attention to s 124 of the *Property Law Act* as the approved form requires. There is a reference to the section at the head of the Notice, as appears in the approved form, but that, it seems to me, conveys a different message to a reference in a note at the foot of the notice and in the context required by the approved form. The latter suggests to the recipient that it is to the section they should look for their obligations. The former merely suggests that the Notice is given under the section referred to. There is good reason for the two separate references in the approved form.

[15] Given my view it is not necessary to go on and consider the merits of the substantive arguments. However it may assist if I observe that the respondent's submissions are misconceived. The respondent contended that the applicant had, in breach of the lease, failed to abate the rent because the premises had suffered "damage" within the meaning of the term as used in the subject Lease is misconceived.

[16] A little over three years ago the respondent purchased an assignment of the business of the motel for a very substantial sum - $685,000. There remains 12 years of the 15 year lease period to run. The material shows that over the period of the respondent's occupation, the applicants have been refurbishing the bathrooms of the units of the motel complex leased by the respondent. This work was undertaken with the knowledge and consent of the respondent. Unsurprisingly the work has resulted in dust and noise and, of course, the unavailability of the units being refurbished. It has taken longer than expected, or at least longer than the respondent expected.

[17] The usual effect of work done to bring about refurbishment of the units in the motel, work done with the agreement and consent of the respondent, cannot in my view be "damage" in the sense that term is used in the Lease.

[18] The highest the respondent's argument can be put is that work that has taken longer to effect than originally envisaged, which seems to be the real complaint, may justify a complaint that the respondent's right to quiet enjoyment has been adversely affected. The respondent may, as a result, have a right to damages. Such a right may in turn give rise to an equitable set-off. For there to be an equitable set-off, the set-off must essentially be bound up with and go to the root of, challenge, call in question, or impeach the title of the claimant: *Forsyth v Gibbs* [2009] 1 Qd R 403. It is very likely that if the respondent's complaints can be substantiated this condition can be met.

[19] Even if that be so it does not follow that the respondent is thereby entitled to avoid its obligations under the lease to pay rent and council rates.

[20] So far as the rents are concerned the applicants rely on cl 3.1(d) of the Lease which provides: "the tenant must not make any deduction from the rent". As the applicants submit the effect of such a clause has been held to mean that no right of equitable set-off can be maintained so as to justify non-payment of rent: *Re Forest Enterprises Ltd v FEA Plantation Ltd* (2011) 195 FCR 97; [2011] FCAFC 99 [135]–[163].

[21] But more fundamentally there is no evidence that would justify a finding that it is just that the respondent be relieved of forfeiture. Given the agreement between the parties that the work be done, some adverse impact by way of disruption of the business was inevitable. As Mr Arnold submits there is no evidence of the impact of the alleged delays on the takings of the business at all, let alone that would justify non-payment of the rent and outgoings that the respondent is obliged to meet under the terms of the lease. The evidence led is that the monies outstanding now total in excess of $166,000. As well the respondent has made it plain that there is no present intention, and perhaps capacity, to provide any security for the outstanding amounts.

[22] In my view, on the evidence presently before the Court, relief against forfeiture would not be appropriate, despite entertaining, as I do, some sympathy for the respondent's position. The respondent stands to lose a very valuable asset.

Conclusion

[23] Given the defect in the Notice the applicants are not entitled to the relief that they seek and the application should be dismissed.

[24] I commend the solicitors and counsel for bringing to my attention the deficiency in the Notice. I appreciate of course that it was not in their clients' interests that they do so. But their ethics gave them no choice.

[25] On the present material the breach of the lease is not in issue. The substantive merits are with the applicant. The respondent was not represented and so it may be there is no basis for an award of costs. However if it be relevant, in the exercise of my discretion and given the circumstances I make no order as to costs.

Orders

[26] The application is dismissed. There is no order as to costs.

[27] As I have not heard the respondent in relation to these orders I give liberty to apply on the giving of three days' notice.