VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP768/2016

CATCHWORDS

Retail Leases Act 2003 - oral agreement for Lease alleged - whether all terms agreed - whether words used amounted to an agreement – s.64 – Landlord must give tenant 6 months' notice that lease will not be renewed – lease continues until 6 months after notice given – Landlord's right of re-entry in the meantime not affected by statutory continuation - s. 26 of the *Instruments Act* 1958 - no note or memorandum in writing - essential terms not alleged to have been agreed upon - no agreement found – default not disputed – right of re-entry and re-entry established

APPLICANT	Roads Corporation
FIRST RESPONDENT	Bluestone Leisure Group Pty Ltd (ACN 116 141 916)
SECOND RESPONDENT	Jennifer Gay Lindrea
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 and 29 September 2016
DATE OF ORDER	4 October 2016
CITATION	Roads Corporation v Blue Leisure Group Pty Ltd (Building and Property) [2016] VCAT 1688

ORDERS

1. Order the First Respondent to quit and deliver up the Premises formerly known as the Melesa Motel, situated in Western Highway, Ballarat, being the land and improvements comprised in Certificate of Title Volume 8701 Folio 171 ("the Premises") and deliver up vacant possession of the same to the applicant forthwith.
2. The First Respondent whether by its directors, its servants or agents or howsoever otherwise is restrained from remaining in possession of the Premises or from preventing the Applicant from peacefully taking and assuming exclusive possession thereof.
3. Order the First Respondent to pay to the applicant the sum of $43,706.47.

4. It being doubtful whether the Second Respondent has been served with these proceedings and the claim against her not having been agitated before me, no determination is made in regard to the claim against her alleged in the Points of Claim.

5. Liberty to apply in aid of enforcement.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr S Hopper of Counsel
For the Respondent	Mr. M. Redman, Director

REASONS

Request for oral reasons

1. I handed down a decision on this matter last Thursday, 29 September 2016 as set out in the above order. I gave extensive oral reasons at the time for the decision that I made but the director of the First Respondent, Mr Redman, asked for written reasons. Set out below is an edited version of what I said at the time.

Background

2. The Applicant ("the Landlord") is a statutory corporation established under the *Transport Integration Act* 2010. It is the owner of motel premises formerly known as the Melesa Motel, Western Highway, Ballarat, being the land and improvements comprised in Certificate of Title Volume 8701 Folio 171 ("the Premises").

3. By a written lease dated 6 October 2005 ("the Lease"), the First Respondent, which was formerly known as Lindburg Proprietary Limited, leased the Premises from the Landlord for a period of 10 years commencing 1 February 2006 at the rental and subject to the terms and conditions set out in the Lease.

4. There were terms of the Lease:

   (a) that the First Respondent would pay rent, which was to be $10,800 plus GST, to be revised on each anniversary of the commencement date by increasing the rent payable during the previous year of the term by 5% per annum compounded, and also would pay all rates and taxes in relation to the Premises, which were defined in the Lease to be any amount charged against the Premises by any authority;

   (b) that if the rent or any other monies payable under the Lease should not be paid on the due date for payment, whether legally demanded or not, or if the First Respondent should fail at any time to perform or observe any of the covenants in the Lease then the Landlord would be entitled, without prejudice to any other claim which it might have respect of such default, to terminate the Lease at any time, either by giving the tenant notice or by entering into and upon the Premises or any part of them in the name of the whole, whereupon the Lease should be absolutely determined.

5. The Second Respondent is a former director of the First Respondent and is said in the Applicant's Points of Claim to have guaranteed its due performance of all of the covenants, terms and conditions of the Lease. She ceased to be a director of the First Respondent on 15 October 2007.

6. On 10 July 2015 Mr Michael Redman was appointed the sole director and secretary of the First Respondent.

The present claim

7. On or about 20 July 2015 the Landlord sent to a firm of accountants, purportedly on behalf of the First Respondent, a notice pursuant to s.64 to be of the *Retail*

Leases Act 2003 ("the Act"), informing the First Respondent that it did not propose to offer it a renewal of the Lease beyond 31 January 2016 and that, for the purposes of Clause 17.5 the Lease, it objected to the First Respondent continuing in occupation of the Premises after the expiry of the term of the Lease on that day.

8. Notwithstanding the sending of the notice and the fact that no rental or outgoings have been paid by or on behalf of the First Respondent for over a year, it remains in possession of the Premises and Mr Redman refuses to vacate the Premises himself or cause the First Respondent to vacate the same and deliver up vacant possession to the Landlord.

These proceedings

9. These proceedings were issued on behalf of the Landlord on 15 June 2016 seeking an injunctive order for possession of the Premises and for payment of all arrears of rental and outgoings alleged to be due and also mesne profits, as set out in the application.

10. The matter first came before the Tribunal for hearing on 23 June 2016. Mr D Hopper of Counsel appeared on behalf of the Landlord and Mr Redman appear to represent the First Respondent. The Second Respondent did not appear and she has not appeared on any hearing day since. It does not appear from the file whether she has been served with the application.

11. Since the First Respondent had no legal representation and a defence had not been articulated on its behalf, the hearing did not proceed on 23 June but was adjourned to give Mr Redman the opportunity to obtain legal advice and file Points of Defence. Directions were given for the filing and service by the First Respondent of Points of Defence and a Counterclaim. The injunction hearing was fixed for 15 August 2016 with three hours allocated.

12. Mr Redman later wrote to the Tribunal and sought an extension of time for the filing and service of the Points of Defence and Counterclaim and an extension was granted until 28 July 2016. He subsequently sought a further extension which was granted until 25 August 2016 and the hearing of the injunction application was refixed for 1 September 2016.

13. Points of Defence on behalf of the First Respondent were finally received by the registry on 25 August 2016. In this document the First Respondent admitted every substantive allegation made in the Landlord's Points of Claim. All that was disputed was the validity of the service of the notice served upon the accountants on 20 July 2015, and other notices served on 3 and 8 February 2016. Mr Redman also disputed the assertion that, by service of the Points of Claim seeking possession, the Landlord had effected a re-entry of the Premises.

The hearing

14. The matter finally came before me for hearing on 1 September 2016. A few days beforehand, Mr Redman had sought an adjournment of the proceeding on medical grounds. The application was made by email and was refused on the

papers due to the inadequacy of the material that he had submitted. However he was given leave to appear by telephone and he subsequently did so.

15. On the day of the hearing Mr S Hopper of counsel appeared on behalf of the Landlord and Mr Redman appeared by telephone on behalf of the First Respondent. Mr Redman renewed his application for an adjournment but after hearing his application and reading the material that he had submitted and not being satisfied that there was any reason why he was unable to conduct the proceeding as he had, by then, been doing for some time, I refused the application for an adjournment.

16. Mr Redman then made an oral application that the proceeding be struck out pursuant to s. 75 of the *Victorian Civil and Administrative Tribunal Act* 1998. In essence, that section provides that, where a proceeding is manifestly hopeless, the Tribunal may strike it out without requiring the party against whom it is brought to incur the expense of a full hearing. However the power is to be used sparingly and only in a clear case (see Pizer's *Annotated VCAT Act*, 5th edition page 310 and the cases there cited).

17. The ground of Mr Redman's application was that the dispute had not been brought before the Small Business Commissioner prior to the commencement of the proceeding as required by s.87(1) of the Act. However as Mr Hopper pointed out, the application was for an order in the nature of an injunction and so the requirement in s.87(1) did not apply.

18. The affidavit material filed and served on behalf of the Landlord was opened and relied upon by Mr Hopper and I then heard the evidence of Mr Redman. After hearing the evidence I was satisfied that it had been demonstrated that no rent or outgoings have been paid on behalf of the First Respondent since Mr Redman assumed control of the First Respondent and physical possession of the Premises. It was established on the evidence that outstanding rates, water charges and rental of $43,706.47 was owed.

19. In the course of giving his evidence at the hearing on 1 September it appeared that Mr Redman contended that the First Respondent had entered into a binding agreement with the Landlord for the granting of a further term. He had not filed or served any counterclaim or raised this by way of Points of Defence. Indeed, the Points of Defence that had been filed on behalf of the First Respondent effectively admitted the Landlord's claim.

20. Mr Hopper quite properly suggested that the First Respondent should be given the opportunity to seek advice and file and serve proper Points of Defence articulating the defence that it wished to bring and to this end, I adjourned the further hearing of the proceeding part heard until 29 September 2016. I also directed that, by 16 September 2016, the respondents must file and serve any amended Points of Defence, which must set out clearly any further grounds of defence relied upon, and that any further affidavit material to be relied upon by any party must be filed and served by 23 September 2016.

21. Pursuant to these further directions, a document entitled Points of Defence was filed on behalf of the First Respondent on 19 September 2016. The Landlord also filed two further affidavits.

The resumed hearing

22. The defence sought to be articulated in the First Respondent's second Points of Defence is similar to what Mr Redman stated in his evidence before me on 1 September 2016. In paraphrasing this document, I have assumed that Mr Redman's references to the sale of "Lindburg" to the First Respondent is intended to refer to the sale of the shares of the First Respondent to Mr Redman and to Mr Redman's assumption of control as its new director and shareholder. Quite obviously, the First Respondent cannot purchase itself. The allegations that the First Respondent makes are as follows:

    (a) in mid-June 2015, a Mr Weyburg a former director of the First Respondent informed a Mr Baker and a Mr Erickson, who are officers of the Landlord, that he was selling the First Respondent to Mr Redman in the coming weeks and that the First Respondent, under the directorship of Mr Redman, would be responsible for all outstanding monies owed to the Landlord and to the local water authority. It is said that Mr Baker did not object to the proposal.

    (b) in late June 2015 Mr Weyburg met the Landlord's property manager, a Mr Etchells, and told him of the sale of the First Respondent to Mr Redman. Mr Etchells told Mr Weyburg that the First Respondent would be required to make reparation for the full outstanding debt owed to the Landlord and to the local water authority or enter into "an official monthly instalment payment arrangement" with the agent and the water authority to that end and that, if this was done, "…he could not foresee any issue with the [First Respondent] being formally offered a new Lease in October 2015, commencing February 2016.".

    (c) in the first week of July 2015 Mr Redman made contact with Mr Etchells "…to substantiate and confirm the details of the conversation held between Mr Weyburg and Mr Tim Etchells…". The details were confirmed by Mr Tim Etchells. Mr Redman told Mr Etchells that he was purchasing the First Respondent within the next two weeks "…pertaining to, but not limited to, the payment of the outstanding debt…" to the Landlord, the water authority and the current rent due and payable to the Landlord.

    (d) on the basis of this agreement Mr Redman purchased the shares in the First Respondent on 9 July 2015 from Mr and Mrs Weyburg. On the same day he notified Mr Etchells that he had purchased the company and that all correspondence was to be sent to motel. Mr Etchells congratulated Mr Redman on the purchase and arranged for Mr Redman to attend his office the following day to meet him and to provide a copy of the contract of sale, which was to be forwarded to the Landlord

(e) Mr Redman contacted Mr Baker the same day 9 July 2015 to inform him that he was now the new owner of the First Respondent and that all correspondence was now required to be sent to him at the motel. Mr Baker expressed his discontent at the purchase of the company by Mr Redman and said that he would seek legal advice the following day concerning the purchase and would contact Mr Redman in the next fortnight.

(f) Mr Redman did not receive any communication from Mr Baker within the next fortnight and when he contacted Mr Baker on 24 July he was told by him that he (Mr Baker) understood that Mr Redman's purchase of the First Respondent was legal.

(g) Mr Redman was then informed (presumably by Mr Baker) that the Landlord "…had set aside the prior agreed to and established verbal contract between [the First Respondent] and Mr Tim Etchells and [the Landlord], removing Mr Tim Etchells as the then current managing property agent and had already dispatched a letter of Lease nonrenewal to Mastax Accountants of Ballarat dated 20 July 2015.".

(h) Mr Redman then argued with Mr Baker as to the legality of what he had done and Mr Baker said to Mr Redman that the First Respondent was required to pay all current and outstanding monies owed to the Landlord and water authority, whether or not a new Lease was granted.

(i) because of Mr Baker's stance on behalf of the Landlord, the First Respondent was unable to obtain access to a $100,000 company loan in order to pay all outstanding debts, and current and future rent payments up to and including 1 January 2016 owed by the First Respondent to the Landlord and to the water authority

(j) pursuant to the contract entered into between the First Respondent and Mr Tim Etchells, after the First Respondent had made the first two monthly payments to the agent for August and September 2015 Mr Tim Etchells was required to present a new 10 year Lease in October 2015 to the First Respondent.

23. When the hearing resumed on 29 September 2016 Mr Redman confirmed that this was the defence relied upon by the First Respondent. Mr Redman also sought to have Mr Weyburg appear by telephone to answer the allegations made in the two additional affidavits that had been filed and served on behalf of the Landlord since the previous hearing. However, since Mr Hopper did not open or rely upon the two additional affidavits there was nothing to respond to and so there was no need for Mr Weyburg to be called since it was not suggested that he would be called for any other purpose.

24. After considering the matter I accepted Mr Hopper's submissions that, even if I were to accept the truth of everything that Mr Redman said, the First Respondent had no answer to the claim and that an order for possession and the arrears of rent and outgoings ought to be made.

Would the facts that are now alleged amount to a defence?

25. The strongest point made was in relation to the service of the notice under s.64(2)(b) of the Act. That required the Landlord to serve upon the First Respondent a notice informing it that the Landlord did not propose to offer it a renewal of the lease at least 6 months before the end of the then current lease. The consequence of the failure to comply with s.64(2)(b) is that the notice must be given and the lease continues until six months after it has been given.

26. The notice that was given by the Landlord was sent to a firm of accountants who had assumed the practice of the First Respondent's former accountants.

27. I heard no evidence or argument from the Landlord as to whether or not the service of the notice was valid and, for the purpose of my decision I assumed, without deciding, that it had not been and that the lease was therefore still in force. Nevertheless, the section does not provide that the Landlord's rights and remedies are limited during the continuation period and no rental or outgoings had been paid to the Landlord for over a year.

28. The First Respondent's default in failing to pay any rent and outgoings was admitted and the Landlord's right to re-enter are established on the evidence. The only defence raised was that there was a binding agreement to grant a further term of ten years, although how that could amount to a defence to the Landlord's claim for possession was not explained.

29. The amended Points of Defence do not draw a clear distinction between the actions of the First Respondent and Mr Redman personally. However it became clear in discussions at the resumed hearing that Mr Redman was alleging that a binding contract was entered into between the First Respondent as tenant and the Landlord as Landlord for a new lease for a further period of 10 years commencing at the expiration of the then current term.

30. The first problem is that the terms of the alleged contract do not appear to have been agreed. Mr Redman does not suggest that a rental had been fixed or that there was any agreement as to the adjustment of rental throughout the term, whether by way of valuation or CPI increases. There was a guarantor of the current Lease, being the Second Respondent, but there does not appear to have been any discussion between Mr Redman and Mr Etchells of a guarantee being given, presumably by Mr Redman, for the further term. It is doubtful whether the Landlord would have agreed to enter into a further Lease for a period of 10 years without a guarantee, particularly given the history of the First Respondent's tenancy and its insolvency which Mr Redman acknowledged. If the discussion that Mr Etchells had with Mr Redman had amounted to a binding agreement to Lease, the Landlord would have had no guarantor because a contract of guarantee must be in writing, signed by the guarantor in order to be enforceable and no such guarantee had been signed by Mr Redman or by anyone else.

31. The promise alleged to have been made by Mr Etchells was also not sufficiently clear to amount to the undertaking of a contractual obligation. According to Mr Redman, he said that he could not foresee any issue with the First Respondent being formally offered a new Lease in October 2015, commencing February 2016. Mr Redman does not suggest that Mr Mitchell said that a Lease would

definitely be granted, only that he himself could not see any issue about it. That falls a long way short of a contractual promise.

32. Mr Hopper relied upon section 126 of the *Instruments Act* 1958 which requires any agreement for the disposition of an interest in land to be either in writing or evidenced by a note or memorandum in writing in order to be enforceable. The only agreement alleged was an oral one and there were no acts of part performance upon which the First Respondent could rely in the absence of written evidence of the alleged agreement. Even if the promised rental payments had been made, and they were not, they would have been equally referable to the First Respondent paying what it owed under the Lease. Further, it was not alleged by Mr Redman that anything was done by the First Respondent that might have amounted to reliance upon the promise that he claims was made in order to found an estoppel upon which the First Respondent could rely.

33. A related point is that there was no material before me to establish that Mr Etchells had authority, either actual or ostensible, to enter into an agreement for a new Lease on behalf of the Landlord. Since it involved the disposition of an interest in land, any such authority would have needed to have been in writing. I cannot infer the existence of such an authority merely from the fact that Mr Etchells is the managing agent.

Conclusion

34. It was therefore unnecessary to determine whether the facts alleged by Mr Redman were made out because, even if they were, they would not amount to a binding agreement for a further term. Even if they did, such an agreement would not have amounted to a defence to the application.

35. Accordingly, an order for possession and for payment of arrears of rental and outgoings was made.

SENIOR MEMBER R. WALKER