VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP125/2014

CATCHWORDS

RETAIL LEASES. 1. Construction of lease as to when rent review notice may be given. 2. Alleged equitable assignment of lease. Part performance principles. Finding of no equitable assignment of lease. Finding that if there is an assignment, a proceeding to enforce the covenants of the lease against the assignee must be commenced before the expiry of the lease.

FIRST APPLICANT	Euli Nominees Pty Ltd (ACN 004 868 366)
SECOND APPLICANT	Finley Holdings Pty Ltd (ACN 080 365 984)
FIRST RESPONDENT	Kentish Sands Pty Ltd (ACN 063 862 037)
SECOND RESPONDENT	Gordon Malcolm McKee
THIRD RESPONDENT	Carol Denise McKee

VCAT REFERENCE NO. BP126/2014

FIRST APPLICANT	Euli Nominees Pty Ltd (ACN 004 868 366)
SECOND APPLICANT	Finley Holdings Pty Ltd (ACN 080 365 984)
FIRST RESPONDENT	Seaville Pty Ltd (ACN 006 554 856) (deregistered 26 September 2016)
SECOND RESPONDENT	Giovanni Versace
THIRD RESPONDENT	Francesco Versace
FOURTH RESPONDENT	Anna Versace
FIFTH RESPONDENT	A.L. - R.V. Pty Ltd (ACN 130 051 928)
WHERE HELD	Melbourne
BEFORE	Senior Member Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	5 April 2017
DATE OF ORDER	5 May 2017
CITATION	Euli Nominees Pty Ltd v Kentish Sands Pty Ltd, Building and Property [2017] VCAT 565

ORDERS

Proceeding BP125/2014

1. A specialist retail valuer, to be appointed by the Small Business Commissioner, is to determine the current market rent payable by the first respondent under the lease the subject of this proceeding from 1 July 2013, 1 July 2014 and 1 July 2015.
2. Costs reserved with liberty to apply. If no application is received by 31 May 2017, there will be no order as to costs.

Proceeding BP126/2014

1. The applicants' claims, listed for hearing before me pursuant to the orders made 1 February 2017, are dismissed.
2. Costs reserved with liberty to apply. If no application is received by 31 May 2017, there will be no order as to costs.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicants:	Mr J Masters of Counsel
For Respondents	Mr P Best of Counsel (for the respondents other than Seaville Pty Ltd which is deregistered)

REASONS

INTRODUCTION

1 These proceedings concern two retail premises leases in respect of premises at 217-223 Chapel Street, Prahran.

2 Proceeding BP125/2014 concerns the lease of shops 2, 5, 7, 9, 10, 11 and part of shop 8 and a first-floor store at the premises. The applicants, Euli Nominees Pty Ltd ("**Euli**") and Finley Holdings Pty Ltd ("**Finley**"), are the landlords. The first respondent, Kentish Sands Pty Ltd ("**Kentish**"), is the tenant. Mr McKee and Mrs McKee, as guarantors of the obligations of Kentish, were initially named as the second respondent and third respondent respectively in the proceeding. Following the death of Mrs McKee in May 2016, Mr McKee in his capacity as trustee of the estate of the late Mrs McKee was substituted as the third respondent. The lease remains on foot.

3 Proceeding BP126/2014 concerns the lease of shop 1, part of shop 8 and suites 8 and 9 at the premises. The applicants are the landlords. Seaville Pty Ltd ("**Seaville**") and Azzimo Pty Ltd (formerly named F.A.V. Nominees Pty Ltd) ("**Azzimo**") became co-tenants on 1 April 2003. The applicants assert that the fifth respondent, AL-RV Pty Ltd ("**ALRV**") became the tenant by equitable assignment of the lease in around 2009. The second third and fourth respondents, Giovanni Versace, Francisco Versace and Anna Versace respectively, executed a guarantee on 1 April 2003 whereby they guaranteed the obligations of Seaville and Azzimo under the lease. The applicants say that, with the assignment of the lease to ALRV, the second, third and fourth respondents became guarantors in respect of ALRV's obligations as lessee. The tenancy came to an end on or about 1 September 2014 when the premises were vacated. Seaville was deregistered on 26 September 2016.

4 In the two proceedings, the applicants brought a number of claims including claims in respect of arrears of outgoings, rent and alleged failure to make good. By reason of the commonality of issues, and commonality of interests behind the "tenant" respondents, the proceedings were listed for hearing together.

5 The hearing commenced before me on 28 November 2016, however, by consent the proceedings were referred immediately to a compulsory conference before another Tribunal member. The compulsory conference extended into the following day and the parties reached settlement on most of the issues in dispute. By consent orders made 1 February 2017, the remaining issues in the proceedings were listed for hearing before me on 5 April 2017.

6 In proceeding BP125/2014, the parties remain at odds in respect of market rent review under the subject lease. Determination of the issue is a matter of construction of the lease.

7 In proceeding BP126/2014, the applicants again seek a determination in respect of market rent review, the determination of which rests on the underlying issues as to whether the subject lease was assigned to ALRV, and whether the covenants under the lease are enforceable as against ALRV. If it is determined that the lease was assigned and is enforceable, there remains dispute as to whether the second, third and fourth respondents are, by reason of the assignment, guarantors in respect of ALRV's obligations.

8 The hearing proceeded before me on 5 April 2017. Having regard to the limited nature of the remaining issues in dispute, the parties agreed to present relevant facts by reference to witness statements filed in the proceeding, without requiring cross-examination of witnesses.

9 Mr Masters of Counsel represented the applicants and Mr Best of Counsel represented the respondents (other than the deregistered Seaville). Extensive and helpful written submissions were filed and served prior to the hearing.

10 I will consider proceeding BP125/2014 first.

PROCEEDING BP125/2014

11 The subject lease was entered into on 1 May 1994 with an initial term of two years and two months expiring on 30 June 1996. The lease provided for seven further terms of three years each. Kentish exercised its option for a second term of three years which commenced on 1 July 1996. There has since been six further three-year renewal terms, commencing respectively on 1 July in 1999, 2002, 2005, 2008, 2011 and 2014.

12 Clause 8(a) in the lease provides that the rental payable is as stated in the schedule to the lease, and the rent may be reviewed and adjusted at the times and in the manner set out in the schedule. The schedule sets out the sum of rent for the initial period and identifies "*dates of rental review*" as "*Upon each successive anniversary of the commencement date pursuant to clause 8".*

13 Clause 8 (b) of the lease provides that at any time during the period of six months (each of such periods being a "*review period*") prior to or subsequent to the dates for review of rental set out in the schedule, and any renewal of the lease pursuant to clause 7, (each such date being an "*adjustment date*"),

- the landlords may give a written notice to Kentish setting out the amount which the landlords assess to be a proper annual rent having regard to the current open market rental value thereof and to all matters then relevant to the determination of such annual rental, and

- unless within one month from the date on which the landlords give such notice Kentish notifies the landlords by notice in writing that Kentish disputes such assessment, the annual rent shall be varied accordingly.

14 Clause 8(c) of the lease provides that in the event Kentish disputes the landlords' assessment of rent, and the parties after consultation are unable to reach agreement within 30 days of the adjustment date, then the proper annual rent, having regard to the current open market rental value thereof and to all matters then relevant to the determination of such annual rental, shall be determined by an independent valuer appointed by the President for the time being of the Australian Institute of Valuers, and

i. any determination by the valuer shall be made as an expert and not as an arbitrator;

ii. in the case of any review of rental during the term of the lease, but not at the commencement of any further term, the annual rent so determined shall in no case be more than the annual rental payable at the adjustment date plus an amount equal to 7% of such annual rent;

iii. all costs incurred in connection with the determination of the annual rent shall be paid by the landlords, for the one part, and Kentish for the other part, equally unless the valuer determines the annual rent to be equal to or greater than that specified in the landlords assessment notice given under clause 8 (b), in which case the costs of the determination shall be borne by Kentish;

iv. the annual rent payable under the lease shall be the amount so determined, provided that in no event shall the rental payable by Kentish in any successive year be in excess of 107% of the rent payable in each relevant proceeding year;

v. any variation in the annual rent resulting therefrom shall take effect on and from the adjustment date.

15 Clause 8(e) of the lease makes provision for payment of rent pending determination of rent review, with adjustment (calculated from the adjustment date) to be made once the rent review is determined.

16 Clause 8(f) of the lease provides:

> If the Lessor shall fail to exercise its right under Clause 8(b) within any review period then such right may be exercised at any time prior to the next review period and in every such case the provisions of this Clause 8(b)-(e) shall be interpreted in all respects as if the adjustment date had fallen on the actual date of the notice from the Lessor to the Lessee under clause 8(b) hereof (as modified by this clause 8 (f)). No succeeding review period shall be postponed by reason of the operation of this Clause in relation to any preceding review period.

[underlining added]

17 Having regard to the successively renewed terms of the lease as referred to above, the *adjustment date* referred to in clause 8 (b) of the lease has been 1 July each year since 1996, and the *review period* referred to in clause 8 (b) has been 1 January to 31 December each year.

18 The parties agree to the appointment of a valuer to determine current market rent payable from the adjustment dates 1 July 2013, 1 July 2014 and 1 July 2015. In respect of these three adjustment dates, it is accepted that clause 8(c) of the lease is operative, and the parties agree that it is appropriate that a specialist retail valuer be appointed by the Small Business Commissioner.

19 The applicants say that the valuer should also determine current market rent for a further period, namely from 13 March 2013. On that date, 13 March 2013, the applicants gave written notice to Kentish of their assessment of proper annual rent to apply from that day. The applicants say that clause 8(f) of the lease applies to that notice. That is, they say that having failed to give notice of their assessment of proper market rent within the review period that concluded on 31 December 2012, they are entitled to give later notice under clause 8(f), and that the adjustment date will be taken to be the date that the notice was given, namely 13 March 2013.

20 Kentish says that the notice of 13 March 2013 does not attract the operation of clause 8(f) because the notice was not given prior to the next review period.

21 As noted above, as defined under the lease each review period runs from 1 January to 31 December each year. If the words "*at any time prior to the next review period"* in clause 8(f) are taken to mean *at any time prior to the commencement of the next review period*, clause 8(f) is rendered superfluous because there is simply no time between the conclusion of one review period and the commencement of the next.

22 The applicants say that the clause 8(f) should be construed in a way that does not render it superfluous. They say that the very existence of clause 8(f) in the lease is reason to conclude, objectively, that the parties intended the clause to have a purpose, and not to be superfluous. They say that to give it purpose, a reasonably objective purpose, the relevant words in the clause should be interpreted to mean *at any time prior to the conclusion of the next review period*, or in other words, at any time *during* the next review period.

23 The respondents say that clause 8(f) is not ambiguous or capable of more than one meaning, and must be construed in accordance with the general principles of construction. Effect must be given to the unambiguous words of the text of the document. It is not a matter for the Tribunal to remake or amend a contract for the purpose of avoiding a result which might be considered inconvenient or unjust.

24 I accept the respondents' submission. In my view the words in clause 8(f) are clear and unambiguous. The words *at any time prior to the next review period* simply do not mean at any time *during* the next review period.

25 In my view, the definition of "*review period"* in clause 8(b) does not create ambiguity within the terms of the document. Rather, the definition has the effect of rendering clause 8(f) superfluous. But this, in my view, is not reason enough to import a construction on words entirely at odds with their plain meaning.

26 The definition of *review period* is itself dependent on definition of the dates for review of rental which, by reference to the schedule to the lease, means each anniversary of the commencement date.

27 One might ask why the parties agreed to terms which render clause 8(f) superfluous. It might be that the parties utilised a standard form document and did not appreciate the effect of annual rental review dates as specified in the schedule to the lease. It might be that the parties did not turn their minds to clause 8(f) at all. But this is speculation on my part.

28 The construction of the whole of clause 8 in the lease by reference to its plain text does not make the lease unworkable or uncommercial in respect of rent reviews. It is not particularly unusual that particulars presented in a schedule to a lease render one or more of the general clauses in the lease superfluous. There is no sound justification for a construction of the text of the lease in a manner aimed at creating a meaning or purpose that is not reflected in the clear and plain text of the lease.

29 For the above reasons I find that there should be no adjustment of rent from 13 March 2013. I will make the order that the parties agree should be made in the event of such finding, namely:

> A specialist retail valuer, to be appointed by the Small Business Commissioner, is to determine the current market rent payable by the first respondent under the lease the subject of this proceeding from 1 July 2013, 1 July 2014 and 1 July 2015.

PROCEEDING BP126/2014

Background/chronology

30 The subject lease was entered into by the applicants, Euli and Finley, as landlords, and by Seaville and Azzimo as tenants, on 1 April 2003. The term of the lease was three years, with provision for four further terms of three years each.

31 Also on 1 April 2003, the second, third and fourth respondents, Giovanni Versace, Francisco Versace and Anna Versace respectively (collectively "**the guarantors**") entered into a guarantee by which they guaranteed the obligations of Seaville and Azzimo under the lease.

32 The lease provided for rental reviews every 12 months.

33 The lease was renewed for a further three year term commencing 1 April 2006.

34 The lease was varied by deed of variation dated 23 April 2007. The effect of the variation was to confirm rental (market) reviews effective from the commencement of each renewal term, and to confirm that between each renewal term rent would increase annually by 4%.

35 On 6 March 2008, ALRV was registered as a corporation. An ASIC search extract of ALRV dated 1 December 2016 records that Giovanni Versace has been one of two directors of ALRV since its registration.

36 An ASIC search extract of Seaville records that Giovanni Versace was initially one of a number of directors of the company, and that he was the sole director from 18 March 2008 until the company was deregistered on 26 September 2016.

37 An ASIC search extract of Azzimo records that Giovanni Versace became the sole director of Azzimo from 24 April 2008 until the company was deregistered on 5 March 2010.

38 On 21 January 2009, Seaville and Azzimo exercised their option to renew the lease for a further term of three years commencing on 1 April 2009.

39 On 6 February 2009, the respondent's solicitors, Trumble Szanto, sent a letter to the Gray & Johnson, the agent of the applicants, stating amongst other things:

> re: Your client : Finley Holdings Pty Ltd and Euli Nominees Pty Ltd
>
> Assignment of lease: Shop 1, 217 – 223 Chapel Street Prahan (and part of Shop 8 and Suites 8 and 9)
>
> Seaville Pty Ltd and FAV Nominees Pty Ltd to AL-RV Pty Ltd
>
> We refer to the above matter and advise that our clients need to assign the lease to a new entity being AL-RV Pty Ltd trading as Ruby Tuesdays.
>
> The principal behind the proposed assignee is John [Giovanni] Versace who as you are aware, is one of the principals in relation to the existing tenant. Given that the transferor and the transferee have common principals we do not propose to provide references, experience etc which are obviously superfluous in these circumstances.
>
> We note that in accordance with s.61(3) of the *Retail Leases Act*, as a pre-condition to requesting the landlord's consent, the tenant is required to give the proposed assignee a copy of any disclosure statement given to the tenant concerning the lease and details of any changes of which the tenant is aware, or could reasonably be expected to be aware, that affects the information contained in the disclosure statement. In this regard we enclose a copy of the disclosure statement as provided by you in your correspondence of February 5, 2009. On this basis we will provide for John Versace to be the guarantor to take

> effect from the assignment and the previous guarantors, being Francesco Versace and Anna Versace, will be relying on s.62(2) of the *Retail Leases Act*, which effectively releases them from further obligations under the guarantee they signed in accordance with the Act.
>
> It would obviously make more sense for the lease for the new term to be drawn in favour of the proposed assignee John Versace as the guarantor. Kindly obtain the lessor's instructions in this regard.

("**the 6 February 2009 letter**")

40 On 9 February 2009, Gray & Johnson responded to the above letter by facsimile letter to Trumble Szanto ("**the 9 February 2009 letter**") stating, amongst other things:

> We refer to your letter dated 6 February, 2009 and advise as follows:
>
> Our client's consent to the Assignment of Lease to AL-RV Pty Ltd T/A Ruby Tuesdays. We note that Mr John Versace would be the new Guarantors [sic]. We concur with your views in respect that the lease for the new term be drawn in favour of the proposed assignee

41 No formal documents were ever subsequently prepared or executed to confirm a lease for the term commencing 1 April 2009 and/or the assignment or transfer of the lease to ALRV.

42 On 7 December 2009, the applicants' agent sent a letter to the leased premises addressed to Seaville and FAV Nominees Ltd, but not addressed to ALRV, stating, amongst other things:

> …Through your solicitor, Messrs Trumble Szanto Lawyers you have exercised your option to renew your lease for a further term of three years with effect from 1 April, 2009.
>
> Our office proposed a rental on 21 March, 2009, which was subsequently rejected by your solicitors on 6 February, 2009[sic]. Since then, in accordance with the Second Schedule of the Lease we have requested for a rental determination…
>
> We wish to advise you that unless you accept the asking rent or agree to a rental determination within seven days of the date of this letter, we will have no other option but to make an application for a hearing at the Small Business Commission to achieve resolution of this matter…

("**the 2009 rental notice**")

43 The applicants rely on the 2009 rental notice as triggering their entitlement to now obtain a market rent determination, pursuant to the terms of the lease and subject to applicable provisions of the *Retail Leases Act* 2003 as to rent reviews, as and from 1 April 2009.

44 On 5 March 2010, Azzimo was deregistered.

45 On 2 September 2010, Trumble Szanto sent a letter to Schetzer Brott & Appel, who were then the solicitors for the applicants, ("**the September 2, 2010 letter**") stating amongst other things:

> We act for John [Giovanni] Versace and AL-RV Pty Ltd.
>
> We refer to your letter of September 1, 2010 and in response provide a copy of our letter to your client's agent Gray & Johnson dated February 6, 2009 together with its response by facsimile dated February 9, 2009.
>
> Your clients have consented to the lease for the new term commencing in March, 2009 to be in the name of AL-RV Pty Ltd trading as "Ruby Tuesdays" with John Versace as the new guarantor. As such there is an agreement to lease which is a lease in equity binding the parties. It is not our client's fault that no formal written lease has yet been submitted.
>
> All of the alleged material changes to the lease are irrelevant and in any event, have been fully disclosed. It is not true that AL-RV Pty Ltd has not received the consent of the landlord as such consent is evidenced in the facsimile from Gray & Johnson dated February 9, 2009.
>
> Clearly, there is a lease in equity subsisting in favour of AL-RV Pty Ltd on the basis that it is the agreed assignee pursuant to the lease which expired on March 31, 2009, and that it is the tenant in whose favour your client's agent agreed in writing that the lease for the further term would be with.
>
> Our client requires that your client provide a new lease in favour of AL-RV Pty Ltd in accordance with the option granted... and in line with the deed of renewal dated January 30, 2006, whereby the previous lease was renewed for a further term of three years from April 1, 2006, together with three further terms of three years. Clearly, our client, AL-RV Pty Ltd is in the middle of the first of such first three year term and is entitled to two further three-year options. The lease which should be submitted to it should reflect these provisions.
>
> It appears to our office that what is in issue here is essentially an argument over the rent and an attempt to characterise your clients failure for [sic]
>
> providing our client with a formal lease document cannot and should not be, characterised as a material breach of the lease…

46 On 13 March 2013, the applicants sent Notice of Default to Seaville, ALRV and the guarantors. In the recitals in the notice, Seaville is first referred to as the *"Original Lessee"* and ALRV is first referred to as the *"Proposed Lessee".* Later in the recitals, Seaville and ALRV are referred to, collectively, as the "*Lessee*". The alleged breach of lease on the part of the "*Lessee*" raised in the notice is the subleasing of the premises or part of the premises to an entity "Vonex Limited" without the consent of the landlords. ("**the March 2013 default notice**").

47 On 10 April 2013, Trumble Szanto sent a letter to SBA Law (formerly Schetzer Brott & Appel) stating, amongst other things:

> Notice of default dated March 13, 2013
>
> Our client maintains that consent to subletting has been given but, in any event, Vonex Ltd vacated the premises in February 2013…
>
> Lease
>
> Your client has agreed to provide a lease in favour of our client and it is not open to your client to resile from this position. We have requested that lease in writing and it is yet to be provided. The tenant cannot be prejudiced by the failure of the landlord to prepare a lease.
>
> …
>
> To suggest that the tenant is without rights in relation to a lease your client is obliged, but has failed, to provide is nonsensical. Furthermore, the fragility of the position you are putting forward is compounded when you threaten to withdraw your client's consent. Such consent was requested in a letter to Gray & Johnson of February 6, 2009 and provided in their response dated February 9, 2009. A concluded agreement in relation to this offer and acceptance was recited in our subsequent letter to Schetzer Brott & Appel dated September 2, 2010.
>
> The parties have conducted themselves accordingly for some years now and it is mischievous to suggest otherwise.

48 On 21 July 2014, a "Notice to Quit" signed by "Roslyn Eldar" in her capacity as director of each of the applicants, and addressed to Seaville and Azzimo, was sent to Seaville at the leased premises, and to Azzimo at an address in Caulfield North ("**the Notice to Quit**"). A copy of the Notice to Quit is annexed at the end of these reasons. The notice briefly recites the history of the lease, and asserts that Seaville had, since 1 April 2012, remained at the premises as tenant on a month-to-month basis. The Notice to Quit requires Seaville and Azzimo to vacate the premises on 1 September 2014.

49 The Notice to Quit makes no reference whatsoever to ALRV.

50 On 28 July 2014, the applicants commenced the proceeding in the Tribunal. Seaville and the guarantors, but not ALRV, were the named respondents. By their Points of Claim filed with the application, the applicants sought orders in respect of alleged unpaid outgoings and rent. They also sought orders to effect a determination of *"current market rent under the Lease payable by Seaville on and from 1 April 2009"*

51 The premises were vacated by the tenant/s on 1 September 2014.

52 On 17 June 2015, by which time there had been a number of amendments to pleadings in the proceeding, Seaville and the guarantors (at that time still the only respondents in the proceeding) filed and served Amended Points of Defence and Counterclaim. The amended pleading made reference ALRV.

No previous pleading by any of the parties had referenced ALRV. Paragraph 19(b) of the Amended Points of Defence and Counterclaim states:

> the rental payments were made to the applicants by AL-RV Pty Ltd as licensee, sub-tenant or assignee of the first respondent [Seaville]
>
> Particulars
>
> At all material times after around March 2008, the Ruby Tuesday business was conducted from the Ruby Tuesday Premises by AL-RV Pty Ltd.
>
> By letter dated 9 February 2009, the applicants consented to the assignment of the first respondent's lease to AL-RV Pty Ltd.

53 On 12 August 2015, the applicants responded with an application to the Tribunal seeking to join ALRV as the fifth respondent to the proceeding. ALRV was joined as the fifth respondent by orders made by the Tribunal on 27 August 2015.

54 On 28 August 2015, the applicants filed a Second Further Amended Points of Claim, naming ALRV as the fifth respondent. The amended pleading references the "*proposed assignment of the lease"* to ALRV, referencing in particular the correspondence from Trumble Szanto to Gray & Johnson dated 6 February 2009 and the response correspondence from Gray & Johnson dated 9 February 2009 (both correspondences referred to above in these reasons). The amended pleading makes various reference to *"the tenants"*, including relief sought as against *"the tenants",* however the amended pleading, does not actually specify who "*the tenants"* are. Clarification arrives in the applicants' Third Further Amended Points of Claim dated 30 October 2015, where at paragraph 18, "*Seaville and Azzimo, alternatively AL-RV*" are referenced as *"the tenants"*.

55 Seaville was deregistered on 26 September 2016.

56 There is no dispute that a restaurant and bar businesses named "Ruby Tuesdays" operated from the premises from around 2008/2009, and continued to do so until around the time the premises were vacated on 1 September 2014.

57 In his witness statement dated 9 June 2015,filed in this proceeding, Giovanni Versace states, amongst other things:

> Azzimo was my father's company…
>
> The original tenants of the shop were Azzimo and Seaville. My father and I opened the shop many years ago. Between 2002 and 2007 my father was taking care of the shop…
>
> I took over operation of the shop in 2008. I took over and changed the trading name to Ruby Tuesday, a bar and restaurant.
>
> As part of that change:
>
> the business changed to a cafe and licensed bar;

> the tenant was to change from Seaville and Azzimo to AL-RV Pty Ltd; and
>
> the property was renovated completely…
>
> … The liquor licence for the premises was transferred from Azzimo to AL-RTV Pty Ltd and it started paying rent from September 2008.
>
> The first and possibly the second payments from September 2008 were made by cheque, signed by me…
>
> Rent was paid in cash as directed by Lena Cartwright [a bookkeeper /manager employed by the applicants] until June 2013… We received invoices from her. All payments are recorded in AL-RV's tax returns…
>
> The landlords consented to the assignment of the lease from Seaville to AL-RV, however, to the best of my knowledge, information and belief, the lease was never in fact assigned to AL-RV, so Seaville remained the tenant. Seaville is still my registered company."[1]

[Seaville was still registered at the date of Giovanni Versace's witness statement]

58 One of the issues in the proceeding, but no longer a matter for determination as a result of the settlement reached by the parties, involved the amount of rent paid (by anyone) in the period after 2008. The issue was compounded by the alleged mismanagement of the applicants' affairs by their employed bookkeeper/manager. As I understand it, for the purpose of the issues before me, there is agreement between the parties that ALRV made at least some rental payments from 2008.

ORDERS SOUGHT

59 The applicants seek:

(a) a declaration to the effect that there was an equitable assignment of the lease to ALRV, and that ALRV is bound as lessee under the terms of the lease;

(b) an order that a specialist retail valuer, to be appointed by the Small Business Commissioner, determine the current market rent payable by ALRV under the lease on and from 1 April 2009;

(c) a declaration to the effect that the second, third and fourth respondents are bound as guarantors of the obligations of ALRV as assignee of the lease.

60 As I understand their position to be, the guarantors and ALRV raise no issue as to the content of the 2009 rental notice constituting, in 2009, a trigger for a rent review under the terms of the lease. What they say, however, is that the notice has no bearing on ALRV because there was no effective, enforceable assignment of the lease to ALRV. They say that the

[1] Giovanni Versace witness statement paragraphs 2 – 22 Tribunal book page 489-492.

appropriate order is that the claims, listed for hearing before me pursuant to the orders made 1 February 2017, be dismissed with no order as to costs.

61 The guarantors also say that if I find there is an enforceable assignment of the lease to ALRV, they are not, in any event, bound as guarantors in respect of ALRV's obligations.

DISCUSSION

62 Reference hereinafter to "the respondents" is a reference to the guarantors and ALRV.

63 The applicants accept that, barring any reinstatement of the registration of Seaville pursuant to section 601 AH of the *Corporations Act* 2001, no order can now be made against Seaville.

EQUITABLE ASSIGNMENT

64 The general rule at law is that the creation or disposition of a legal interest in land requires a document signed by the person creating or conveying the interest, however, in the absence of such signed document, equity will uphold an agreement to create or dispose of the interest provided there is satisfactory evidence that the agreement has been part performed.[2]

65 The applicants say that agreement to assign the lease is confirmed in the 6 February 2009 letter and the 9 February 2009 letter. They say the agreement is also confirmed by the subsequent correspondence of the respondents' lawyers, notably the September 2, 2010 letter.

66 The applicants say also that, as confirmed by Giovanni Versace in his witness statement, ALRV acted in accordance with the agreement, including operating the Ruby Tuesday business at the premises from 2008, and paying rent to the applicants. These actions, say the applicants, constitute part performance of the assignment of lease agreement.

67 The respondents say that any agreement evidenced by 6 February 2009 letter in conjunction with the 9 February 2009 letter was not an agreement to assign the lease, but rather an agreement to grant the option lease, commencing 1 April 2009, solely to ALRV with a new singular guarantor Giovanni Versace, replacing the existing guarantors. The respondents say that it was a condition of the agreement that a lease would be drawn noting ALRV as the lessee, and that the applicants failed to perform this condition.

68 As to part performance, the respondents say that there must be unequivocal acts of part performance of the agreement alleged. They say there is not unequivocal acts of part performance in this case.

69 In my view, there is doubt as to the nature of the agreement, and the actions of the parties, and as such equity will not uphold the alleged agreement to assign the lease to ALRV.

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[2] Sections 53 to 55 *Property Law Act* 1958; *Walsh v Lonsdale* (1882) 21 Ch D 9

70 The following comments of Fullagar J, in *Thwaites v Ryan* [1984] VR 65 at 77, as to part performance and the surmounting of the Statute of Frauds, are instructive:

> As I apprehend the law in Victoria at present, it is wrong first to postulate the contract pleaded and then to ask if the alleged acts were a part performance of it, or of a contract of its general nature: see the joint judgement of Isaacs and Rich JJ. In *McBride v Sandland* (1918) 25 C.L.R. 69, at pp.77-9. One must first seek to find such a performance as must imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded. Their Honours, with whom Powers J. agreed, said: "No harm can arise from reversing the order as a matter of convenience in taking evidence, provided the necessary elements of part performance are borne in mind and properly applied to the circumstances when the facts come under consideration. But if the terms of the oral bargain are first ascertained, and then the alleged acts of part performance are judged of merely by their consistency with or applicability to that bargain, grevious error may result."

71 In my view, consideration of the actions or "performance" of the parties in this case does not lead unequivocally to the alleged assignment of the lease by agreement. In my view, consideration of the parties' actions leads to uncertainty as to the nature of any agreement reached.

72 The applicants place much reliance on ALRV's possession of the premises, the operation of the Ruby Tuesday business from the premises and payment of rent by ALRV. These actions are consistent with an agreed assignment of the lease. However, they are also consistent with alternative arrangements including the agreement as alleged by the respondents.

73 Giovanni Versace was the sole director, and controlling mind, of both Seaville and ALRV. With or without an assignment or transfer of the lease to ALRV, Mr Versace could run the Ruby Tuesday business at the premises under the auspice of either entity or both. Clearly it suited him to run it under the auspice of ALRV, but this could be done without any assignment of the lease from Seaville. The payment of rent by ALRV is consistent with Mr Versace's preferred business arrangements, but not necessarily indicative of an assignment of the lease to ALRV.

74 As Giovanni Versace says in his witness statement, it was his understanding that there was no assignment of the lease, so Seaville remained the tenant.

75 Having regard to Mr Versace's control of both Seaville and ALRV, in my view the conducting of the Ruby Tuesday business at the premises under the auspice of ALRV, and the payment of rent by ALRV, might well be taken to be actions indicative of Mr Versace's arrangement of his business affairs, but not necessarily actions taken in reliance upon or in performance of *any* particular agreement with the applicants.

76 The proposal in the 6 February 2009 letter includes a release of the guarantors, with Mr Giovanni [John] Versace becoming the sole guarantor. While the 9 February 2009 letter in response indicates the applicants' agreement to this condition, their subsequent actions indicate the contrary. In this proceeding, the applicants seek a declaration that the guarantors are bound as guarantors of ALRV as assignee of the lease. That is, they seek to enforce the alleged assignment agreement, but without the release of the guarantors. Whatever might have been agreed in February 2009, it did not include a common intention to bind the existing guarantors to the obligations of ALRV as lessee.

77 By the 9 February 2009 letter, the applicants indicate their agreement for a lease for the new term to be drawn in favour of the proposed assignee, that is, in favour of ALRV, but no such lease documentation was ever drawn.

78 There are a number of other actions on the part of the applicants that are not consistent with the alleged assignment of the lease to ALRV:

- The 2009 rental notice is addressed to Seaville and FAV Nominees Pty Ltd, but not to ALRV.
- In the March 2013 default notice, ALRV is referred to by the applicants as the "*Proposed* Lessee".
- The Notice to Quit served by the applicants on 21 July 2014 is addressed to Seaville and Azzimo, but not to ALRV. The notice recites the history of the lease and makes no reference whatsoever to ALRV.
- The proceeding commenced by the applicants on 28 July 2014 named Seaville, but not ALRV, as a respondent.

79 For all the above reasons, I am not persuaded that there is sufficient grounds to uphold the alleged agreement to assign the lease to ALRV. In my view the terms of any agreement reached pursuant to the 6 February 2009 letter and the 9 February 2009 letter are not entirely clear, and the subsequent "performance" of the parties creates uncertainty, not clarity.

80 This finding is enough for me to dismiss the applicants' claims and make the order as suggested by the respondents. However, for completeness I will also briefly address other submissions raised by the parties.

SPECIFIC PERFORMANCE

81 The respondents say that, if there was an assignment of the lease to ALRV, the respondents say that there can be no order for specific performance in respect of an assignment agreement where a party to that agreement, the assignor, has ceased to exist (Seaville and Azzimo both now deregistered).

82 The applicants refer to s.601AF of the *Corporations Act* 2001 which empowers ASIC or the Commonwealth to do any act on behalf of a deregistered company if the Commonwealth or ASIC is satisfied that the

company would be bound to do the act if the company still existed. The applicants say that, under this section, ASIC may specifically perform the assignment agreement on behalf of Seaville and/or Azzimo.

83 It is difficult to envisage ASIC or the Commonwealth utilising s.601AF of the *Corporations Act* to assist the applicants in this case. In any event, in my view the fact that the assignors no longer exist does not, of itself, prevent an order in the nature of specific performance in respect of the assignee's obligations under the lease.

84 The bigger problem for the applicants is that the lease itself expired before the applicants brought the proceeding as against ALRV. The lease expired upon the vacation of the premises by the tenant/s by 1 September 2014 in response to the Notice to Quit served 21 July 2014. At that time, no proceeding had been brought against ALRV. ALRV was joined to the proceeding by order made 27 August 2015 upon the joinder application made by the applicants on 12 August 2015.

85 The respondents refer to the Supreme Court decision in *McMahon v Ambrose*[3] as authority for the proposition that, save for exceptional cases (and respondents say that this is not an exceptional case), an order for specific performance of a purported equitable assignment of a lease will not be granted when the lease has already expired at the time when proceedings were commenced upon the alleged assignment agreement.

86 The essential facts in *McMahon v Ambrose*, and the decision of Hampel J at first instance, are set out in the respondents submissions:

> Rojain, the landlord, leased premises to Ambrose. Ambrose then assigned the lease to McMahon. The assignment was not by deed, but oral, and consequently was an assignment in equity. McMahon ultimately abandoned the premises. Rojain forfeited the lease and then sued Ambrose for arrears of rental. Ambrose joined McMahon as a third party to the action, claiming indemnity. The main action was settled and the action on the third-party notice came on for hearing.
>
> The trial judge found that:
>
> - there had been an oral agreement between McMahon and Ambrose to assign the lease;
> - there was sufficient part performance to take the assignment out of the Statute of Frauds;
> - although the lease was no longer in existence he would give effect to the equity created by the partly performed agreement for an assignment;
>
> The Court awarded damages in equity to Ambrose against McMahon.

[3] [1987] VR 817

87 McMahon appealed to the Full Court where Murray and Marks JJ (McGarvie J dissenting) upheld the appeal. At pp 819 - 820 Murray J states:

> Halsbury's Laws of England, 4TH ed., vol.44, para.418 refers to the question in the following terms:
>
> "A contract for the grant of a lease for a term which has expired before the date of the hearing will not be specifically enforced. The principle is that equity does nothing in vain, and the court will refuse to order specific performance of a contract whenever the performance of the order would be a waste of time and money. However, the court is now prepared to grant specific performance of a contract to grant a licence to occupy land for a few days, and in exceptional circumstances it may order the execution of a deed creating an interest for a term which has already expired or is immediately terminable"…
>
> No Australian authority was referred to us which suggested that in Australia the courts have been prepared to adopt a different view. Dr Spry in his work Equitable Remedies, 3rd ed., p.129 leaves the question open.
>
> The award of damages in the present case was, as it had to be, an award of equitable damages under s.62(3) of the Supreme Court Act. It depended upon the remedy of specific performance being available to the respondent. For the reasons set out above I do not think that that remedy was, on the present state of the authorities, available to the respondent. At best it rests upon the view that "in exceptional circumstances the court may order the execution of a deed creating an interest for a term which has already expired or is immediately terminable".

88 At p. 849-850, Marks J states:

> There was an early view that specific performance would not be granted unless an order could be made to operate on a subject matter in existence at the time of hearing…
>
> However, the modern view is that it is sufficient if the relief could be given at the time of the institution of the proceedings…
>
> The submission here on behalf of Ambrose is that even the latter is not necessary, that is, it is sufficient if sometime in the past the relief could have been given. I do not think that the authorities, not even those relied on by Ambrose, support it. There is a distinction between the existence of subject matter on which an order can fruitfully operate and the existence of an agreement, the time for performance of which has expired, on which an order might arguably have useful operation…
>
> In my opinion it is necessary for a party seeking specific performance to show that at the time of the institution of proceedings the court could have made an order which put the parties "in the relation contemplated by the agreement". In J.C. Williamson v Lukey and Mulholland (1931) 45 C.L.R. 282, at p.297 Dixon J said: "the remedy

> [specific performance] is not available unless complete relief can be given, and the contract carried into full and final execution so that the parties are put in the relation contemplated by the agreement"…
>
> Here there was not, in my opinion, on any view a subject matter still in existence at the time of the third-party proceedings for a decree of specific performance…In the words of Dixon, J., Ambrose and McMahon could not have been put "in the relation contemplated by their agreement" to assign…
>
> In his submission on behalf of Ambrose, Mr Desmond suggested that there had been a further development of the law which enabled the Court to do "substantial justice". In my view there has been no such development.

89 The applicants raise no matters which might put this case in the "exceptional" category as referred to by Murray J.

90 The applicants say that they are pursuing an accrued right in respect of a lease that has been assigned. In my view that is an oversimplification. The applicants are not suing for damages pursuant to an accrued right. They seek an order that the respondent, ALRV, as assignee under an equitable assignment of the lease, be compelled to comply with the rent review process under the lease. It is, fundamentally, relief in the nature of specific performance. The proceeding as against ALRV was instituted after the lease had expired. In my view, under *McMahon v Ambrose*, this creates an insurmountable obstacle for the applicants.

PRIVITY

91 The respondents say that, assuming an assignment of the lease in equity, the applicants have the further problem that there is no privity of contract or privity of estate as between the applicants and ALRV, and as such, under common law, the covenants under the lease cannot be enforced as against ALRV.

92 The applicants accept the general proposition at common law as put by the respondents, but they say that, on the authority of the Court of Appeal in *Cooma Clothing Pty Ltd and Others v Create Invest Development Pty Ltd*[4], by reason of sections 3 and 8 of the *Retail Leases Act* 2003, privity of contract will be conferred.

93 Under s.3 in the *Retail Leases Act*, "lease" is defined to include an agreement for a lease. S. 8 provides:

> For the purpose of this Act, an assignment of a retail premises lease is taken to be a continuation of that lease (and not the entering into of a new lease).

[4] [2013] 46 VR 447

94 The essential facts in *Cooma* are:

> Mr and Mrs Perera were the tenants under a lease that was due to expire on 31 January 2011. Mr and Mrs Afzal were the Lessor. In 2010, Mr and Mrs Afzal entered into a contract of sale to sell the subject premises to Create Invest Development Pty Ltd ("CID"). By letter to the Pereras dated 5 May 2010, CID offered a renewal term of three years commencing 1 February 2011. The Pereras accepted that offer on 12 May 2010.
>
> On 1 June 2010, the Pereras assigned the lease to Cooma. The assignment was confirmed in a transfer of lease executed by the Lessor, the Pereras and Cooma. The transfer document made specific reference to the CID renewal offer dated 5 May 2010, and Cooma's acknowledgement consenting to the terms of that renewal.
>
> Cooma went into possession of the premises and performed the terms of the lease. The sale of the premises to CID was effected on 27 September 2010.When the original term expired, 31 January 2011, Cooma vacated the premises.
>
> Cooma sued for damages for the lost benefit of the option lease.

95 An issue before the Court of Appeal was whether CID could enforce the agreement for the option lease as against Cooma, notwithstanding that Cooma was not a party to the agreement with CID. The Court found:[5]

> As opposed to the position under general law, however, under s3 of the Retail Leases Act, a "lease" includes an agreement for lease and, under s8, an assignment of a "lease" results in a continuation of the lease as opposed to the creation of a new lease. Those provisions dictate that, in as much as the transfer of lease operated as an assignment from the Pereras to Cooma of the executory contract for new lease as between CID and the Pereras, it operated as a continuation of the contract as between CID and Cooma.
>
> Logically, it follows that, despite the original lack of privity of contract or estate as between CID and Cooma, the transfer of lease was in effect deemed by s8 to have created privity of contract as between them and thus conferred on CID a direct right of enforcement against Cooma.

96 It seems to me that, on the authority of *Cooma*, if there had been an effective assignment of the lease to ALRV, privity of contract would have been conferred as between ALRV and the applicants. However, even with that obstacle removed, the applicants still cannot overcome the obstacle discussed above, that is, the insurmountable obstacle raised by the fact that the proceeding seeking to enforce the covenants of the lease was first brought against ALRV after the expiry of the lease.

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[5] Nettle and Neave JJ at p.447

THE GUARANTORS

97 In my view, had the applicants overcome the hurdles discussed above, they would still not have been entitled to the declaration sought as against the guarantors.

98 If there was an enforceable agreement to assign the lease to ALRV, in my view the agreement clearly included the condition, as set out in the February 6 letter, that the guarantors would be released and replaced by a new single guarantor, Giovanni [John] Versace. And in that circumstance, in my view Giovanni Versace would only be bound as guarantor under a new instrument of guarantee executed by him.

CONCLUSION IN PROCEEDING BP126/2014

99 For the reasons set out above, I will order in proceeding BP126/2014 that the applicants' claims, listed for hearing before me pursuant to the orders made 1 February 2017, be dismissed.

COSTS

100 Having regard to:

(a) the respondents' proposed order in proceeding BP126/2014 that, in addition to the dismissal of the applicants' claims, there be no order as to costs, and

(b) the limited nature of the issue determined in proceeding BP125/2014, and

(c) section 92 of the *Retail Leases Act* 2003,

it seems likely that no party will seek costs in either proceeding. However, in case the situation is otherwise, I will reserve costs with liberty to apply by 31 May 2017. If no application in respect of costs is received by that date, there will be no order as to costs.

SENIOR MEMBER M. FARRELLY

"RFE-9"

5.7

NOTICE TO QUIT

TO: Seaville Pty Ltd (ACN 006 554 856) of Shop 1, 217 Chapel Street, Prahran, Victoria 3181

AND TO: Azzimo Pty Ltd (ACN 005 483 241) of 67A Kooyong Road, Caulfield North, Victoria 3161

WHEREAS:

A on or about 1 April 2003, Finley Holdings Pty Ltd and Euli Nominees Pty Ltd, as landlords, and Seaville Pty Ltd and Azzimo Pty Ltd (then named F.A.V. Nominees Pty Ltd), as tenants, entered into a Lease in respect of Shop 1, part of Shop 8 and Suites 8 and 9 (the **Leased Premises**) of the land situated at 217–223 Chapel Street, Prahran in the State of Victoria;

B items 6 and 7 of the First Schedule to the Lease provided that the term of the Lease was three years;

C on or about 1 April 2006, Finley Holdings Pty Ltd, Euli Nominees Pty Ltd, Seaville Pty Ltd and Azzimo Pty Ltd entered into a Renewal of lease in respect of the Premises;

D clause 1 of the Renewal of Lease provided that the Lease was renewed for a further term of three years commencing on 1 April 2006;

E on or about 23 April 2007, Finley Holdings Pty Ltd, Euli Nominees Pty Ltd, Seaville Pty Ltd and Azzimo Pty Ltd entered into a Deed of Variation of Lease which varied the Lease;

F on or about 21 January 2009, Seaville Pty Ltd and Azzimo Pty Ltd exercised an option to renew the Lease for a further term of three years commencing on 1 April 2009;

G on or about 5 March 2010, Azzimo Pty Ltd was deregistered;

H since 1 April 2012, Seaville Pty Ltd has remained in possession of the Lease; and

I pursuant to clause 3(c) of the Lease, Seaville Pty Ltd is a tenant from month to month of the Leased Premises,

166

Finley Holdings Pty Ltd and Euli Nominees Pty Ltd hereby give notice to Seaville Pty Ltd and Azzimo Pty Ltd to vacate the Leased Premises on 1 September 2014.

Dated: 21 July 2014

FINLEY HOLDINGS PTY LTD
(ACN 080 365 984)

per:

Roslyn Eldar

Director

EULI NOMINEES PTY LTD
(ACN 004 868 366)

per:

Roslyn Eldar

Director

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