VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP451/2015

CATCHWORDS

Terms of Settlement – operation; creation of new lease? New lease subject to condition – condition precedent or condition of operation of lease? Agreement to negotiate reasonably – an agreement to agree?

APPLICANT:	Little Legs Play Centre Pty Ltd (ACN: 143 426 555)
FIRST RESPONDENT:	Mr David Speranza
SECOND RESPONDENT:	Ms Karen O'Brien
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	24 and 30 April 2015
DATE OF ORDER:	3 August 2015
DATE OF REASONS:	3 August 2015
CITATION	Little Legs Play Centre Ptgy Ltd v Speranza (Building and Property) [2015] VCAT 1158

ORDERS

The Tribunal finds and declares that:

1. the old lease executed in 2010 still binds the parties;
2. the re-entry into the Premises by the respondent on 23 April 2015 in reliance upon the old lease was valid;
3. there is a breach by the respondents of clause B(a) of the Terms of Settlement dated 16 June 2014;
4. there is a breach by the respondents of clause D(c) of the Terms of Settlement dated 16 June 2014.

The Tribunal orders:

5. By **4.00pm on 18 August 2015**, the applicant must file and serve:
   (a) affidavit material and submissions relevant to the issue of relief against forfeiture; and
   (b) submissions regarding the assessment of damages for breach of clause B(a) of the Terms of Settlement; and
   (c) submissions regarding the assessment of damages for breach of clause D(c) of the Terms of Settlement**.**
6. By **4.00pm on 1 September 2015**, the respondents must file and serve any affidavit material and submissions in reply.
7. **The proceeding is listed for hearing at 2.15 pm on 8 September 2015, at 55 King Street, Melbourne, before Member Edquist, with 2 hours allowed,** at which time the Tribunal will hear from the parties in relation to:
   (a) the applicant's claim for relief against forfeiture; and
   (b) the assessment of damages for breach of clause B(a) of the Terms of Settlement;
   (c) the assessment of damages for breach of clause D(c) of the Terms of Settlement,
   (d) any other matter raised.
8. Liberty to apply, including liberty to apply by consent for the proceeding to be listed for mediation.
9. Costs reserved.

MEMBER C EDQUIST

APPEARANCES:

For Applicant	Mr T Fennessy of counsel
For Respondent	Mr M Dean of counsel

REASONS

1 In this proceeding the applicant, Little Legs Play Centre Pty Ltd (ACN: 143 426 555) has come to the Tribunal seeking relief against forfeiture in respect of a factory 2 in Melton ('the Premises') which it leases from the respondent landlords. The applicant also seeks an order that the respondents comply with terms of settlement the parties executed on 16 June 2014.

2 This proceeding is the latest chapter in a long running saga which had its genesis in 2010 when the parties initially entered into a lease ('the old lease'). This is not the first time the parties have been before the Tribunal. A critical part of the story is that in April 2014 the respondents re-entered the Premises, prompting the applicant to issue proceedings seeking relief against forfeiture of the old lease. This led to a mediation, which in turn led to the execution of terms of settlement on 16 June 2014 ('ToS').

3 Execution of the ToS did not finalise the issues between the parties. The respondents assert that the applicant defaulted again repeatedly. On 23 April 2015, the respondents re-entered the Premises for non-payment of rent.

4 These proceedings were issued on 24 April 2015. The applicant seeks:

(a) relief against forfeiture;

(b) that the respondents be ordered to provide immediately exclusive access of the Premises to it; and

(c) that the respondents be ordered to comply with the ToS dated 16 June 2014.

5 This proceeding was first listed for an injunction hearing on 24 April 2015. The Tribunal ordered that, upon the applicant giving the usual undertaking as to damages, it was to have repossession of the Premises. Furthermore, the respondents were restrained until 10.00am on 30 April 2015, or until further order of the Tribunal, from:

(i) removing, damaging or otherwise interfering with the applicant's property at the Premises; or
(ii) providing any person or entity with exclusive possession, a lease or a licence of the Premises.

6 The matter, being part heard, was adjourned to 30 April 2015. On that occasion, orders were made that by 4 May 2015 the applicant was to file and serve some limited documents and also to file and serve its final submissions by 14 May 2015. The respondents were directed to file and serve their final submissions by 28 May 2015. The applicant's documents and submissions were filed on time, but the respondents' submissions were filed a day late, on 29 May 2015.

7 In the ToS, the parties agreed to replace the old lease with a new lease. A question arises as to whether this replacement has occurred. It is agreed between the parties that a decision must be made as to whether the parties have entered into a new lease.

8 The respondents say that the old lease still operates, and that they issued their Notice of Re-entry on 23 April 2015[1] on this basis. The respondents rely on clause 3(d)(i) of old 2010 lease which provides that the landlord can re-enter the Premises in the event of non-payment of rental, or any other monies payable by the tenant, for a period of 14 days after they ought to have been paid, even though no demand has been made.

9 The applicant, on the other hand, says that a new lease was entered into upon execution of the ToS ('the new lease'), that it applies, and that the re-entry is invalid as there can be no re-entry under the new lease without notice. The applicant also says the notice of re-entry is invalid as it is given under the old lease, which does not apply.

10 If this issue is resolved in the applicant's favour then that will largely dispose of the current dispute because there will be no effective re-entry, and the applicant will be entitled to a continuation of possession. In these circumstances, if the respondents wish to re-enter, they will have to issue a notice of re-entry which reflects the requirements of the new lease. It follows that, if the primary issue is resolved in favour of the applicant, there will be no need to deal with the issue of relief against forfeiture.

11 Having considered the evidence and the submissions made by the parties, I set out my finding regarding the issue of which lease in operation, and, insofar as it is necessary, deal with the remaining issues raised in the submissions. These issues include, apart from relief against forfeiture:

(a) whether the respondents have breached the obligation imposed on them by clause B(a) of the ToS regarding repair of the Premises; and

(b) whether the respondents have breached the obligation imposed on them by clause D(c) of the ToS to negotiate with the applicant regarding the cost of installation of a separate electricity meter, given that the cost will exceed $8,000.

BACKGROUND

12 The respondents leased the Premises to the applicant for a period of three years with four further options of three years each, from 15 June 2010.[2]

13 The applicant defaulted on payment of rent under the 2010 lease on a number of occasions. In particular, the respondents assert in their

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[1] The respondents' notice of re-entry dated 23 April 2015 is Exhibit MM5 to the affidavit of Michelle Angela Millar sworn 24 April 2015, which is Tribunal Book, Document 22 or TB22.

[2] The first lease is TB1.

submissions that, on 12 July 2012, they issued a first notice of default and that, on 22 August 2012, they issued a second notice of default.[3]

14 The parties signed terms of settlement on 27 November 2012 pursuant to which the applicant agreed to pay a net $48,866.67 to the respondents, being the rental which the parties had agreed was due as at 30 November 2012, less a reduction of $20,000, being the applicant's contribution to the respondents' repairs to the Premises.[4]

15 The respondents assert that the applicant fell into arrears again in 2013 and that, on 25 September 2013, a third notice of default was issued.[5] The respondents further say that on 24 March 2014 they issued a fourth notice of default.[6]

16 It is agreed that on 11 April 2014 the respondents re-entered the Premises for non-payment of rent, and in response, on that day, the applicant issued proceedings R82/2014 seeking relief against forfeiture.

17 A mediation followed on 16 June 2014 before Mediator Cyngler. At the conclusion of this mediation, the parties executed the ToS. These ToS are the terms which the applicant is seeking to have enforced in this proceeding.

18 Despite the execution of the ToS, the applicant fell into arrears again and on 12 December 2014 the respondents issued, what they assert, was a fifth notice of default.[7] The applicant, according to the respondents' submissions, did not dispute this notice but paid the respondents $9,926.69 on 19 December 2014.[8]

19 Furthermore, the respondents submit, the applicant failed to make monthly payments of rent due on 1 January 2015, 1 February 2015, 1 March 2015 and 1 April 2015 either in the amount of monthly rental required under the first lease, namely $4,766.67 or under the new lease, namely $6,416.66.[9]

20 It is in this factual matrix that on 23 April 2015 the respondents re-entered the Premises for non-payment of rent.

21 On 23 April 2015, the respondents say, the applicant paid $4,400 in rent; and on 27 April 2015 $2,300 in rent, and on 30 April 2015 $2,800 in rent.[10]

Has a new lease been entered into?

22 As noted, in order to determine the legitimacy of the respondents' re-entry on 23 April 2015, it is necessary to establish whether a new lease has been

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3 TB5.
4 TB6.
5 TB9.
6 TB10.
7 TB16 and also TB4.
8 Respondents' submissions, paragraph 17.
9 Respondents' submissions, paragraph 18.
10 Respondents' submissions, paragraphs 20, 22 and 23 respectively.

entered into. The applicant contends that upon execution of the ToS 'the Existing Lease was replaced with a new LIV Retail Lease.[11]

23 The respondents on the other hand, contend that the wording of clause 5(d) and paragraphs E and F of the ToS suggests the provision of a bank guarantee in the form required by the respondents is a condition precedent to the existence of the new lease; and as the applicants have not satisfied this condition precedent the new LIV Retail Lease has not come into existence.[12]

24 Because the case turns on the wording of the ToS it is appropriate to set out its relevant operative provisions in full:

> A. The parties hereby agree to replace the Existing Lease with a new LIV Retail Lease on the following terms:-
>
> 1. (a) The Commencement Date being 15 June 2014;
>
> (b) The commencing Rental to be as determined under clause 3(f)(ii)/3(g)(ii) of the Existing Lease and the eighth special condition therein;
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> (c) The Landlord to make the request under clause 3(g)(ii) of the Existing Lease such appointment within seven (7) days of the date hereof, or, such qualified valuer to be agreed by the Parties;
>
> (d) Each party is at liberty to make submissions to such appointee or agreed valuer as they see fit;
>
> (e) Such commencing Rental is to begin on the first day of the month following the date of determination; and
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> (F) The new Lease to be guaranteed by Ms Catherine Anne Smith by way of Deed of Guarantee or as otherwise proposed by the Landlord.
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> 2. The initial term of the new Lease is to be three (3) years with two (2) further options of three (3) years each and a final option of two (2) years.
>
> 3. The new Lease is to include the following special conditions:-
>
> (a) From the Existing Lease, the first (1st), third (3rd), fifth (5th), sixth (6th) and eighth (8th) special conditions;
>
> (b) The new special conditions are as follows:-
>
> i. Disclosure Statement to be provided to the Tenant by the Landlord as per the Retail Leases Act 2003.

[11] Applicant's submissions, paragraph 3(a).
[12] Respondents' submissions, paragraph 31.

ii. The Tenant to pay or reimburse the Landlord for outgoings, being two-thirds of all municipal, water, drainage, sewerage rates, charges and levies.

iii. All gas, electricity, telephone, sewer disposals, and water consumption charges;

iv. Any such payment or reimbursement of rates, charges and levies to be adjusted as from the 1 July 2014 and paid as invoices.

4. (a) The Rental payable exclusive of outgoings and GST to be increased at affixed rate of 3% per annum until the next market review on the exercise of an option ("base rental"); and

(b) The Rental is payable monthly in advance on the 1st of the calendar month or as directed by the Landlord in writing.

5. (a) The Landlord will provide to the Tenant confirmation of the security deposit required within seven (7) days of the date hereof;

(b) Upon receipt of confirmation from the Landlord of the security deposit required; the Tenant will forthwith apply for a bank guarantee equivalent to six (6) months base rental;

(c) Within seven (7) days of receipt of the said bank guarantee the Tenant will provide a copy of the bank guarantee and upon acceptance by the bank such guarantee to be lodged with the Landlord; and

(d) The new Lease is subject to the Tenant obtaining the said bank guarantee.

B. (a) The Landlord agrees to attend to all of the repairs in page 2 of the Building Report of the Mr Louie Le dated 21 June 2014; and

(b) The Landlord agrees to engage qualified trades people to attend to the repairs within thirty (30) days of the rental determination referred to in 1(b) herein.

C. (a) The Tenant agrees to seek from the Council all necessary permits and licenses in relation to any use by it or its licensees and to provide the Landlord with copies of same outside the use of the premises.

(b) The Tenant agrees to enter into a written license agreement that will be subject to the Landlord consent.

D. (a) Within thirty (3) days of the rental determination the Landlord will obtain a quotation for the installation of the separate electricity meters for factory 2 and 1

[address deleted] Street, Melton in the state of Victoria, 3337 ("factory 1").

(b) Within a further thirty (30) days of receiving the said quotation, the Landlord will carry out such installations (sic) provided that the cost of such installation does not exceed the sum of $8,000.

(c) In the event that the cost of the installation of the separate electricity metre (sic) exceeds the said sum of $8,000, the parties agree to enter into negotiations regarding same and will do all things reasonable to settle this matter.

E. The parties further agree to the following:-

(a) Enter into Deed of Release in respect of all disputes arising out of the existing Lease;

(b) The parties to sign Consent Orders to strike out the said VCAT proceedings with a right of re-instatement;

(c) The Tenant to notify the VSBC that the application is to be adjourned for a three (3) month period from the date hereof;

(d) Upon satisfaction of the above terms, the parties agree to enter into mutual releases with respect to the said VCAT and VSBC proceedings; and

(e) Parties to bear their own Legal Costs of the said VCAT and VSBC proceedings.

F. (a) the Landlord/Tenant will be at liberty to apply to have the proceedings reinstated and to obtain a determination for the sum the (sic) outstanding plus all solicitor/client costs incurred in doing so.

25 On the face of it, the terms of the new lease appear to have been set out with such particularity in paragraph A of the ToS that it would be possible for a document containing those terms to be engrossed and executed. On this basis, I do not consider that the proposition that there is a new lease will fail merely on the basis that the ToS do not set out the provisions of the new lease with sufficient certainty. In this respect, at least, I agree with the submission of the applicant that the ToS are not void for uncertainty.[13]

26 As at 30 April 2015, no lease had been prepared for execution. The applicant submits that the respondents were to prepare the new lease.[14] The applicant was certainly expecting the respondents' lawyers to provide a draft, as is apparent from a letter from the applicant's lawyers, Hughes Watson Marks Kennedy, dated 2 March 2015, which was put into evidence by the applicant.[15] The respondents' lawyers, Callea Pearce, were under

[13] Applicant's submissions, paragraph 6(b).
[14] Applicant's submissions, paragraph 4(a).
[15] Exhibit A2.

instructions not to provide a proposed lease until 'the bank guarantee has been obtained pursuant to the Terms of Settlement'.[16]

Conduct of the parties

27 There is some indication that the parties are conducting themselves in a manner consistent with the new lease being in operation, even though a new lease has not been prepared.

28 For instance, under two of the provisions of the new lease, which are to be transferred over from the old lease, there was to be a determination of the new rental.[17] On 1 December 2014, Mr Warwick Burnham of Warwick Burnham Real Estate was appointed as valuer pursuant to the ToS. He received submissions from the parties and in a Rental Determination issued on 1 December 2012, determined the rental to be $70,000 per annum plus outgoings and GST.[18] On a monthly basis, the new rental was to be $5,833.30 plus outgoings and GST, or $6,416.66 inclusive of GST.

29 Another important provision of the ToS is that the new lease is to be guaranteed by Ms Catherine Anne Smith by way of deed of guarantee, or as otherwise specified by the respondents.[19] The respondents were required to confirm to the applicant the security deposit required within 7 days of the date of the ToS.[20] Upon receipt of confirmation from the respondents of the security deposit required, the applicant was to supply a bank guarantee equivalent to six month's base rental.[21]

30 The respondents complied with the 7 day deadline created by clause 5(a) of the ToS, in that by email dated 18 June 2014 the respondents' lawyers advised that once the rental figure had been determined, the landlord would require only a five month guarantee to satisfy the ToS.[22]

31 A deed of guarantee from Westpac, dated 25 March 2015, in the sum of $24,000, from the applicant in favour of the respondents, was lodged with the respondents.[23]

32 This security was supplied on or after 25 March 2015 in purported compliance with the requirement to provide security equivalent to five month's rental. However, the applicant concedes that the bank guarantee, being for $24,000, is not based on five month's rental calculated using the newly determined rental, as was required by the respondents. Five month's rent calculated using the new rental figure determined by Mr Burnham

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16 Email from Callea Pearce dated 27 March 2015, put into evidence by the applicant as Exhibit A3.
17 ToS clause 1(b), which itself refers to clause 3(f)(ii)/3(g)(ii) of the old lease and the eight special conditions of the old lease, which are all included in the new lease pursuant to clause 3 of the ToS.
18 Mr Burnham's Rental Determination is TB15.
19 ToS clause 1(F).
20 ToS clause 5(a).
21 ToS clause 5(b).
22 TB21.
23 The Westpac bank guarantee is Exhibit MM-4 annexed to the affidavit of Michelle Angela Millar sworn 24 April 2015, which is TB22.

under the ToS would be 5 x $6,416.66 or $32,083.33. $24,000 represents five month's rounded up rent under the 2010 lease (5 x $4,800).

33 Nonetheless, the applicant says that the security of $24,000 was accepted without objection by the landlord 'although not based on the new commencing rental'.[24]

34 The provision of this security has crystallized as a key issue between the parties in the dispute as to which lease is in place.

35 On the face of it, the applicant has not supplied security in the required amount, and so it is necessary to address the respondents' contention that clause 5(d) of the ToS operates as a condition precedent, and its non-performance prevents the new lease from coming into existence.[25]

The submissions of the parties on the operation of the Terms of Settlement

36 The applicant submits that the ToS constitute a concluded agreement. The ToS do not constitute a preliminary agreement and are not subject to contract. Reference is made to *Masters v Cameron* (1954) 91 CLR 353.[26]

37 The relevant passages appearing in the joint judgment of Dixon CJ, McTiernan and Kitto JJ in *Masters v Cameron* read:

> 9 Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
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> 10 In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

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[24] Applicant's submissions, paragraph 4(d).
[25] Respondents' submissions, paragraph 31.
[26] Applicant's submissions, paragraph 6(a).

38 The applicant's contention is that the ToS constitute 'a concluded agreement' and that they operate to create a new lease. This is clear from the applicant's submission that the present case is similar to *Godeke v Kirwan* (1973) 47 ALJR 543; (1973) 129 CLR 629, where a document for the purchase of land headed 'offer and acceptance' was held to constitute a binding and enforceable contract even though it was accepted that the parties intended that a further contract should be executed.[27]

39 As noted, the central contention of the respondents is that:

> The wording of clause 5(d) and paragraphs E and F of the Terms of Settlement suggest that the provision of a bank guarantee in the form required by the Terms of Settlement was a condition precedent to the existence of the new LIV Retail Lease referred to in the Terms of Settlement.[28]

40 As the respondents point out,[29] whether non-fulfilment of a condition precedent prevents a contract from coming into existence, or whether it operates as a condition of performance, depends on the contract in question. Reference is made to *Perri v Coolangatta Investments Pty Ltd (*1982) 149 CLR 537, 149 CLR 537 and *Trewarne Antique & Fine Jewellery Pty Ltd v Perpetual Limited* [2013] VCAT 1743.

41 In *Trewarne Antique & Fine Jewellery Pty Ltd v Perpetual Limited***,** Walker SM had to determine whether an offer set out in a letter from a landlord's agent to a tenant, which was said to have been accepted by the tenant, gave rise to a binding agreement between the parties. In the course of his decision, Walker SM referred to the observations of Mason J in *Perri v Coolangatta Investments Pty Ltd*, where his Honour said at [17]:

> This divergence in approach calls for some discussion of the nature of conditions generally and of the characteristics of special condition 6 in particular. There is an obvious difference between the condition which is precedent to the formation or existence of a contract and the condition which is precedent to the obligation of a party to perform his part of the contract and is subsequent in the sense that it entitles the party to terminate the contract on non-fulfilment. In the first category the transaction creates no rights enforceable by the parties unless and until the condition is fulfilled. In the second category there is a binding contract which creates rights capable of enforcement, though the obligation of a party, or perhaps of both parties, to perform depends on fulfilment of the condition and non-fulfilment entitles him to terminate.

and at [19]:

> Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the

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27 Applicant's submissions, paragraph 6(a).
28 Respondents' submissions, paragraph 31.
29 Respondents' submissions, paragraph 30.

> conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is no binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated event a condition precedent to the duty of one party, or perhaps of both parties, to perform. Furthermore, it gives the courts greater scope in determining and adjusting the rights of the parties. For these reasons the condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion.

42 As noted by Walker SM in *Trewarne Antique & Fine Jewellery Pty Ltd v Perpetual Limited*, the learned authors of Cheshire & Fifoot *Law of Contract* Tenth Australian Edition (at para 20.4) cite *Perri v Coolangatta Investments Pty Ltd* in connection with this proposition:

> **"Bias against conditions of contract formation."**
>
> Whether non-fulfilment of a contingent provision prevents a contract from coming into existence, or operates as a condition of its performance, must depend on the particular contract. But at least where the parties have fully settled the terms of their transaction the court will favour the view that any contingent condition included among them is a condition of performance rather than of formation of the contract.

The relevant provisions of the Terms of Settlement

43 In order to understand the effect of clause 5(d) of the ToS it is necessary to look at the operative provisions of the ToS as a whole.

44 In support of its contention that the new lease is already in operation the applicant points to the following provisions:

(a) the form of the lease is to be that of a LIV Retail Lease.[30]

(b) the commencement date of the new lease is specified as 15 June 2014.[31]

(c) there is to be a mechanism for determination of the rent.[32]

(d) security is to be provided.[33]

(e) the term of the new lease is to be three years and there are to be two further options of three years each and a final term of two years.[34]

(f) the new lease is to contain the first, third, fifth, sixth and eighth special conditions contained in the 2010 lease.[35]

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30 ToS clause A.
31 ToS clause 1(a).
32 ToS clause 1(b).
33 ToS clause 1(F), (sic) and clause 5.
34 ToS clause 2.

(g) a number of new special conditions are specified.[36]

(h) there is a rent escalation clause.[37]

45 The applicant's position is that the replacement of the old lease has been effected by the words of the ToS which provides at clause A:

> The parties hereby agree to replace the Existing lease with a new LIV Retail lease on the following terms.

46 The word 'hereby' is highlighted by the applicant as indicating the parties' immediate intention.[38]

47 I accept the applicant's argument that the use of 'hereby' demonstrates that the parties are acting with immediate intention, but that of itself does not mean that the new lease automatically comes into operation. This is because the relevant words of paragraph A are:

> 'The Parties hereby agree to replace the Existing Lease with a new LIV Lease on the following terms …'.

48 It is noteworthy that the parties 'hereby agree to replace' the old lease with a new lease. They do not 'hereby replace' or 'by these Terms of Settlement replace' the old lease with a new lease. I therefore find, accordingly, that paragraph A of the ToS does not of itself substitute a new lease for the old lease.

49 The respondents, as noted, point to not only clause 5(d) but also to paragraphs E and F of the ToS as establishing that the new lease is subject to a condition precedent, namely the provision of the bank guarantee.[39]

50 Clause E refers the parties further agreeing to do certain things including:

(a) entering into a deed of release in respect of all disputes in connection with the existing lease;

(b) signing consent orders to strike out the VCAT proceedings with a right of re-instatement;

(c) notifying the VSBC of a three month adjournment;

(d) upon 'satisfaction of the above terms', entering into mutual releases regarding the VCAT and VSBC proceedings; and

(e) the parties bearing their own legal costs.

51 None of these matters appears relevant to the operation of the new lease, save for the provision in clause E(d) that the entering of mutual releases is subject to 'satisfaction of the above terms'.

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35 ToS clause 3(a).
36 ToS clause 3(b).
37 ToS clause 4(a).
38 Applicant's submissions, paragraph 3(a).
39 Respondents' submissions, paragraph 31.

52 In binding the parties to sign mutual releases 'upon satisfaction of the above terms', clause E(d) of the ToS is consistent with the view that the new lease is not yet in operation. On this interpretation, only when the new lease is in place and the other terms of the ToS have been complied with, will mutual releases will be given.

53 I accept this interpretation of clause E(d) because, in my view, the ToS appears, when read as a whole, to operate in incremental stages pursuant to which the new rent is to be determined, then the new guarantee is to be provided, then the new lease is to be executed, and the other agreements regarding repairs and the installation of the second electricity meter are to be addressed.

54 I am not persuaded that clause F of the ToS is relevant. It provides that:

> [The parties] will be at liberty to have the proceedings reinstated and to obtain a determination for the sum the (sic) outstanding plus all solicitor/client costs incurred in doing so.

55 I am of the view that this clause cannot be considered in isolation, because, taken out of context, and read literally, it suggests there has been no settlement of the disputes. It invites each party to rejoin the disputes which were the subject of the mediation. I note that clause F appears to be drawn from the standard VCAT terms of settlement. However, in the standard terms, the circumstances which must exist before the parties can have the proceeding reinstated are that the settlement sum or part of it has not been paid, in other words that there has been a breach of the terms. I consider clause F must be read as coming into operation if, and only if, there has been a breach of the ToS.

56 The upshot is that the respondents must rely solely on the words of clause 5(d) and paragraph E(d) in support of their contention that the new lease is subject to a condition precedent.

57 As noted, clause 5(d) simply provides:

> The new lease is subject to the Tenant obtaining the said bank guarantee.

58 Clause 5(d) is not unambiguously expressed as a condition precedent. However, I find and declare that clause 5(d) is to be viewed as a condition precedent, because this is consistent with the ToS when read as a whole, which in my view describes a staged process for the creation of the new lease.

59 As I have found and declared that clause 5(d) operates as a condition precedent, and as the evidence discloses that the security provided by the applicant does not meet the requirement for security specified by the respondents pursuant to clause 5(a) of the ToS, I find that the new lease has not come into existence. Accordingly, I find and declare it is the old lease that still binds the parties.

60 I note that this finding that the old lease is still in operation is consistent with:

(a) the fact that the respondents have not started invoicing the applicant with the new rental under the new lease;[40]

(b) the view of the respondents expressed in its lawyers' letter dated 16 February 2015 that a new lease was yet to be executed pursuant to the ToS;[41]

(c) the applicant seeing its obligation regarding payment of arrears in terms of the rental payable under the old lease, even in March 2015.[42]

What is the effect of the old lease remaining in operation?

61 As noted, the applicant says that if the new lease is in place, then the notice of re-entry relied on by the respondents is invalid as it clearly relies on the old lease.[43]

62 The respondents on the other hand argue that they validly re-entered the Premises on 23 April 2015 without notice of non-payment of rent as they were entitled to do this under the old lease.[44]

63 I find and declare that as the old lease still binds the parties, the re-entry on 23 April 2015 in reliance upon the old lease was valid.

Relief against forfeiture

64 On the basis that the respondents' re-entry on 23 April 2015 was valid, the respondents are entitled to possession of the Premises. Accordingly, it will be necessary to determine the applicant's application for relief against forfeiture.

65 As the evidence regarding the issue of relief against forfeiture was given more than two months ago, it is appropriate that the parties be given an opportunity to submit further evidence on the issue.

Repairs

66 In the application, the applicant sought, amongst other things, compliance with the ToS. One of the matters complained of at the hearing by the applicant's director, Michelle Millar, was that the respondents had not discharged the obligation placed upon them by clause B(a) of the ToS to attend to all the repairs on page 2 of the building report of Mr Louie Le dated 21 June 2014. In her evidence, on 30 April 2015, Ms Millar conceded the roof may have been repaired, but complained that the centre of the roof still leaked because of ineffective capping. She also said the drainage in the

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40 Applicant's submissions, paragraph 4(b).
41 Exhibit A1.
42 As is apparent from the letter from Hughes Watson Marks Kennedy dated 2 March 2015, which is Exhibit A2.
43 See paragraph 9 above.
44 Respondents' submissions, paragraph 32.

car park was not fixed. And, she said, there were water stains in the kitchen.

67 At the hearing, the first respondent, Mr Speranza, gave evidence concerning the performance of repairs. He said the roof over the Premises had been fixed; that the gutters can hold water, but maintenance of the gutters has been performed; and that the driveway was asphalted and the walkways rectified, although pooling could still occur.

68 A letter from the respondents' solicitors, Callea Pearce, dated 16 February 2015, was tendered by the applicant.[45] In this letter the respondents' solicitors asserted that the respondents had attended to all required repairs. The letter attached 'invoices/receipts and photographs verifying that all works have been completed'.

69 The invoices attached to the respondents' solicitors' letter of 16 February 2015 include one prepared by a plumber, Mr Anthony Keating, of ALK Plumbing & Drainage, dated 6 February 2015. This confirmed the roof was in 'extremely good order' and 'the gutters have all been cleared'. The letter confirmed the 'poly carb' had 'moulded to the existing sheet extremely well'; that the top hat was 'fixed well'; and the foam under the ridge cap 'is fine and will not cause any problem'. Finally, the letter said 'Down pipes look in good order'.

70 The submissions filed by the applicant are completely silent as to the issue of outstanding repairs.

71 The respondents' position on repairs is that as the applicant has failed to make any written submissions regarding the repairs required at the Premises, it is assumed that a claim regarding repairs is not pursued.[46]

72 As the applicant is legally represented, the respondents' position is understandable. I agree that it would appear from the submissions that the applicant has abandoned any claim that there is a breach of the ToS regarding the respondents' failure to repair the premises in the manner outlined as necessary by Mr Le. However, the absence of submissions is not fatal to the applicant's position regarding repairs, as the issue was a live one at the hearing.

73 On the basis of the evidence presented at the hearing, in particular the report of Mr Keating, it would appear that the respondents have discharged the obligation placed upon them by clause B(a) of the ToS to attend to the repairs to the roof, and the down pipes, identified by Mr Le in his report of 21 June 2014. I accept Mr Speranza's evidence that the gutters have been cleaned but note he did not dispute the applicant's evidence that the gutters still pool. And I also accept his evidence that the driveway and walkways have been rectified.

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45 Exhibit A1.

46 Respondents' submissions, paragraphs 36 and 37.

74 It appears from the evidence of Ms Millar that an issue remains regarding water stains in the kitchen. Mr Speranza said in evidence that he had just heard about it. However, the kitchen roof is an issue referred to in Mr Le's report.[47]

75 On the evidence before me I am satisfied that there is a breach by the respondents of the obligation placed on them by clause B(a) to 'attend to all of the repairs in page 2 of the Building Report of Mr Louie Le dated 21 June 2014' insofar as:

(a) the gutters still pool; and

(b) the repair of corroded roof metal sheets above the kitchen has not been carried out.

If forfeiture of the lease is granted, these repairs will have to be attended to.

Electricity meter

76 As noted, paragraph D of the ToS provides:

> (a) Within thirty (30) days of the rental determination the Landlord will obtain a quotation for the installation of the separate electricity meters for factory 2, and 1 [address deleted] Street, Melton in the State of Victoria, 3337 ('factory 1').
>
> (b) Within a further thirty (30) days of receiving the said quotation, the Landlord will carry out such installations (sic) provided that the cost of such installation does not exceed the sum of $8,000.
>
> (c) In the event that the cost of installation of the separate electricity metre (sic) exceeds the said sum of $8,000, the parties agree to enter into negotiations regarding same and will do all things reasonable to settle this matter.

77 At the hearing there was evidence from the applicant's Ms Millar that Fleming, Kinnear & Cave Pty Ltd, electrical contractors, had quoted, on 2 February 2015, $9,670 for the splitting of the electrical wiring for factory 1 and factory 2 into two separately metered tenancies, and associated works.[48]

78 The applicant contends that, in the circumstances, the Tribunal should order the respondents to pay such part of the excess over $8,000, as is considered reasonable, as their share of the cost, or alternatively, award damages for the breach of clause D(c) of the TOS.[49]

79 Against this, the respondents contend there has been no breach of the terms. The respondents say the evidence is that the applicant has offered to pay half the excess, and that the respondents have rejected that offer but have

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47 Mr Le's report was put into evidence by the applicant as Exhibit A4. The corrosion of metal roof sheets above the kitchen is mentioned at Item 3 on page 2.

48 This quotation was attached to the letter from Callea Pearce dated 16 February 2015, which is Exhibit A1.

49 Applicant's submissions, paragraph 8.

agreed to pay $8,000 towards the cost of installation.[50] The respondents further say:

> The parties have negotiated and done all things reasonable to settle the matter. The fact that the parties have not settled the dispute does not give one party an entitlement at law to obtain an order forcing the other to pay more than that which in negotiation it has offered to pay. It is not for the Tribunal to substitute its own mechanism or decision where the parties have failed to negotiate a resolution.[51]

80 In this connection, the respondents rely on *WTE Cogeneration v RCR Energy Pty Ltd* [2013] VSC 314.[52]

81 I am not persuaded that *WTE Cogeneration v RCR Energy Pty Ltd* is relevant. That case concerned a dispute resolution clause which the Court held was unenforceable because it required the parties to meet to attempt to resolve the dispute or to agree on methods of doing so. The clause failed because the process established by it was uncertain. It was merely an agreement to agree.

82 In the present case, the obligations on the parties are clear. If the cost of the meters exceeds $8,000, the parties are 'to enter into negotiations… and… do all things reasonable to settle this matter'. This is more than an agreement to agree.

83 Clause D(b) of the ToS requires the respondents to carry out the installation of the separate electricity meter if the cost does not exceed $8,000. The cost to install the separate meter has been established to be $9,670. Clause D(c) of the ToS, in effect, requires the parties to negotiate some split of the excess over $8,000, namely $1,670. The minimum contribution contemplated by the respondents under clause D(c) is $1, and the maximum is $1,669. In my view, to offer absolutely nothing over $8,000 amounts to a refusal to enter into negotiations. It is not doing all things reasonable, and I find and declare that the respondents are therefore in breach of clause D(c) of the ToS.

84 There being a breach of clause D(c) of the ToS, it falls to the Tribunal to assess damages. Neither party made submissions regarding the measure of damages for this breach. I consider it is appropriate the parties be given the opportunity to do so.

85 Costs will be reserved but the parties attention is drawn to s 92 of the *Retail Leases Act 2003*.

MEMBER C EDQUIST

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50 Respondents' submissions, paragraph 34.
51 Respondents' submissions, paragraph 35.
52 Respondents' submissions, paragraph 35.