**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. BP798/2015

## CATCHWORDS

Retail tenancy, injunction, serious question to be tried, balance of convenience, *Retail Leases Act* 2003 sections 28, and 64, notice of option to renew – adequacy, overholding for more than 12 months, hearsay, *Victorian Civil and Administrative Tribunal Act* 1998 s98(1)(b).

| | |
|---|---|
| **APPLICANT** | LEGFIN Pty Ltd (ACN 098 452 530) |
| **RESPONDENTS** | Mr Thomas Anthony, Ms Annieta Anthony |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member Lothian |
| **HEARING TYPE** | Injunction |
| **DATE OF HEARING** | 29 June 2015 |
| **DATE OF ORDER** | 3 July 2015 |
| **CITATION** | LEGFIN Pty Ltd v Anthony (Building and Property) [2015] VCAT 986 |

## ORDERS

1 The Applicant's application for an injunction is dismissed.

**2 This proceeding (and counterclaim) is listed for a full day mediation to be conducted by Mediator Falduti at 55 King Street Melbourne on 13 August 2015 commencing at 9.30 a.m. The mediator may make necessary arrangements with the parties.**

3 All parties must attend a mediation personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the mediation.

4 Liberty to apply.

**5 I direct the Principal Registrar to send copies of these orders to the parties now by facsimile marked "urgent" or email.**

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

| | |
|---|---|
| For Applicant | Mr P.W. Lithgow of Counsel |
| For Respondents | Mr T. Anthony and Ms A. Anthony in person |

## REASONS

1 The applicant-Tenant seeks an injunction to prevent the respondent-Landlords from evicting it from the premises, Office 2/346 Main Street, Mornington. The matters that must be determined in favour of the Tenant to grant the injunction are whether there is at least one serious question to be tried, and whether the balance of convenience favours granting the injunction.

2 The issue of whether there is a serious question to be tried turns on whether the Landlords were entitled to give the Tenant notice to vacate on 5 June 2015. The Tenant submits that it is arguable that the Landlords were not entitled to do so because they had not given the Tenant proper notice of its entitlement to exercise an option. As discussed below, on the Tenant's own evidence, it does not wish to exercise the option. The only reason why this is relevant is because, the Tenant submits, proper notice is a necessary step to enable the Landlords to give an effective notice to vacate.

3 Another question raised by the Tenant concerns the status of the lease between it and the Landlord, if it is found to be overholding from the previous lease, for longer than 12 months. The Tenant argues that this constitutes a new retail lease and it is therefore entitled to a minimum period of five years from when overholding commenced.

4 Again, the only relevance is whether the Landlords have given proper notice. As discussed below, the Tenant's own evidence is that it does not wish to hold the premises for the remainder of five years from when overholding commenced.

5 Because this is an application for an injunction my decision is not based on determinations of fact, other than concerning the balance of convenience. Nevertheless, as Deputy President[1] Macnamara said in *Beds for Backs v Palace Pty Ltd*[2]:

> In the present case I have found that there is a difficult question of statutory construction. However, there is no reason to think that the construction of the statute will be any easier or any clearer at a later hearing than it will be today.… I think that it is proper for pure questions of law and construction to be determined even upon an interim or interlocutory application such as the present.

## BACKGROUND

6 According to the affidavit of Christopher Hill, a director of the Tenant, dated 13 June 2015, the Tenant trades under the name "Hill Legal Lawyers and Consultants". The Tenant also permits a company, "Life Solutions

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1 Now Judge Macnamara of the County Court

2 [2006] VCAT 2677,paragraph 13

Financial Advisers Pty Ltd", owned by Mr Hill and his wife, to occupy part of the leased premises.

7 Mr Hill was absent from Australia on leave for the hearings and so was not available for cross examination or to answer questions from the Tribunal. Mr Hill deposed that he and his wife would be absent from Australia between 15 June and 13 July 2015 to assist his elderly, unwell mother to visit her relatives in England for the last time. I have no reason to doubt the accuracy of this explanation.

8 The first respondent, Mr Anthony gave evidence on the first day of hearing 22 June 2015. In the course of the hearing I asked Mr Anthony if he wanted to obtain legal advice. He said that he did and the proceeding was adjourned to 29 June 2015.

9 As occurred at the first hearing, Mr Lithgow of Counsel appeared for the Tenant. The Landlords appeared for themselves with the assistance of and their real estate agent, Mr Stephen Back. Mr Anthony said they had obtained legal advice, but chose not to have the lawyer they consulted represent them because of the cost they had already incurred of $8,500 and the cost they said they would incur if they were represented further of $27,000. I remark that the second sum is surprisingly high and the documents filed, which bear Mr Back's name and details, have missed the point on occasions, as described below.

10 In accordance with orders of 22 June 2015, the Landlords filed affidavits by Mr Anthony and Mr Stephen Back, both dated 25 June 2015. Mr Lithgow objected on various grounds to paragraphs 3 to 7, 14 and 15 of Mr Back's affidavit. Where I refer to those paragraphs I also refer to the objection.

11 The Landlords also filed Points of Defence and Points of Counterclaim. The second respondent, Mrs Anthony, also gave evidence at the second hearing. Mr Anthony's cross-examination was concluded then Mr Back gave more evidence.

## CHRONOLOGY

12 Mr Hill deposed that on 1 August 2007 the Tenant entered into an initial lease with the Landlords, being part of the ground floor of a two-storey building; an area of 122m$^2$.

13 According to the schedule to the initial lease, exhibited to Mr Hill's affidavit as CH-1, the lease was for three years, and gave the Tenant the option of two further terms, each of five years.

14 Mr Hill stated that some time in or about April 2010 he had discussions with Michele Adams of the managing agent and exercised the renewal of the lease for three years, not five years. The managing agent then was Jacobs & Lowe Real Estate.

15 Mr Hill stated that the renewed lease constituted a fresh lease document expressed to commence on 1 October 2010. He added that at the time the

lease was renewed a separate lease was entered into for office 3 of the same building.

16 Both the leases were due to expire on 30 September 2013. Mr Hill stated at paragraph 7:

> At no time did I receive any notice from the Landlords' Agent with regard to the renewal of any of those leases nor any notice that complies with the requirements of section 28 of the *Retail Leases Act* 2003. [Emphasis added]

17 Paragraph 19 of Mr Hill's affidavit is curious. It is as follows:

> I have recently had drawn to my attention a letter dated 16 January 2013 from Ashleigh Bolton of Jacobs and Lowe requesting that the tenant exercise its option by 30 June 2013. I do not recall receiving that letter. Unlike other correspondence from Jacobs & Lowe, it is not on their letterhead. However, I have also had drawn to my attention an email transmission dated 7 February 2013 that appears to refer to that letter and has my electronic signature attached to it. [Emphasis added]

18 Mr Hill does not say that either letter is the product of fraud, but gives the impression that perhaps all is not quite right with them. If the second is genuine, the first must be, because the second refers to the first.

19 Most of the email complains of the air-conditioning system, refers to various earlier complaints, and threatens to arrange air quality testing unless the Landlord undertakes to do so within 48 hours. The parts of the email relevant to the option are as follows:

> As you are aware, you have recently sent us an Option Notice to exercise our rights to renew the above Lease, such option to be exercised by the 30th June 2013. [Emphasis added]
>
> We are currently considering our position in relation to the tenancy as well as other future tenancy options.
>
> One of our deep concerns ... relates to the air-conditioning at our premises.

There follow the detailed complaints and threats concerning the air-conditioning system. The letter concludes:

> Naturally the Landlord's cooperation or reluctance in dealing with these issues will have a significant bearing on whether we exercise the option to renew the Lease for a further option period.

20 I note Mrs Anthony's evidence that the Landlords thoroughly overhauled the air-conditioning system, at a cost of approximately $140,000. Under cross-examination Mr Anthony said that problems with the air conditioning were finally resolved in 2014.

21 Mr Anthony stated at paragraph 3 of his affidavit that on or about 16 January 2013 notice pursuant to s28(2)(a) of the RL Act was provided to the Tenant and that the exhibit to Mr Hill's affidavit, CH-9, is a true copy of the letter and "exercise of option" form.

22 I note that neither Mr Hill nor anyone on behalf of the Tenant suggested that the Option Notice of 16 January 2013 was in any way invalid until Mr Hill's letter to Mr Back of 10 June 2015, referred to below.

23 If the tenancy is properly characterised as overholding, it commenced on 31 October 2013.

24 Mr Hill stated that he received from Jacobs & Lowe a letter dated 4 July 2014 and two "option details" notices relating to a further term for three years commencing 1 September 2014. Mr Hill said that neither he nor anyone else for the Tenant purported to sign or give any indication that the Tenant would exercise the options set out in the notices.

25 Mr Hill stated at paragraph 9 that shortly after receiving the correspondence from Jacobs & Lowe he had discussions with them and various other agents:

> ...who had approached me indicating that the Respondent Landlord would be interested to sell the premises to the Applicant.

26 Mr Hill stated that he told Ms Adams that the Tenant was seeking more space, and that if it could not be obtained at the building containing the premises, the Tenant would need to move. He stated that Ms Adams said it was possible that the Salvation Army would move from the area occupied by them within the building, adjacent to the rented premises. He stated that by the end of August 2014 Ms Adams advised him that the Salvation Army may be vacating. Mr Hill continued:

> Encouraged by the respondent's agent that the adjoining premises of the Salvation Army would become vacant which [the Tenant] could expand into and that the respondent would be interested in selling the ground floor area I did not make other enquiries to relocate the business of [the Tenant].

27 It is surprising that Mr Hill came to either of these conclusions, as the email of 20 August 2014[3] from Ms Adams to Mr Hill states:

> I have received the below email from Salvation Army, so we are still a little time away from knowing their plans. As their lease does not expire all together in 2015 it is possible that we could not offer them a renewal at all.
>
> I will go back and speak with the owners regarding a possible purchase and get back to you.

28 Equally surprising is Mr Hill's statement at paragraph 11:

> It wasn't until in or about December 2014 when I was informed by the managing agent that the Respondent <u>was no longer interested in selling the premises</u> and that he was only interested in entering into a fresh lease ... [Emphasis added]

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[3] Part of exhibit CH-4 to Mr Hill's affidavit

The statement is surprising because Mr Hill neither deposes to a positive statement that the Landlords were willing to sell, nor exhibits a document to that effect. The strongest basis upon which to base his hopes was the statement at paragraph 9 of his affidavit, referred to above, about statements by "various Agents including the managing Agent ... indicating that the Respondent Landlord would be interested to sell ...". Mr Hill gave no evidence of an offer by either party.

29 Mr Anthony said under cross-examination that he was aware that Mr Hill had sought an asking price but he added "that was quite a few years ago".

30 At paragraphs 7 and 8 of his affidavit, Mr Anthony stated:

> … on or about early January 2015 we instructed Mr Stephen Back to enter negotiations with [the Tenant] in an effort to renew the lease.
>
> 8. That on or about January 2015 we instructed Mr Back to pursue the interest of any parties he believed might be interested in the premises occupied by [the Tenant].

31 At paragraph 12 of his affidavit, Mr Hill stated that the Hill Superannuation Fund entered a contract on 9 April 2015 to buy vacant land in Mornington to build accommodation for Hill Legal and Life Solutions Financial Advisers. The necessary inference is that the Tenant will no longer need the premises when the new property is ready to move into.

32 Mr Hill stated that he met Mr Stephen Back "shortly prior to signing the contract". Mr Hill goes on to depose of various meetings and discussions starting on 29 January 2015. At paragraph 14, Mr Hill stated that Mr Back told him there was a group of doctors that had expressed interest in the premises, in which case the Tenant would not need to vacate until about November 2015. Mr Hill said he told Mr Back that:

> ...this time frame would be suitable to the Applicant as the building of its new premises would be complete by this date.

33 At paragraph 4 of his affidavit Mr Back stated:

> In late January 2015 I had formed the view that Mr Hill was not interested in renewing the lease for any term …

Mr Lithgow properly objected to this paragraph. Mr Back's opinion of what Mr Hill might or might not be interested in is irrelevant. A simple statement of what was discussed could have been useful.

34 Mr Anthony stated at paragraph 9 and 10:

> 9. On or about 11 May 2015 we did sign an offer to lease document with Positive Psychology.
>
> 10. That on 5 June we instructed our Agent, Stephen Back, to serve [the Tenant] notice to vacate by 5 PM 8 July 2015.

35 At paragraph 11 of his affidavit, Mr Back stated that on 5 May 2015 Mr Kyriakoulis of Positive Psychology told Mr Back he wished to lease the

entire ground floor rather than just the premises. Mr Back said he knew that there was interest in Positive Psychology's current location at 1 Ross Street, Mornington which was for sale at the time.

36 At paragraph 12 Mr Back stated that between 5 and 15 May 2015, he and Mr Kyriakoulis e-mailed each other about the proposed lease and during that e-mail exchange, Mr Kyriakoulis informed Mr Back that it was quite important "that he have a decision as soon as possible".

37 At paragraph 13 of his affidavit, Mr Back stated that Mr Kyriakoulis signed an offer to lease document and paid a security deposit into Mr Back's trust account.

38 The offer to lease is exhibited to Mr Back's affidavit as SB-4. The proposed commencement date in the offer to lease is 1 July 2015.

39 Mr Back continued:

> I also informed Mr Hill by e-mail that same afternoon that things had changed in relation to his tenancy and that we needed to meet.

40 Mr Lithgow objected to paragraph 14 of Mr Back's affidavit on the basis of hearsay. Under s98(1)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") the Tribunal is not bound by the rules of evidence, and does, on occasions admit hearsay evidence where it will not breach the rules of natural justice. The hearsay evidence is intermingled with direct evidence. The relevance of paragraph 14 is that it provides context to the underlined parts of the notice exhibited to Mr Hill's affidavit at CH-6, quoted below at paragraph 46.

41 Mr Back stated:

> I met with Mr Hill in the afternoon 21 May 2015 it was at that meeting I informed Mr Hill that offer had been made and accepted. It was also brought to my attention that Mr Hill felt that it was impossible for him to relocate by 1 July 2015 and that given he was acting for the purchaser of 1 Ross Street Mornington (Positive Psychology's premises). Mr Hill felt that he would be able to discuss the matter with the purchaser and thereby grant an extension on Positives tenancy thereby extending his own to a more favourable timeframe. [sic]

42 I accept that Mr Back can give evidence that he had some conversation with Mr Hill about Positive Psychology taking a lease. I have no regard to the suggestion that Mr Hill might attempt to influence the purchaser of 1 Ross Street to benefit himself or his company. Similarly, I give no weight to what Mr Back considers Mr Hill might have "felt".

43 Had the Landlords or Mr Back on their behalf given the Tenant notice to vacate before 1 June 2015, the Landlords would have been in a stronger position to gain possession by 1 July 2015 – the date it was agreed Positive Psychology would take possession of the whole ground floor including the premises. Mr Back admitted under cross-examination that his failure to give

timely notice has at least partly contributed to the problem of the inconsistency between the date Positive Psychology was promised the premises and the earliest date upon which the Tenant might be required to vacate.

44 Mr Lithgow also objected to paragraph 15 of Mr Back's affidavit on the basis that it contains conclusions of law and hearsay. The parts which are of interest to me are as follows:

> During the period of 21 May 2015 – 5 June 2015 numerous enquiries by both myself and Mr Hill with the purchaser of 1 Ross Street, Mornington, in relation to extending the tenancy of Positive Psychology were unsuccessful and flatly refused. [sic]

45 I accept that Mr Back can give evidence that he spoke to the purchaser of 1 Ross Street but his evidence that Mr Hill had such conversations is very weak. If he had given evidence of conversations between himself and Mr Hill about this matter it might have been of use.

46 Mr Hill stated that he received the notice to vacate, dated 5 June 2015, at 6:35pm that day. The notice is exhibit CH-6. It is as follows, excluding the formal parts:

> Dear Chris
>
> I have recently updated the landlord of [the premises] in relation to the situation as it currently stands. Not surprisingly they are unwilling to jeopardize the future tenancy of the psychologist's in anyway.
>
> Thus I have been instructed to advise you of the need for Hill Legal to vacate the premises ... no later than 5:00pm 8th of July 2015 being a months notice as required under the lease agreements.
>
> I still like to believe that we may be able to reach a mutual outcome for all involved so if things change please let me know as soon as you can.
>
> Please feel free to contact me should you wish to discuss further. [sic] [Emphasis added]

47 As stated above, Mr Back claimed to have discussed with Mr Hill that Positive Psychology would move into the premises. The underlined parts of exhibit CH-6 are consistent with such a conversation having taken place.

48 A document that was not included as an exhibit to Mr Hill's affidavit but was tendered by Mr Lithgow at the hearing on 29 June 2015. It was a reply e-mail from Mr Hill to Mr Back at 10:19 PM on 5 June 2015. It is:

> Stephen
>
> As discussed I will not be able to vacate by that date.
>
> It is possible that we may be able to achieve a vacation date by 15 July.
>
> As you are aware, both directors of the company are away overseas until 12 July

We are urgently making enquiries for alternate premises and will make our best endeavours to vacate the premises as soon as possible

49 Mr Anthony agreed under cross-examination that he was aware of this e-mail.

50 At paragraph 17 of his affidavit Mr Hill stated that he sent Mr Back an email dated 10 June 2015 advising that the notice was defective and the Tenant could not vacate by 8 July 2015. The email is exhibit CH-7 to Mr Hill's affidavit and states in part:

> We refer to your e-mail letter… dated 5 June last purporting to give notice to Hill Legal to vacate the above premises by no later than 5 PM on 8 July next.
>
> We dispute such notice and the period of notice required of us to vacate our premises.
>
> The facts and our position in this matter is summarised as follows: –
>
> …
>
> 4. The lease was a lease that is regulated under the *Retail Leases Act 2003*.
>
> 5. Under section 28 of the *Retail Leases Act* the landlord was required to serve written notice on us of the date that the option is no longer exerciseable. Section 28 requires this notice to be given at least 6 months and no more than 12 months before the last date that the option could be exercised.
>
> 6. Pursuant to our lease the last date for the exercise of any further option was **1 July 2013** and so therefore the landlord was required to provide notice stating that 1 July 2013 was the latest date to exercise the option and this notice was required to be made between the 2 July 2012 and 30 December 2012 (at least 12 months but no more than six months before the last date for exercising the option).
>
> 7. No such Notice was provided to us by the landlord or the former agents Jacobs and Lowe real estate.
>
> 8. On **4 July 2014** we received a letter from Jacobs and Lowe real estate enclosing a notice headed "option details". A copy of this notice is attached in respect of [the premises].
>
> 9. The purported notice on 4 July 2014 does not comply with section 28 of the Retail Leases Act as to its substance and form and was made after the period referred to above in breach of section 28.
>
> 10. Section 28 of the Act provides that where the landlord fails to provide the notice under that section the lease is taken to **expire 6 months after the landlord serves that notice** and if that date is after the lease ends then the lease continues until the date of such notice, that is, the lease terminates <u>after six months from when proper notice is provided.</u>

11. If your e-mail letter of 8 [sic 4] July was valid notice (which we do not admit) we have **6 months** to vacate from the date of that notice in accordance with section 28(b) of the *Retail Leases Act*.

12. Alternatively, we dispute that your e-mail of 8 July [sic] last is a valid notice of termination. It fails to comply with the Notice requirements of the lease and the requirements set out in *Commonwealth Bank of Australia v Montebello & Anor.*[4]

…

51 Mr Anthony stated at paragraph 4 of his affidavit that:

> …to the best of my knowledge [the Tenant] never exercised or purported to exercise its options to the further terms under the lease. [sic]

52 The Tenant sought an undertaking from the Landlords by 11 June 2015 that they would not take steps to terminate the lease on 8 July 2015. The Tenant stated that it would seek an injunction, and has done so.

53 On 22 June 2015 Mr Back gave oral evidence about the proposed tenancy of Positive Psychology. He said that Positive Psychology had given the Landlords an extension to provide possession of the premises until 11 July 2015, that Positive Psychology was aware of the Tenant's application for an injunction and that whether or not Positive Psychology eventually took the premises would depend on the outcome of the Tenant's application.

54 At paragraph 11 of his affidavit, Mr Anthony stated:

11. That on 25 June 2015 Positive Psychology as a result of us being [un]able to provide them with possession on 1 July 2015 have requested to terminate that lease.

At the beginning of the hearing of the hearing on 29 June 2015 Mr Anthony said "we've lost Positive Psychology – we need a lease in place to assist with the refinancing".

55 After Mr Lithgow had made submissions concerning the significance of Positive Psychology no longer waiting to take a tenancy, Mr Back gave further oral evidence stating that Positive Psychology might still be available to take the tenancy. His evidence contradicted that of Mr Anthony and was unconvincing.

56 If the tenancy is properly characterised as overholding, and by virtue of the Tenant overholding for longer than 12 months it is entitled to a new lease of 5 years, that lease would expire on 30 October 2018.

## SERIOUS QUESTION TO BE TRIED

57 As stated above, the matters raised by Mr Lithgow as serious questions to be tried are whether the Tenant can resist eviction because it is arguable that the Landlords failed to give the Tenant proper notice regarding the exercise

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[4] Mr Hill gave no explanation of the effect of that case.

of the option, and whether it is arguable that the Tenant, if having overheld for more than 12 months, is entitled to a new five year lease.

### Notice regarding exercise of option

58 Section 28 of the *Retail Leases Act* 2003 ("RL Act") provides in part:

> **Obligation to notify tenant of option to renew**
>
> (1) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable—
>
> (a) at least 6 months; and
>
> (b) no more than 12 months—
>
> before that date but is not required to do so if the tenant exercises, or purports to exercise, the option before being notified of the date.
>
> (2) If subsection (1) requires the landlord to notify the tenant but the landlord fails to do so within the time specified by that subsection—
>
> (a) the retail premises lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the landlord notifies the tenant as required; and
>
> (b) if that date is after the term of the lease ends, the lease continues until that date (on the same terms and conditions as applied immediately before the lease term ends); …

Notice of 16 January 2013

59 The notice provided, excluding formal parts:

> Dear Chris,
>
> **Re: LEASE OPTION**
>
> **Property: GF, 2/346 Main Street Mornington, Vic 3931**
>
> We wish to advise that your lease agreement expires on 30/09/2013 with one further option of three (3) years.
>
> We require written confirmation by 30/06/2013 whether or not you wish to renew this agreement for a further term of three (3) years.
>
> Please sign the bottom of this notification (whichever statement applies) and return to this office at your earliest convenience.
>
> If you have any questions or require any further information please do not hesitate to contact this office.
>
> …
>
> ---
>
> **Exercise of option** Date……
>
> The Lessee Hereby Exercises the Option for a further Term of Three (3) years commencing 1 October 2013.

Lessee FOR AND ON BEHALF OF: [the Tenant]

GF, 2/346 Main Street

Mornington, Vic 3931

…….

(sign here)

Or

The Lessee Hereby advises they **DO NOT** wish to exercise the Option for a further Term of Three (3) years commencing 1 October 2013.

Lessee FOR AND ON BEHALF OF: [the Tenant]

GF, 2/346 Main Street

Mornington, Vic 3931

…….

(sign here)

60 Mr Lithgow's only criticism of the notice of 16 January 2013 is that it does not give sufficient notice. As the Tenant's capacity to exercise the option expired on 30 June 2013, the last date upon which the Landlords should have given the Tenant notice was 30 December 2012; the notice was 16 days late, and the notice period 16 days short.

61 The fact situation is almost identical to the facts in *Beds for Backs,* where less than six months notice was given, and the period was shorter than six months. Deputy President Macnamara concluded, having analysed s21(2) of the RL Act:

> With some hesitation …I conclude that the proper construction of [sub-section 2] is that the words *as required* refer back to sub-section (1) hence the notice of the letter … is an effective notice for Section 28(2)(a) and the fact of it being late extends the period during which the option to renew may be exercised to a date being six months thereafter presumably to [the equivalent of 16 July 2013 in this proceeding, even though that is not the date that was in the notice]

62 Deputy President Macnamara found that there was no serious question to be tried, and dismissed the application for an injunction.

63 I adopt his reasoning and find, with respect to the notice of 16 January 2013 there is no serious question to be tried. It is therefore not necessary for me to consider the notice of 4 July 2014, because it is made redundant by the earlier notice. Nevertheless, I discuss it.

## Notice of 4 July 2014

64 By letter dated 4 July 2014 Mr Lee Martin of Jacobs & Lowe sent the Tenant two documents, each headed "option details". One was for office 2, the other for office 3. The covering letter was as follows, excluding the formal parts:

Please find enclosed details of the option renewal of lease for the above property. Please sign the notice where indicated and return to this office or fax to 5975 9075.

Rent charges will automatically increase to $3783 per calendar month (plus GST) for Office 2 and $882.66 per calendar month (plus GST) for Office 3, as of 1 September 2014.

If you have any questions or require any further information please do not hesitate to contact this office.

65 The "option details" document for Office 2 was as follows:

**OPTION DETAILS**

**2/346 Main Street – GF, Mornington, Vic, 3931**

Tenant: Legfin Pty Ltd t/a Hill Legal

Landlord: Thomas & Annieta Anthony

*The following terms and conditions are subject to the landlord and tenant's written approval.*

| | |
|---|---|
| Premises: | 2/346 Main Street – GF, Mornington, Vic 3931 |
| Term of Lease: | 3 Years |
| Further option: | Nil |
| Commencement Date: | 1st September 2014 |
| Monthly payment of rental: | $3783.00 pcm rent |
| | $378.30 pcm gst |
| | $4161.30 total per calendar month |
| Outgoings: | All outgoings are the tenants responsibility |
| Security Deposit | $3200.00 (ALREADY PAID) |
| Rent Reviews | Increased annually by 3% |
| | Reviewed to market at the end of each term |

66 The "option details" document for office 3 was similar.

67 Mr Lithgow submitted that the documents were defective because they were provided nine months after the leases had expired and contained the following alleged mistakes:

a The commencement date was wrong. It should have been 1 October 2013.

b The monthly rental should have been reviewed to market – the method of calculation was incorrect.

c The words: "The following terms and conditions are subject to the landlord and tenant's written approval" should not have been used. The Landlords should have sent the Tenant the proposed lease.

d The option did not say by what date it must be exercised.

Mr Lithgow submitted that the rights of the Tenant were preserved until it was sent a valid notice to exercise its option.

68 Under cross-examination Mr Lithgow asked Mr Anthony about various aspects of the compliance of the "option details" with the RL Act. Mr Anthony replied that he had not had legal advice on that point.

69 Although it would seem surprising if a firm of solicitors receiving such a document would not understand what the Landlords' agent was trying to achieve, it is arguable that these documents were not valid notices under s28 of the RL Act. However, as I said above, the issue of whether these notices raise a serious question to be tried is made redundant by the valid notice of 16 January 2013.

### Overholding and a new lease

70 The Tenant submits that on the basis of the decision in *Daco Enterprises Pty Ltd v The Golden Sultana Pty Ltd* [2006] VCAT 2547, it is arguable that the overholding creates a new tenancy. It submits further that where a periodic tenancy lasts for more than a year, then in accordance with ss 11 and 12 of the RL Act, there is a "new" retail premises lease, which entitles the Tenant to a minimum five year period for the new lease.

71 Mr Lithgow submitted at paragraphs 8 and 9 of his written submissions:

> If a "new" *Retail Leases* Act tenancy has been created by overholding for more than 12 months, then s64 of the *Retail Leases Act* requires the landlord to give at least six months notice before the lease term ends of the landlord's intentions.
>
> No notice under s64 … has been given.

72 I remark that if Mr Lithgow's analysis is correct, it is not surprising that no notice has been given as the Landlords would not be entitled to give it until, at earliest, 30 October 2017.

73 I also remark that if the Tenant establishes that there is a new lease of five years, it is governed by s64(5) of the RL Act:

> (5) If the landlord fails to comply with subsection (2), the tenant may, whether or not the landlord has given the tenant a notice as required under subsection (4)(a), give written notice to the landlord terminating the lease from a day that is not earlier than the day on which the term of the lease expires.

74 The Tribunal is not bound by its own earlier decisions, but is influenced by them. The *Daco* decision means that it is at least arguable that a tenant who seeks the remainder of a five year period will be awarded that period.

75 Nevertheless, the facts in this case are different to those in *Daco.* In this case the Landlord wants the Tenant, or some other tenant, to stay for a substantial period, but the Tenant was not willing to commit itself. There is nothing in the Tenant's Points of Claim or Mr Hill's affidavit that demonstrates that the Tenant wants to remain until 30 October 2018.

76 The question of whether there is a lease created by overholding is therefore of academic interest, but is not a serious question to be tried when it does not reflect the relief sought by the Tenant – an injunction alone, with no declaration that the Tenant is entitled to occupation until 30 October 2018.

## BALANCE OF CONVENIENCE

77 I accept that it is very inconvenient to the Tenant if it has to move out of the premises on one month's notice, but find that it is at least partly responsible for its own fate because it could have renewed the lease to ensure possession. It did not do so. It did not even give evidence that it attempted to negotiate a tenancy providing a certain date to vacate, to the mutual benefit of itself and the Landlords.

78 Further, even if the notice of 4 July 2014 was not a valid option notice, it is certainly an overture by the Landlord to the Tenant; an invitation to commence or continue negotiations.

79 I accept Mr and Mrs Anthony's evidence that they are due to renegotiate finance for their property with their bank, within the next five or six weeks, and that unless they have a tenant for the premises, they will be severely disadvantaged. I accept Mr Anthony's evidence that the building in which the premises is located is the only property investment they hold, that the Tenant holds the largest tenancy within the building and it is a major source of income for the Landlords. I accept Mr Anthony's evidence that he instructed his agents to offer the Tenant naming rights for the building and that the Landlords were keen to retain the Tenant.

80 I am also satisfied that it is very inconvenient to the Landlords not to have a tenancy in place, particularly when they are seeking to renegotiate finance.

### Positive Psychology

81 The Tenant's written submissions contends that Positive Psychology pulled out of the proposed tenancy because it could not have occupation by 1 July 2015, and that this was not the responsibility of the Tenant, because the earliest the Tenant could have been obliged to give up possession was 5:00pm on 8 July 2015.

82 Mr Lithgow said that Positive Psychology is no longer waiting to move in and that the Landlords promised them occupancy on 1 July 2015 when they had no right to do so. He said that the balance of convenience favours preserving the status quo.

### Damages an appropriate remedy

83 I am not satisfied that damages are an appropriate remedy in circumstances where the Landlords have described the urgency of their financial situation, their difficulties in affording legal representation, and the likelihood that any claim for damages will be strenuously defended, having regard to the Tenant's approach to date.

### Conclusion regarding balance of convenience

84 The burden of proving that the balance of convenience is in its favour falls upon the Tenant. I am not satisfied that it has done so.

## CONCLUSION

85 I am not satisfied that there is a serious question to be tried or that the balance of convenience is in favour of the Tenant. I therefore dismiss the Tenant's application for an injunction.

86 As foreshadowed on 9 June 2015, I order that the proceeding be set down for a mediation on the earliest available date after Mr Hill returns to Australia.

**SENIOR MEMBER M. LOTHIAN**