

REPORT
OF THE
LAW REFORM COMMISSION

ON OPTIONS IN LEASES

(L.R.C. 5)

1968

PREFACE

The Law Reform Commission has been functioning since the beginning of 1966 and has been constituted by the Law Reform Commission Act, 1967. The Commissioners are—

The Honourable Mr Justice Manning, Chairman.

Mr R. D. Conacher, Deputy Chairman.

Professor W. L. Morison.

Mr J. O. Stevenson.

The Executive Member of the Commission is Mr R. E. Walker. The offices of the Commission are at Park House, 187 Macquarie Street, Sydney.

This report is the fifth report of the Commission made to the Attorney-General pursuant to a reference by him to the Commission. The short citation for this report is L.R.C. 5.

LAW REFORM COMMISSION

REPORT ON OPTIONS
IN LEASES

To the Honourable K. M. McCaw, M.L.A.,
Attorney-General for New South Wales.

In your letter dated 9th June, 1967, you made a reference to this Commission in the following terms:

“To review the law relating to provisions in leases enabling the tenant to renew the lease or to purchase the leased premises and incidental matters.”

The amendments suggested in the proposed Bill attached to this report are required for the purpose of assisting tenants who accept or who have accepted leases containing an “option to purchase” or “option of renewal”, but also containing a quite common form of condition to the exercise of such option to the effect that the tenant “shall in the meantime” (i.e., up to the time of exercise of the option) “duly perform and observe the covenants and agreements by and on the part of the tenant contained in this lease up to the expiration of the term hereby granted.” We take the words quoted from the report of *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.* (1957 59 S.R. 122, at pp. 122, 123).

The facts in that case were that the lessee had an option to renew the lease which he had purported to exercise. The option was expressed substantially in the terms that if the tenant should wish to take a renewed lease and should give notice to the lessor within a limited time and should in the meantime duly and *punctually pay the rent* reserved by the original lease and perform the covenants of the original lease, then the lessor was to grant a new lease. Notice exercising the option was duly given by the lessee but the lessor refused to grant the new lease on the ground that the tenant had not during the original lease *punctually paid the rent*. The rent had been paid not on the due dates but by irregular payments during the term of the lease, but no objection had been raised by the lessor, who had always accepted such payments even though overdue. There was no suggestion that any rent was owing at the date of the notice exercising the option. The Full Court held that “the due and *punctual* payment of rent” was a condition precedent to the exercise of the option. Since the judgment of the Full Court was delivered, solicitors acting for

lessees have usually insisted on the insertion, in a lease containing an option, of a clause enabling the lessee to exercise his "right of renewal or right of purchase" if there shall not be *at the time of the exercise of such option* any existing breach or non-observance of any of the covenants on the part of the lessee contained in the lease.

The result of the judgment of the Full Court would appear to be that a breach of a covenant, however trivial and however long before the time for exercise of the option the breach may have occurred, prevents the exercise of the option although the lessor may have waived the breach so far as concerns forfeiture of the original term.

Such a condition could operate harshly, especially where the option is an option to purchase the leased property. In such a case, if the option is exercised, the landlord would have no further interest in such property other than his lien for purchase money. In such circumstances the condition would operate merely as a penalty to secure performance of the covenants during the term and could inflict on the tenant a loss in an amount unrelated to any damage suffered by the lessor consequent on a breach of covenant; it could confer on a lessor a windfall beyond contemplation at the date of the original lease, e.g., the common case where the value of the freehold of the leased property has increased between the date of the grant of the original lease and the date for exercise of the option. Unscrupulous lessors could take advantage of every circumstance which might, in such a case, enable him to avoid the option for purchase.

Section 129 of the Conveyancing Act, 1919–1967, makes certain provisions for the relief of tenants in regard to rights of re-entry or forfeiture and the proposed new sections 133c to 133g extend relief—but only upon application to the Court—in regard to options and like rights of renewal or purchase.

The object of the proposed Bill is—of course—to enable the Court to give effect to an "option of renewal" or an "option to purchase", if the Court in all the circumstances of the matter, considers that this should be done, i.e., to enable a lessee to make application to the Court for the enforcement against the lessor of the lessee's option notwithstanding some default by the lessee in complying with the terms of his lease. Pursuant to section 133E an order may be made by the Court whether or not the lessor has already granted any estate or interest in the subject property to some person other than the lessee, e.g., has already conveyed his reversion to such other person. The result will be that the Court may grant relief to the lessee as against not only the lessor but also an assignee of the reversion. Thus, if under the general law the option is binding on the assignee of the reversion, the option may be enforced against the assignee notwithstanding the breach of condition from the consequences of which the Court has granted relief.

It will be noted that although section 53 (3) of the Real Property Act, 1900-1967, purports to protect an "option to purchase" the subsection refers only to *registered* leases for a term exceeding 3 years, and in the form prescribed by that Act; even when the lease is registered the option may be exercised only if "the lessee shall pay the purchase money stipulated and otherwise observe his covenants expressed and implied in such instrument"; i.e., the option could be avoided by the lessor if facts existed of the nature referred to in the "McCaul" case above-mentioned. Although section 116 of the Conveyancing Act provides that Part VIII shall apply to leases and sub-leases of land under the provisions of the Real Property Act "notwithstanding anything in that Act contained", we consider it advisable to make a specific amendment to section 53 (3) of the Real Property Act so as to make it clear that that subsection will operate where relief has been granted under the proposed section 133E of the Conveyancing Act.

The provisions in the proposed new sections 133C to 133G will apply to leases and under-leases of land whether registered or not and whether or not the land is under the provisions of the Real Property Act—*see* section 116 of the Conveyancing Act and the relative definitions in section 128.

In our work under this reference we have considered the comparable legislation in New Zealand, sections 120 and 121 of the Property Law Act, 1952. The proposed Bill gives effect to the broad principles of those sections.

We note with gratitude the help which we have received from the Council of the Law Society of New South Wales and from Mr P. J. Grimes who is an examiner of titles and is executive member of the Property Law Revision Committee.

R. D. CONACHER, Deputy Chairman.

J. O. STEVENSON, Member.

13th September, 1968.

A BILL

To make provision with respect to options of purchase and renewal and other like rights of lessees; for that purpose to amend the Conveyancing Act, 1919, as amended by subsequent Acts, and the Real Property Act, 1900, as amended by subsequent Acts; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title and citation.

1. (1) This Act may be cited as the "Conveyancing (Amendment) Act, 1968".

(2) The Conveyancing Act, 1919, as amended by subsequent Acts and by this Act, may be cited as the "Conveyancing Act, 1919-1968".

(3) The Real Property Act, 1900, as amended by subsequent Acts and by this Act, may be cited as the "Real Property Act, 1900-1968".

Amendment of Act No. 6, 1919.

2. The Conveyancing Act, 1919, as amended by subsequent Acts, is amended—

Sec. 2. (Division of Act.)

(a) by inserting in section two immediately before the matter relating to Part IX the following new matter—

DIVISION 4.—*Lessee's options*—ss. 133C-133G.

Sec. 128. (Interpretation.)

(b) by omitting from section one hundred and twenty-eight the word and figure "Division 3" and inserting in lieu thereof the words and figures "Divisions 3 and 4";

Part VIII. (Leases.)

(c) by inserting in Part VIII next after section 133B the following new Division—

DIVISION 4.—*Lessee's options*.

Interpretation.

133C. For the purposes of this Division—

"Breach", in relation to a condition, includes a non-performance or non-fulfilment of the condition.

"Condition", in relation to a lessee's option, means a term or condition (express or implied and whether or not contained in the lease) upon or subject to which—

(a) the lessee's option is exercisable; or

(b) a lessee or any person deriving title through a lessee is, after exercise of the lessee's option, entitled to a conveyance, transfer, renewal, extension or grant pursuant to the lessee's option but does not

include a stipulation fixing the time for exercise of a lessee's option or the time within which a lessee's option is to be exercised where it is further stipulated that the time so fixed shall be of the essence of the contract.

"Lessee's option" means—

- (a) an option of purchase, right of pre-emption or other like right exercisable by a lessee in respect of the whole or any part of the reversion of the lessor in the whole or any part of the demised premises; or c.f. 15 & 16 Geo. 5, c. 22, s. 10 (1), class C (iv).
- (b) an option or other like right for the renewal or extension of a lease, or for a new lease, exercisable by the lessee, in respect of the whole or any part of the demised premises.

133D. The provisions of this Division shall apply to a lessee's option given before or after the commencement of the Conveyancing (Amendment) Act, 1968, and shall have effect notwithstanding any stipulation to the contrary. Application.

133E. (1) The Court may make orders for the relief of a lessee or any person deriving title through a lessee from the consequences of any breach of any condition of a lessee's option and whether or not the lessor may have granted any estate or interest in the demised premises to any person other than the lessee and, in particular, may order that an exercise of a lessee's option shall be valid, or that the lessee or any person deriving title through the lessee shall be entitled to a conveyance, transfer, renewal, extension or grant, as the case may be, pursuant to a lessee's option, notwithstanding any breach of any condition of the lessee's option. Relief from consequences of breach.

(2) The Court may make an order under subsection one of this section upon terms as to costs, expenses, damages, compensation or otherwise.

133F. An application for relief under section 133E of this Act may be made— Procedure.

- (a) in proceedings instituted for that purpose; or
- (b) in proceedings instituted for determining or enforcing any rights arising out of a lessee's option or arising out of a breach of any condition of a lessee's option.

Limitation.

133G. Where a lessor serves on a lessee a notice objecting to give effect to a lessee's option on the ground of any specified breach of any specified condition of the lessee's option, an application under section 133E of this Act by the lessee or any person deriving title through the lessee for relief from the consequences of the breach shall not be maintainable against the lessor unless made in proceedings instituted within three months after service of the notice.

Amendment of Act No. 25, 1900. Sec. 53. (Lands under the provisions of this Act—how leased.)

3. The Real Property Act, 1900, as amended by subsequent Acts, is amended by inserting in subsection three of section fifty-three of that Act after the word "observe" the following—“(unless relieved under section 133F of the Conveyancing Act, 1919, as amended by subsequent Acts)”.