

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1247/2016

CATCHWORDS

Retail Leases Act 2003 (Vic), option to renew, authority of third party to bind landlord in mediation before the Small Business Commission, effect of settlement reached at Small Business Commission, alleged unconscionable conduct by tenant, whether landlord entitled to rent review by specialist valuer.

APPLICANT	River View Pty Ltd (ACN 071 155 943)
RESPONDENT	Primrose Meadows Pty Ltd (ACN: 089 757 755)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	4 and 5 July 2018, 20 and 21 August 2018 with submissions filed on 7 September 2018 and 11 September 2018
DATE OF ORDER AND REASONS	18 October 2018
CITATION	River View Pty Ltd v Primrose Meadows Pty Ltd (Building and Property) [2018] VCAT 1623

ORDER

- 1 It is declared that by letter dated 27 May 2016, River View Pty Ltd exercised the option for a further term commencing 2 September 2016.
- 2 By 4pm on 30 November 2018, Primrose Meadows Pty Ltd is to provide to River View Pty Ltd a lease of the premises for the period 2 September 2016 to 1 September 2021 on the terms of the lease (as varied by the Lease by Renewal) and containing six options for further terms of five years.
- 3 The counterclaim is dismissed.

- 4 By 30 November 2018 the parties may apply on a question of costs but they are directed to the provisions of s92 of the *Retail Leases Act 2003* (Vic).

L. Forde
Senior Member

APPEARANCES:

For Applicant Ms L Papaelia of counsel

For Respondent Mr J Levine of counsel

REASONS

INTRODUCTION

- 1 The applicant, River View Pty Ltd (**tenant**) leased premises known as the Lincolnshire Arms Hotel (**hotel**) at 1 Keilor Road North Essendon (**premises**) from the respondent, Primrose Meadows Pty Ltd (**landlord**).
- 2 The tenant claims that it exercised the second option in its lease and seeks a declaration to that effect as well as specific performance of an agreement for lease commencing 2 September 2016.
- 3 The landlord denies that the tenant validly exercised the second option or that it is entitled to specific performance of an agreement for lease. The landlord counterclaims seeking a declaration that the rent for the term of the lease commencing 2 September 2011 be determined by a specialist retail valuer and that the tenant pay any shortfall between the rent paid during the term and the rent determined by the specialist retail valuer. The landlord further seeks orders that terms of settlement (which will be referred to later) and the Lease by Renewal be set aside leaving the tenant on a monthly tenancy and for the tenant to paint the hotel and pay damages and costs.

WITNESSES

- 4 Ms Grace Yang, dispute resolution officer at the Small Business Commission (**SBC**), Mr Amin Dahaby, general manager of the Lincolnshire Arms Hotel (**hotel**), Ms Christine Guest former bookkeeper at the hotel and Mr John O'Halloran director of the tenant gave evidence on behalf of the tenant.
- 5 Mr Antonio D'Anna, director of the landlord gave evidence on the landlord's behalf.

BACKGROUND FACTS

- 6 The parties agree that: -
 - i The tenant operated a hotel from the premises since 1996 under a lease (**original lease**);
 - ii The landlord purchased the premises in 2000;
 - iii In 2001 the tenant exercised an option under the original lease;
 - iv In 2006 the tenant exercised a second option under the original lease;
 - v The parties did not agree on the rent for the second option period. Warren Young of Ronald Young & Co was appointed to determine the rent. The market value was determined to be \$420,000 per annum plus GST. This was less than the preceding year's rent.
 - vi Mr O'Halloran and Mr D'Anna had a difficult relationship since the rental determination with Mr D'Anna avoiding all direct contact with

- Mr O'Halloran and not responding to correspondence. Mr D'Anna usually had a representative acting for him in dealings with the tenant.
- vii On 7 February 2007, a lease following the second option exercise was entered (**lease**) for a term of five years commencing 2 September 2006 and expiring 1 September 2011 with eight options for further terms of five years.
 - viii The *Retail Leases Act 2003* (Vic) (**RLA**) applies to the premises;
 - ix By letter dated 31 January 2011, the tenant sent a letter to the landlord exercising the first option in the lease;
 - x On 14 December 2011, the landlord's solicitors MNG Lawyers (**MNG**) sent the tenant three copies of a document entitled "Lease by Renewal" (**Lease by Renewal**) with a commencement rent of \$520,000 per annum plus GST;
 - xi The tenant disputed the rent and sought a determination of the rent. The landlord did not participate in the rental determination. In April 2012, the tenant made an application to the SBC to refer the dispute primarily about rent to mediation.
 - xii On 19 June 2012, Mr O'Halloran attended mediation at the SBC. Mr Straussman attended the mediation and said he was representing the landlord. Mr D'Anna did not attend the mediation.
 - xiii On 19 June 2012, the tenant entered into terms of settlement to resolve the dispute (**terms of settlement**) at the SBC mediation. The signed terms of settlement annexed the Lease by Renewal which had handwritten alterations to, amongst other matters, the commencement rent. The rent had been altered from the typed figure of \$520,000 to \$390,000. The tenant claims that the terms of settlement (which required a new lease in the same terms as the Lease by Renewal with alterations) are binding on the landlord. As the landlord's authorised agent, Mr Straussman attended the mediation and signed the terms of settlement on behalf of the landlord. The landlord's position is that Mr Straussman had no authority to sign the terms of settlement and the terms of settlement do not bind the landlord.
 - xiv From June 2012 the landlord issued tax invoices for rent of \$390,000 plus GST per annum and the tenant paid the amount on the tax invoices.
 - xv By letter dated 27 May 2016 to the landlord, the tenant exercised the second option in the lease.
- 7 The landlord claims it is entitled to have a rental determination following the exercise of the option on 31 January 2011. It says it is not bound by any agreement reached at the SBC mediation.
- 8 The tenant contends that by its exercise of the option on 27 May 2016, the landlord and tenant are parties to an agreement for lease on the terms of the

lease as varied by the Lease by Renewal for a further term of five years commencing 2 September 2016.

- 9 The landlord says the option was not validly exercised on 27 May 2016 as the tenant was in default and is holding over as a monthly tenancy.
- 10 Mr D'Anna says that Mr Straussman is currently incarcerated for fraud-related offences. Mr D'Anna says that he was the victim of fraud perpetrated by Mr Straussman, having paid Mr Straussman in excess of \$200,000 to assist with his business affairs.

ISSUES

- 11 There are four issues for determination in this proceeding:
 - i Is the tenant entitled to a new lease commencing September 2016?
 - ii Is the landlord entitled to have the rent for the previous term determined by a specialist retail valuer on the basis that the lease by renewal and/or terms of settlement are void?
 - iii Is the landlord entitled to an order that the tenant paint the premises on the basis that the tenant failed to paint the premises in breach of the lease?
 - iv Is the landlord entitled to damages from the tenant for the tenant's alleged unconscionable conduct?

ISSUE I - Is the tenant entitled to a new lease commencing September 2016?

- 12 It is not disputed that the tenant exercised the option for a further lease term commencing 2 September 2011 to 1 September 2016.
- 13 There is a dispute over the validity of the lease document. If the terms of settlement are binding, the Lease by Renewal attached to the terms will govern the lease period. If the terms of settlement are not binding, the tenant will still have exercised an option but without agreement on the lease documents.
- 14 The tenant's right to exercise the option for a further term from 1 September 2016 is not dependant on there being a binding lease document in place. In the absence of a lease document, the tenant has the right in equity to exercise the option.
- 15 The landlord contends that the tenant was in breach of the lease at the time it purported to exercise the option on 27 May 2016. The landlord says the option was not exercised. The landlord provided no evidence to the Tribunal of having issued notices of default to the tenant prior to 27 May 2016. The landlord did not provide evidence of the tenant having persistently defaulted under the lease prior to 27 May 2016.

- 16 Section 27 of the RLA provides
- (2) If a retail premises *lease* contains an option exercisable by the *tenant* to renew the *lease* for a further term, the only circumstances in which the option is not exercisable is if—
 - (a) the *tenant* has not remedied any default under the *lease* about which the landlord has given the *tenant* written notice; or
 - (b) the *tenant* has persistently defaulted under the *lease* throughout its term and the landlord has given the *tenant* written notice of the defaults.
- 17 As no notice of default was issued by the landlord to the tenant prior to 27 May 2016 and no evidence of persistent default provided, the landlord cannot by reason of s27 of the RLA maintain that the option was not exercisable.
- 18 To the extent that the lease might contain any provision inconsistent with s27(2) of the RLA, that provision will be void by reason of s94 (1) of the RLA.
- 19 I find, for the reasons stated, that the tenant exercised an option for a further term of 5 years commencing 2 September 2016 and the tenant is entitled to a new lease for this period. I reject the proposition that the tenant is holding over on a monthly tenancy.

ISSUE II -Is the landlord entitled to have the rent for the previous term determined by a specialist retail valuer on the basis that the Lease by Renewal and/or terms of settlement are void?

- 20 The landlord’s position is that the Lease by Renewal and terms of settlement are void and no rent has been agreed. It is entitled to have the rent determined by a specialist retail valuer.
- 21 I must decide whether the landlord is bound by the act of Mr Straussman signing the terms of settlement. To decide this, it is necessary to examine in some detail the role Mr Straussman took prior to the SBC mediation.
- 22 Mr O’Halloran is a practising solicitor in Victoria. His evidence is that he made contemporaneous file notes of his telephone conversations. The file notes are contained in the Tribunal book. The correspondence he refers to in his evidence is contained in the Tribunal book.
- 23 Mr O’Halloran’s evidence can be summarised as follows:
- a The first contact he had with Mr Straussman was a telephone call from Mr Straussman on 8 September 2011. The call was in response to Mr O’Halloran’s letter dated 16 August 2011 to the landlord (sent to Mr D’Anna’s home address). In the letter, he requested a new lease or renewal document following the exercise of the option. Mr Straussman told him that Mr D’Anna was on a cruise and Mr D’Anna would respond to his request when he returned in two weeks.

- b After two weeks had passed, Mr O'Halloran wrote to Mr D'Anna referring to the earlier letter and his telephone conversation with Mr Straussman and requested a response. He left a telephone message on Mr D'Anna's mobile phone on 11 October 2011 asking him to return his call.
- c He received a telephone message from Mr Straussman on 12 October 2011 saying Mr D'Anna was grieving because a relative had died in a car accident. He said he wanted the matter to progress positively, he was meeting Mr D'Anna on 14 October and he would contact Mr O'Halloran the following week.
- d On 20 October 2011 Mr O'Halloran received a call from Mr Straussman to arrange a meeting with Mr D'Anna and Mr Straussman on 10 November 2011 at the hotel. He wrote to the landlord that day referring to the discussion with Mr Straussman and confirming the meeting.
- e On 10 November 2011, Mr Straussman contacted him and cancelled the meeting. He suggested the rental issue go to a rental determination and provided assurance that a lease would be in place before Christmas.
- f On 14 November 2011, he contacted Mr Straussman who confirmed that Mr D'Anna had engaged a solicitor to prepare the lease documentation and would have it in place before Christmas.
- g On 17 November 2011, he wrote to Mr D'Anna setting out his attempts to have a new lease and again referring to Mr Straussman.
- h On 20 November 2011, Mr Straussman telephoned him and said he would have a lease before Christmas.
- i On 28 November 2011, he wrote to Mr D'Anna referring to the recent conversation with Mr Straussman and attached a notice pursuant to section 26 (3) of the RLA giving notice of the landlord's failure to provide a disclosure statement.
- j On 6 December 2011, Mr Straussman called him saying a letter would be coming in relation to roof repairs and confirming a lease would be in place by Christmas.
- k On 9 December 2011, he received a call from Mr Straussman saying he and Mr D'Anna had been to see a solicitor and the tenant would have the lease by 14 December.
- l On 14 December 2011, the tenant received, by courier, a letter from MNG attaching three copies of a document entitled "Lease by Renewal" with the commencement rent of \$520,000 per annum plus GST and requesting that the document "*be signed and return the originals for signing by the landlord.*"

- m He wrote to MNG on 15 December 2011 acknowledging receipt of the Lease by Renewal and rejecting the rent proposed of \$520,000. He proposed a rent of \$380,000. The letter requested that if agreement could not be reached procedures be implemented to determine a fair market rent. His rent offer was rejected by a letter from MNG Lawyers dated 16 December 2011.
- n Samantha Freeman of Knight Frank was nominated as the valuer to determine the current market rent by letter dated 23 February 2012. He wrote to Ms Freeman on 15 March 2012 accepting her appointment. Ms Freeman did not receive confirmation of her appointment from the landlord.
- o As no rent had been agreed or a determination made the tenant applied to the SBC.
- p He received an email from the SBC on 30 April 2012 advising that the landlord had agreed to attend mediation arranged for 30 May 2012. On 23 May 2012 he received an email from Grace Yang of SBC advising that Mr D'Anna had been rushed to hospital and that the mediation was to be rescheduled. The SBC rescheduled the mediation to 19 June 2012.
- q He attended mediation on 19 June 2012 and brought with him the three copies of the Lease by Renewal document which were attached to the letter from MNG dated 14 December 2011. He met Mr Straussman for the first time and Mr Straussman said he was attending on behalf of the landlord.
- r Agreement was reached at the mediation to resolve the rent dispute.
- s The agreement was recorded in the written terms of settlement. The terms of settlement provided that:
 - (1) the landlord shall provide to the tenant a renewed lease of the premises commencing on the 2 Sept. 2011 on the same terms and conditions as the lease which expired on the 1 Sept. 2011, with
 - (a) an agreed rent of \$390,000 per annum plus GST.
 - (b) to be identical to "Lease by Renewal" document prepared by the landlord's solicitor, signed by the tenant and attached thereto.
 - (2) The renewed lease signed by the landlord shall be provided to the tenant by 26 June 2012.
 - (3) The landlord shall provide to the tenant a disclosure statement by 26 June 2012.
 - (4) The tenant shall write to the landlord's authorised agent, Mr Shane Straussman C/65 Brewster Street Essendon 3041, and provide details concerning the leaking roof and the car park drainage, within seven days of date hereon.

(5) The landlord agrees to use its best endeavours to attend to the roof repairs and the car park drainage as soon as practicable, so as to prevent flooding of the premises.

(6) The landlord acknowledges that the repairs referred to above shall be at the landlord's expense.

t After writing the terms of settlement he made handwritten changes to each of the three copies of the Lease by Renewal document altering the commencing rent from \$520,000 to \$390,000 per annum plus GST and deleting clause 3. He signed all three copies and initialled the handwritten amendments. He then signed the terms of settlement and gave the terms of settlement and the three copies of the signed Lease by Renewal to the mediator. Mr Straussman witnessed his signature as guarantor and signed the terms of settlement as the authorised agent of the landlord.

24 Mr O'Halloran says that he believed Mr Straussman had authority to enter into the terms of settlement because: -

- a he represented that he had that authority;
- b Mr D'Anna had permitted Mr Straussman to manage and conduct the landlord's business in the preceding months;
- c Mr D'Anna failed to object to the tenant speaking with Mr Straussman about a request for a new lease after receiving letters from the tenant which referred to conversations between the tenant and Mr Straussman (as Mr D'Anna's representative);
- d Mr D'Anna failed to inform the tenant that Mr Straussman was not his representative or agent after receiving letters from the tenant which referred to Mr Straussman as the landlord's representative and Mr Straussman's assertions of those facts and that he arranged for Mr Straussman to attend the mediation on 19 June 2012;
- e Mr Straussman's involvement coincided with the landlord not engaging lawyers to deal with the tenant;
- f having a representative was consistent with Mr D'Anna's position that Mr D'Anna would not deal directly with Mr O'Halloran or respond to his emails, letters or calls as set out in his witness statement;
- g Mr Straussman contacted Mr O'Halloran in response to letters and messages Mr O'Halloran had sent to Mr D'Anna's residence or left on Mr D'Anna's mobile phone; and
- h Mr D'Anna advised Mr Straussman of the mediation date and Mr Straussman attended with the knowledge of Mr D'Anna.

25 Mr D'Anna gave conflicting evidence about his relationship with Mr Straussman in the counterclaim and in his affidavit dated 2 March 2017. In cross examination Mr D'Anna accepted that Mr Straussman was a friend until he discovered he was a fraudster. Mr D'Anna says he paid Mr

Straussman to engage with Mr O'Halloran about the rent for the hotel. Mr D'Anna said he paid Mr Straussman in excess of \$200,000 to not only assist with Mr O'Halloran but "to do other things as well."

26 Mr D'Anna admits that he provided Mr Straussman with a copy of a medical certificate that Mr Straussman forwarded to the SBC on 24 May 2012 to obtain an adjournment of the first mediation. He denies that he authorised Mr Straussman to send the letter. I find this implausible as in the absence of wanting to use the certificate to support an adjournment there was no reason for Mr D'Anna to provide the certificate to Mr Straussman.

27 The records of the SBC were summonsed, and Ms Yang called to give evidence. The SBC records include letters from SBC to the landlord sent to Mr D'Anna's residential address. There is one letter dated 25 May 2012 addressed

"Mr Antonio D'Anna
Primrose Meadows Pty Ltd
c/o Shane Straussman
(redacted) Street
Essendon Vic 3648."

The letter states the new date and time of the adjourned mediation as 19 June 2012.

28 Mr Yang of SBC says she telephoned Mr D'Anna on 13 June 2012 and made a file note of the telephone conversation. Mr D'Anna does not recall receiving the call. Ms Yang's file note is contained on the SBC file. Ms Yang's note reads "*I called R. Antonio D'Anna asked me to call 0413 **** (number redacted for privacy) because Shane is now handling this matter. I left a phone message on 0413 ****. Shane called me back and said Mr D'Anna may not attend mediation in person. But he may authorise Shane to attend the mediation. The confirmation slip will be sent to us soon.*"

29 Mr Yang says that a confirmation attendance slip dated 14 June 2012 purported to be signed by Mr D'Anna was sent to SBC. The slip stated, "*in case I am unable to attend the mediation, the person who I have given authority to make decisions on the day will be Mr Shane Straussman.*" Mr D'Anna denies having signed the slip.

30 Mr D'Anna's evidence regarding Mr Straussman can be summarised as follows: -

- a He cannot recall the 25 May 2012 letter from the SBC. He denies having passed this letter on to Mr Straussman and says Mr Straussman was a regular visitor to his house.
- b When asked about the mediation on 19 June 2012 he said "*I don't know. I can't remember.*" When asked if Mr Straussman attended on his behalf, he said "*He probably went there but he had no authority*"

- c He does not recall when he first saw the terms of settlement. He thought he received them a week or two after the mediation from Mr Straussman and when he saw the terms he said, “*That’s not right.*”
- d He has interests in six properties and is a director of four companies. He has experience in business and is an experienced landlord.
- e He gave conflicting evidence of the dealings between Mr Straussman and Mr O’Halloran. On one occasion he accepted he knew Mr Straussman was talking to Mr O’Halloran about the rent. On another occasion he denied having authorised Mr Straussman to negotiate the rent, but he did not stop Mr Straussman talking about the rent with Mr O’Halloran. In answer to a further question he agreed that he engaged Mr Straussman to negotiate with Mr O’Halloran about the lease. Later in his evidence when asked whether Mr Straussman was authorised to speak with Mr O’Halloran, he said he was not.
- f He accepts that having received the letter dated 28 November 2011 from the tenant, he knew the tenant believed Mr Straussman to be acting for the landlord and he did nothing to correct this position.
- g He discovered the alleged fraud by Mr Straussman in October 2014. From July 2014 he suffered from severe anxiety and depression and medical reports were produced which link the symptoms suffered to the actions of Mr Straussman.

- 31 Based on the evidence of Ms Yang and the documents produced by the SBC, I find that Mr D’Anna was aware of the mediation on 19 June 2018 and authorised Mr Straussman to attend the mediation on the landlord’s behalf. This is consistent with his engagement of Mr Straussman to deal directly with the tenant about the rent leading up to the mediation.
- 32 I found Mr D’Anna to be evasive and inconsistent in his answers. He is clearly distressed by the actions of Mr Straussman but in his own words he believed Mr Straussman would get results for him. On his own evidence he knew Mr Straussman was dealing with the tenant, the SBC and MNG and did nothing to stop the interaction.
- 33 I am satisfied that Mr D’Anna, having engaged Mr Straussman to “get results”, allowed Mr Straussman to take on a role whereby he was representing the landlord in its dealing with the tenant. I find that the landlord is bound by the actions of Mr Straussman in entering into the deed of settlement on 19 June 2012.
- 34 There is insufficient medical or other evidence to support the proposition put forward by the landlord that Mr D’Anna was incapable of managing his business affairs during 2012.
- 35 It is not in dispute that the landlord issued a tax invoice dated 20 June 2012 to the tenant. The invoice is signed by the landlord. It reflects the rent as \$390,000 plus GST. Mr D’Anna says he was directed to issue the tax invoice by his accountant. He denies it was issued in accordance with the

terms of settlement. This does not explain why the invoice was for \$390,000 given the rent for the previous term was \$467,000 plus GST per annum. I find that the tax invoice was issued in accordance with the terms of settlement.

- 36 It is not disputed that the tenant received a signed Disclosure Statement from the landlord on 26 June 2012 with the annual base rent of \$390,000 plus GST.
- 37 Mr D'Anna denies the Disclosure Statement was issued in compliance with the terms of settlement. In his witness statement he says "*Primrose was required to provide that document by law, otherwise no rental would be payable and that was the amount being paid. The rental dispute at the time had not been resolved, the matter had been referred to a valuer, then mediation which I did not attend*".
- 38 I do not accept Mr D'Anna's explanation. Mr D'Anna knew the matter was mediated on 19 June 2012 and he must have known, being the sole director of the landlord, that the landlord did not participate in the engagement of the valuer prior to mediation.
- 39 At the time the Disclosure Statement was issued the rent payable was \$467,000 plus GST per annum, not \$390,000 plus GST per annum. Had Mr D'Anna believed he had to issue the Disclosure Statement in the absence of the terms of settlement, I find he would have issued it for the current rent being \$467,000 plus GST per annum.
- 40 I find the tax invoice dated 20 June 2012 and Disclosure Statement were issued by the landlord in accordance with the terms of settlement. I do not accept Mr D'Anna's position that at the time they were issued he was not aware of the terms of settlement.
- 41 Mr D'Anna denied in cross examination that Mr Straussman spoke to the landlord's lawyer MNG about the lease. Despite that, in a letter from MNG to the landlord dated 21 December 2011 the lawyer states "*I confirm I have discussed with Shane the manner in which you should respond.*" This letter was included in the file produced by Mr D'Anna's lawyer pursuant to orders for production made during the trial. I found Mr D'Anna to be evasive when answering questions about Mr Straussman's engagement with MNG.
- 42 I found Mr O'Halloran's evidence to be supported by contemporaneous file notes and correspondence. His evidence was consistent.
- 43 Accordingly, for the reasons stated, I find that Mr D'Anna and the landlord engaged Mr Straussman to act on the landlord's behalf. The landlord engaged Mr Straussman to attend the SBC mediation. The landlord became aware of the terms of settlement at least one or two weeks after the mediation. At no time did the landlord raise with the tenant at that time that Mr Straussman was not authorised to attend the mediation or agree on terms on behalf of the landlord. The landlord issued the tax invoices and

Disclosure Statement reflecting the agreement reached at mediation. The landlord is bound by the terms of settlement.

- 44 The landlord also claims that it is entitled to an order that the rent for the previous term be determined by a specialist retail valuer because the Lease by Renewal is void.
- 45 It is not disputed that on 14 December 2011 the tenant received a letter from MNG on behalf of the landlord enclosing three copies of the Lease by Renewal with a commencing rent typed in print of \$520,000 plus GST per annum. The letter states “*kindly facilitate execution of the deed and return the three originals for signing by the landlord.*”
- 46 Mr O’Halloran’s evidence about the Lease by Renewal can be summarised as follows:
- a none of the three copies of the Lease by Renewal he received had been signed by the landlord;
 - b he brought the three copies of the Lease by Renewal to the mediation on 19 June;
 - c he made handwritten amendments to each of the three Lease by Renewal documents. A photocopy of one of the Lease by Renewal documents with handwritten amendments signed by Mr O’Halloran was attached to the terms of settlement;
 - d on or about 26 June 2012 the landlord delivered to the hotel a copy of the Lease by Renewal containing the handwritten amendments changing the rent to \$390,000 plus GST per annum which was signed by Mr D’Anna. At the same time the Disclosure Statement with a commencing rent of \$390,000 plus GST per annum signed by Mr D’Anna was delivered.
- 47 Mr D’Anna’s evidence about the Lease by Renewal can be summarised as follows:
- a he signed one copy of the Lease by Renewal at the offices of MNG sometime before 14 December 2011;
 - b the signed copy of the Lease by Renewal was enclosed in the letter sent by MNG to Mr O’Halloran on 14 December 2011;
 - c he delivered a signed copy of the Disclosure Statement but he did not deliver a signed copy of the Lease by Renewal. He only signed the Lease by Renewal once when it contained the typed rental figure of \$520,000 plus GST per annum at the offices of MNG.
- 48 The wording of the MNG letter is very clear. It reads that the three original Leases by Renewal are “*to be executed then returned for signing by the landlord*”. If one of the Leases by Renewal had been signed by the landlord, the letter would not have asked for all copies to be signed by the landlord. Based on the clear words of the letter and the evidence of Mr O’Halloran, I

find that Mr D'Anna did not sign any of the three Lease by Renewal documents provided to the tenant in the MNG letter of 14 December 2011.

- 49 I reject the evidence of Mr D'Anna where it conflicts with Mr O'Halloran. I find that Mr D'Anna signed the Lease by Renewal after the rent was altered to \$390,000+ GST per annum in compliance with the terms of settlement. It is unlikely that Mr D'Anna would have signed only one of three copies if he signed the documents before 14 December 2011.
- 50 I find that Mr O'Halloran was a credible and reliable witness. His evidence is supported by contemporaneous file notes and correspondence confirming the substance of his communications. Some of his evidence was supported by evidence provided by others such as Ms Yang from the SBC. I find that Mr D'Anna was highly emotional which is understandable when recalling the history of this matter. He was inconsistent in his recollection of events. He was insistent that Mr O'Halloran was somehow complicit in Mr Straussman's alleged fraud. This was pure conjecture on his part. No evidence whatsoever was adduced in support of any allegation of wrongdoing or collusion by Mr O'Halloran.

ISSUE III -Is the landlord entitled to an order that the tenant paint the premises on the basis that the tenant failed to paint the premises in breach of the lease?

- 51 Mr O'Halloran says that
- a from August 2012 to late 2013 the interior and exterior of the premises were painted;
 - b in 2016, the exterior of the premises was painted by SG & PH Coatings Pty Ltd;
 - c in 2016 the interior was painted by PJ Duggan Building and Construction Pty Ltd; and
 - d parts of the premises are painted on an ongoing basis to ensure that the premises is maintained to a high standard.

Invoices were produced to support the 2016 painting works.

- 52 Mr D'Anna asserts in his witness statement that the tenant failed to paint the whole of the inside and outside of the property within six months of the last year of the lease in the period ending 1 September 2016. In cross examination he said words to the effect of "I don't care about the paint... There were areas that were not painted but I am quite happy with that."
- 53 In the circumstances, I find that the landlord is not entitled to an order that the tenant paint the premises because the tenant has painted the premises as required by the lease and as accepted by the landlord.

ISSUE IV - Is the landlord entitled to damages from the tenant for the tenant's alleged unconscionable conduct?

54 The landlord claims that Mr O'Halloran engaged in unconscionable conduct by taking advantage of Mr D'Anna's special disadvantage by entering into improvident transactions being the lease by renewal with a commencement rent of \$390,000 plus GST per annum and a refurbishment agreement.

55 Mr O'Halloran says:

- a He met with Mr Straussman on 28 June 2012 at the hotel and they discussed defects requiring repair and a proposed refurbishment.
- b He wrote to Mr Straussman on 4 July 2012, care of Mr D'Anna's residence, setting out the refurbishment proposal. He proposed works totalling \$400,000 with the landlord contributing half.
- c In a meeting at the hotel on 24 July 2012, Mr Straussman confirmed to Mr O'Halloran that the landlord would contribute \$150,000 to \$200,000.
- d Mr Straussman advised that the landlord in addition to the refurbishment contribution would build a new pergola at a cost of \$60,000.
- e He prepared an agreement for the landlord to sign agreeing to a contribution to the refurbishment.
- f He received the signed agreement with a schedule of works for a \$200,000 contribution by the landlord around 19 September 2012.
- g On 10 October 2012 he wrote to Mr D'Anna thanking him for his agreeing to contribute towards the renovations and providing an update of the works.
- h Mr D'Anna attended the hotel in November 2012 and again on 20 December 2012.
- i On 10 January 2013 Mr D'Anna attended the hotel and delivered a cheque for \$100,000.
- j On 6 March 2013 the tenant lodged proceedings in VCAT for the balance of the contribution to the refurbishment. The landlord was represented by Spicer Lawyers and James Moss of counsel in the proceedings. The proceedings were settled with the landlord agreeing to pay \$107,000 to the tenant.
- k The landlord did not raise in the proceeding any claim about improvident transactions.

56 Mr D'Anna's evidence can be summarised as follows:

- a He received the letter dated 4 July 2012 from the tenant to Mr Straussman about the refurbishment but denies the truth of its contents.

- b He knows nothing about the telephone conversations or meeting between Mr O'Halloran and Mr Straussman.
 - c He denies signing the refurbishment agreement dated 16 October 2012. He did not agree to contribute to any refurbishment costs.
 - d He agreed to pay for the pergola as it would add value to the property.
 - e He delivered a cheque for \$100,000 on 10 January 2013 because he had been conned by Mr Straussman into believing that he had signed the refurbishment agreement. He was suffering from severe depression at the time.
 - f He was placed under pressure on 26 August 2013 to sign settlement terms with the tenant.
- 57 To make out this claim the landlord must establish that Mr D'Anna was suffering from a special disadvantage from around June 2012 onwards, that Mr O'Halloran was aware of that special disadvantage and that each of the agreements was an improvident transaction.
- 58 The landlord alleges that Mr D'Anna was subject to a special disadvantage because he was suffering from severe clinical depression and anxiety throughout the period 2011 to 2015. The landlord relied on a report of Dr Congee, a psychiatrist dated 27 August 2015 and a report of Dr Michael King, a clinical psychologist, dated 24 September 2015.
- 59 The reports do not state that Mr D'Anna was suffering from severe clinical depression and anxiety during 2011 to 2015. The reports state that Mr D'Anna was suffering from severe anxiety and depression from around July 2015 which is said to be attributable to the conduct of Mr Straussman and the discovery by Mr D'Anna that he had been a victim of Mr Straussman's alleged fraud.
- 60 Accordingly, on the evidence provided the landlord has not discharged the onus of proof to support a finding that Mr D'Anna was under a special disadvantage at the relevant time.
- 61 The landlord claims that the tenant had sufficient knowledge of the alleged fraud as to preclude it from retaining the benefit of the fraudulent documents because the tenant wilfully shut its eyes to the obvious and wilfully and recklessly failed to make enquires that an honest and reasonable person would make.
- 62 Mr O'Halloran says he was not aware that Mr D'Anna was suffering from severe anxiety and depression between 2011 and 2015 and this evidence was not challenged by the landlord. Mr O'Halloran says in his statement that in 2006 Mr D'Anna told him he was suffering from depression. He says at no time since 2006 has Mr D'Anna or any person told Mr O'Halloran that Mr D'Anna was suffering depression or any other mental illness. Mr D'Anna had chosen not to deal directly with Mr O'Halloran since the 2006 rental determination.

- 63 Even if I found that Mr D'Anna was under some special disadvantage, there is no evidence of an awareness by the tenant of the special disadvantage.
- 64 It is unnecessary to decide whether the refurbishment agreement and lease by renewal were improvident transactions.
- 65 That said, no evidence was called about the refurbishment works and whether the agreement to contribute was an improvident transaction.
- 66 The Lease by Renewal is said to be an improvident transaction because of the rental amount of \$390,000+ GST per annum. The rent in the preceding period as determined by an independent valuer was \$420,000 plus GST per annum.
- 67 Mr D'Anna relies upon a valuation prepared by Mr Conway of Conway Commercial dated 20 July 2018 to show the transaction was improvident. In his oral evidence Mr D'Anna claimed that Mr Conway was independent. Mr Conway states in the valuation that the fair market rent is \$790,600 per annum. It is accepted by the landlord that Mr Conway is not a registered valuer. He is an estate agent. It is also accepted that Mr Conway is and was through his company Yukon Pty Ltd the joint owner with Mr D'Anna of two properties.
- 68 Mr Conway is not a valuer and is not independent of Mr D'Anna. Furthermore, the valuation was based upon Mr D'Anna's estimate of the annual income of the hotel. This is set out in the letter from Mr Conway to the landlord dated 15 July 2016. The estimate is not supported by any evidence.
- 69 Given the previous year's rent and all of the circumstances leading up to the Lease by Renewal, I do not accept that the Lease by Renewal was an improvident transaction for the landlord.

L. Forde
Senior Member