

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP542/2017

CATCHWORDS

Retail Lease – return of bank guarantee, whether valid exercise of option, mitigation of loss, whether loss reasonably foreseeable, vacation of premises by subsequent tenant.

APPLICANT	AZW International Pty Ltd ACN: 147 143 851
RESPONDENT/APPLICANT BY COUNTERCLAIM	N J Agius Pty Ltd ACN:006 686 443
SECOND RESPONDENT BY COUNTERCLAIM	Mr Jihong Zhong
THIRD RESPONDENT BY COUNTERCLAIM	Ms Minyuan Wang
FOURTH RESPONDENT BY COUNTERCLAIM	Mr Weijiang Wang
WHERE HELD	Melbourne
BEFORE	L Forde, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	26 & 27 April 2018, 30 & 31 July 2018 and 1 August 2018
DATE OF ORDER	31 August 2018
CITATION	AZW International Pty Ltd v N J Agius Pty Ltd (Building and Property) [2018] VCAT 1281

ORDER

- 1 The claim by the applicant, AZW International Pty Ltd is dismissed.
- 2 AZW International Pty Ltd, Jihong Zhong, Minyuan Wang and Weijiang Wang, (the applicant and second, third and fourth respondents by

counterclaim) must pay to N J Agius Pty Ltd (the applicant by counterclaim) the sum of \$60,248.72.

3 Costs reserved.

L Forde
Senior Member

APPEARANCES:

For Applicant/First – Fourth Respondents by counterclaim Mr L Virgona of counsel

For Respondent/Applicant by Counterclaim Mr M Ridgeway of counsel

REASONS

- 1 Pursuant to a retail lease, the applicant, AZW International Pty Ltd (“AZW”) leased shop T6 at 480 Collins Street Melbourne (“premises”) from the respondent, N J Agius Pty Ltd (“landlord”).
- 2 The issue to be determined is whether AZW exercised an option to renew its lease. AZW says it did not exercise the option and sues the landlord for the return of the original bank guarantee. The landlord says AZW exercised the option and breached the lease by vacating the premises on or about 2 March 2016. The landlord says it accepted AZW’s repudiation and terminated the lease. The landlord claims damages against AZW and the guarantors (the second, third and fourth respondents by counterclaim) under the lease.

THE HEARING

- 3 The hearing took place over five days on 26 and 27 April 2018, 30 and 31 July 2018 and 1 August 2018.
- 4 AZW called evidence from: -
 - i Mrs Lisa Zhong (also known as Jihong Zhong) a director of AZW and one of the guarantors. Mrs Zhong gave evidence with the assistance of a mandarin interpreter provided by the Tribunal; and
 - ii Ms Rebecca Zhong (also known as Minyuan Wang) (“Rebecca”) the daughter of Mrs Zhong and one of the guarantors.
- 5 The landlord called evidence from: -
 - i Mr Norman Agius, a director of the landlord; and
 - ii Mr Oliver Agius (“Oliver”) (the son of Norman Agius) who was involved in the management of the landlord’s affairs;

BACKGROUND TO ALLEGED EXERCISE OF OPTION

- 6 The background facts are largely not in dispute. In 2014, AZW’s current lease term was to end on 31 January 2015. The latest date for exercising the option for a further 5-year term was 31 October 2014.
- 7 It is not in dispute that Ms Zhong is a director of AZW and that she speaks very limited English. Her daughter, Rebecca speaks English and often translated emails and conversations for her mother. Rebecca wrote emails on her mother’s instructions signing off as her mother. According to Rebecca “I use her ideas in my words.” Rebecca worked at the premises which operated as a takeaway coffee shop.
- 8 It is also not in dispute that Norman Agius is a director of the landlord and that his son, Oliver, was involved in the management of the landlord’s affairs including communicating with AZW.

- 9 By email dated 20 January 2014 from Mrs Zhong to Oliver, AZW asked the landlord to consider the request contained in an attached letter. The letter commenced with the line *“we would like you to consider not increasing the rent this year for the following reasons,”* before outlining the financial difficulties AZW was experiencing at the time. The letter concluded with the paragraph: -

“We would like you to kindly consider our situation and help us to go through the current economic hardship. Your help will be very much appreciated and render us the desperately needed confidence to continue operating the business and make it better.”

- 10 By email of 3 April 2014, the landlord sent AZW a notice to exercise option of further term. AZW did not return the acknowledgment to the notice. Rebecca in her evidence acknowledged that her mother had received the email but had no recollection of having read the attached notice.
- 11 By email of 10 August 2014, Ms Zhong wrote to Oliver. Ms Zhong and Rebecca gave evidence that Rebecca wrote the email for her mother translating her mother’s ideas. The email expressed concern that one of the tenants in the food court where the premises were located, vacated its premises and, according to that tenant it was because the food court was getting quieter and businesses were harder to run. Concern was also expressed that the new tenant taking over the vacated business might not *“be so understanding of the agreement and restriction within our food court”*.
- 12 A key document is the email dated 1 September 2014 from Ms Zhong to Oliver. It is important to set out the email in full: -

“Hi Oliver

How are you?

Im (sic) writing this letter regarding out (sic)rental issue.

Since last time we wrote to you in the beginning of the year, the whole economic situation hasn’t(sic) been well and the foodcourt is still as quiet and not many people around. As you know, since a few months ago due to the economic downturn and decreasing number of customers in the Fodcourt (sic), the sandwich bar owner and then the salad bar owner have both left their shops following closely which indicates that the business is getting harder and harder to run. We have always been trying to do our best to get better. Even though all the costs have gone up, in concerned (sic) of losing (sic) customers, we worried of rising our prices. Therefore, it has been really hard for us to keep running the business.

As everyone knows, not only us, but everyone else is getting harder and harder to do their businesses and becomes a bit vicious circle between competitions. For example, a well-known coffee shop next to us named cafenetics which used to be very busy and always full house, but now, not even half of what it was. The reason why the business is so quiet now, we suppose is because full-time employees

are getting less in companies and people are holding less money in hand that cause the overall situations for small businesses like us are in grave difficulties.

Ultimately, we are extremely grateful that you have always been helping us. We would like our landlord to kindly consider our situation and help us to go through the current economic hardship. Your help will be very appreciated and give us confidence to continue operating the business. We are willing to exercise option of further term and hoping you can still help and support us with the rental issue. (underlining added)

kind regards

Jihong Zhong”

- 13 The landlord’s position is that by the email above, AZW exercised the option for a further 5-year term. AZW’s position is that the option was not exercised and would only be exercised if the rent was reduced.
- 14 Oliver says that he spoke to Rebecca by telephone on 29 August 2014. Oliver diarised the need to follow up AZW about the exercise of the option. His diary note was put into evidence. The evidence from both parties was that it was the usual practice for Rebecca to be contacted rather than Mrs Zhong due to the language barrier between Mrs Zhong and the landlord.
- 15 Oliver says his recollection of the call was that Rebecca said AZW would “definitely” exercise the option. He said he asked her to confirm the exercise in an email.
- 16 Following the call, Oliver said that he made a file note which read “spoke Rebecca, she emailing me next week re she wants to exercise option. following up Monday.” The file note was produced to the Tribunal and the notation appears in the middle of a page between other notes. The notation is dated 29 August 2014 and appears immediately before another handwritten note dated 1 September 2014.
- 17 Oliver said in his evidence that the email of 1 September 2014 was the confirmation he was expecting of AZW exercising the option.
- 18 The occurrence of the phone call is not in dispute.
- 19 Rebecca says that she did not recall the date of the telephone conversation or what was said. She was very vague about the conversation although did not deny having had a conversation about the option with Oliver. She denies that she confirmed an intention to exercise the option in the conversation saying, “*I would never say that without reducing rent.*”
- 20 Based on Oliver’s contemporaneous file note recording the outcome of the conversation, his recollection of the conversation and Rebecca’s lack of recall of the conversation, I prefer the evidence of Oliver over Rebecca as to what was said in the conversation. I accept that Rebecca informed Oliver in the telephone call that AZW intended to exercise the option.

WAS THE OPTION EXERCISED?

- 21 Whether the option was exercised turns on the meaning and effect of the email of 1 September 2014. It is well established that the question to be considered is whether a person in the landlord's position when receiving the email fairly understood the meaning of it in the circumstances of its receipt.¹
- 22 The principles governing options were clearly set out by the NSW Court of Appeal in *Prudential Assurance Co Ltd v Health Minders Pty Ltd*.² The principles were adopted by this Tribunal in *South Yarra Colonade Pty Ltd v Designbuilt Industries Pty Ltd*.³ The principles are: -
- i Whether the purported exercise of the option clearly and unequivocally manifests an election to enter into the lease in accordance with the terms of the option;
 - ii Where the tenant purports to exercise the option by letter, proof of the election depends on whether a reasonable person who received the letter and reading it against the background of the dealings between the parties, would fairly have understood to be the meaning of it in all the circumstances.
- 23 Counsel for the landlord submits that the subsequent conduct of the parties is relevant to considering the circumstances of the exercise of the option. I do not agree. If subsequent events were relevant, parties could construct situations after the exercising of an option to create evidence to support a resiling from the exercise or vice versa. What happens after receipt of the option is not relevant to the circumstances of the receipt.
- 24 In *Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd*⁴ Pembroke J noted that "*I doubt very much whether inconsistent conduct by the parties is relevant or probative on the primary question of factual characterisation.*"
- 25 The test is to look at what a reasonable person who received the letter understood it to mean. It is the circumstances of receipt not the events following receipt that must be considered.
- 26 The 1 September 2014 email reads after reference to the economic situation, "we are willing to exercise option...".
- 27 AZW submits that the emails of 20 January 2014, 3 April 2014 and 10 August 2014 form the background of the dealings between the parties relevant to how a reasonable person would fairly understand the email of 1 September 2014. This is not in dispute.
- 28 AZW submitted that a crucial part of the 1 September 2014 email was the words "*Im writing this letter regarding out (sic)rental issue*". I do not

¹ Romer J in *Jones v Daniel* (1894) 2 Ch. At p 335 as adopted in *Carter v Hyde* [1923] HCA 36

² (1987) 9 NSWLR 673.

³ [2013] VCAT 266

⁴ [2011] NSWSC 716 at [24]

interpret this line as supporting an interpretation that the option was not to be exercised until the rent was determined. The line could just as easily be interpreted as AZW confirming that having exercised the option, as stated in the telephone conversation on 29 August 2014, it now wanted to negotiate the rental. AZW was clearly keen to have the rent reduced.

- 29 I find that the email of 1 September 2014 and the words “*We are willing to exercise option of further term and hoping you can still help and support us with the rental issue*” were sufficiently clear to be an operative act as opposed to a mere statement of future intention. The words constitute a clear and unequivocal act to exercise the option. The word “willing” by its ordinary dictionary definition means to be ready, eager or prepared to do something. It shows a positive exercise of the option independent of any rent review.
- 30 The phrase “*and hoping you can still help and support us with the rental issue*” following the words “*We are willing to exercise option of further term and*” is not a qualification or reservation on the exercise of the option. It is a repeat of previous requests by AZW of the Landlord for rental relief. The email does not make the exercise of the option conditional upon the rental relief.
- 31 If the option was exercised, the commencing rental would need to be fixed in accordance with the provisions of the Lease.
- 32 The last sentence of the email of 1 September 2014 was an exercise of the option by AZW. Even if the words were not clear, which I find they were, any reasonable person receiving the email would fairly have understood the meaning of it, in all the circumstances of its receipt to be an exercise of the option. The circumstances include the previous correspondence between the parties and the telephone call on 29 August 2014.
- 33 The parties led evidence about circumstances arising after the option was exercised as being relevant to the determination of the issue. For the reasons stated it is not necessary to consider that evidence in deciding whether the option was exercised on 1 September 2014.
- 34 AZW claims the return of the original bank guarantee from the landlord. Its entitlement to the bank guarantee is dependent on it not having exercised the option.
- 35 I find that AZW exercised the option and entered into a further 5 year term commencing 1 February 2015.
- 36 In the circumstances, AZW failed on its claim and the landlord has shown that AZW breached the lease by vacating the premises thereby entitling the landlord to damages.

WHAT IS THE LANDLORD’S LOSS?

- 37 The landlord gave evidence which was not contested and which I accept that: -

- i On 2 March 2016, AZW vacated the premises;
- ii Immediate attempts were made to re-let the premises;
- iii The premises were licenced to Hyped Café Pty Ltd for the period 20 March 2016 to 30 June 2016 for a weekly rental of \$880.00;
- iv The premises were leased to Pink Corporation Pty Ltd (Pink) for 5 years commencing on 1 September 2016 for a monthly rent of \$4333.33; and
- v Pink Corporation Pty Ltd abandoned the premises in November 2017.

38 As the option was exercised, AZW breached the lease by vacating the premises on 2 March 2016. By vacating the premises, AZW showed an intention not to be bound by the lease. In other words, AZW repudiated the lease.

39 The landlord accepted the repudiation and forfeited the lease as it was entitled to do.

40 The usual measure of damages for breach of contract is an amount to put the innocent party (the landlord) in the same position it would have been had the breach not occurred. Once it terminated the lease, the landlord has an obligation to mitigate its loss.

41 The obligation to mitigate is a duty on the landlord to make reasonable attempts to minimise its financial loss including the taking of reasonable measures to re-let the premises.

42 The landlord produced a spreadsheet (“**the spreadsheet**”) which calculated its loss and damage as being \$108,060.11 as follows: -

1	Rent due to 31/7/17 less amount received from new tenants	\$25,840.63
2	Rates	\$1,973.29
3	Repairs and cleaning to make good	\$1,100.00
4	Legal fees to 26/4/18	\$43,319.00
5	Advertisement fee to locate new tenant	\$995.00
6	Rent shortfall to end of current term (1/8/17 – 31/1/20)	\$21,000.25
7	Landlord’s reasonable costs of mitigating loss	\$8,800.00
8	Penalty Interest	\$5,031.94
9	Rent in arrears up to date of abandonment (2/3/16)	\$4,983.70

- 43 The spreadsheet was prepared on the basis that Pink remained in the premises. The landlord's evidence was that Pink wrongfully vacated in November 2017.
- 44 Assessing each item in the spreadsheet I make the following findings:
- i **Item 1** –AZW did not challenge the landlord's attempts to mitigate its loss. In the circumstances, I accept that the landlord attempted to mitigate its loss when it secured Hyped Café Pty Ltd and Pink to take up the premises. The landlord claims \$25,840.63 being the difference between what it would have received had AZW remained in possession and paid rent and what it did receive from Hyped Café Pty Ltd and Pink up to 1 July 2017. I allow the amount of \$25,840.63 in damages being the shortfall in rent up until 1 July 2017.
 - ii **Item 2** -I allow the amount of \$1,973.29 being for rates due and payable to 1 September 2016 as these are outgoings that AZW ought to have paid.
 - iii **Item 3** -Evidence was given by Oliver, which was not challenged, about the dirty state of the premises following AZW's abandonment and the cost of industrial cleaning in the sum of \$1,100.00. This expense was supported by an invoice dated 25 March 2016. I allow the amount of \$1,100 for cleaning.
 - iv **Item 4**- Counsel for the landlord submitted that the legal fees claimed were not being claimed as damages but rather "on the normal basis." Accordingly, the issue of costs will be reserved, and no allowance will be made for costs as a head of damage.
 - v **Item 5**- Evidence was given by Oliver that the advertisement fee of \$995.00 was in relation to his listing the premises for lease on a variety of websites through Realty Pty Ltd akin to what a commercial agent would do to list a property. The claim is supported by an invoice dated 25 May 2016. There was no challenge to the claim. I allow the fee of \$995.00.
 - vi **Item 6**- A claim is made for the rent shortfall to the end of AZW's lease period. This was on the basis that Pink remained in occupancy. Orders were made on 1 August 2018 that AZW by 4pm on 15 August 2018 file submissions limited to addressing the effect of the landlord, if any, of leasing the premises to Pink and its subsequent abandonment of the premises on the landlord's claim for loss and damage. AZW filed its submissions on 22 August 2018. Notwithstanding the late delivery, I have taken the submissions into account. No evidence was produced in relation to the current market rental or the likelihood of locating a tenant for the premises and at what rent after Pink vacated. AZW conceded in its submissions filed 22 August 2018 that if it exercised the option it is liable to compensate the landlord for the shortfall of rent from the time Pink took the lease until what would

have been the end of AZW's term. Accordingly, AZW accepts that if it exercised the option it is liable to compensate the landlord rent shortfall from 1 August 2017 to 31 January 2020 being \$21,000.25.

The landlord elected to lease the premises to Pink. AZW cannot be held responsible for Pink abandoning the premises. The landlord has rights against Pink and the guarantors under its lease. AZW is not liable for the breaches by Pink of its lease.

- vii **Item 7** – The landlord claims \$8,800 as the cost of mitigating its loss. This claim is based upon Oliver's time spent dealing with lease enquires, meeting prospective tenants, cleaning of the premises, preparing disclosure statements, preparing lease documents and associated time. There was no evidence that Oliver had invoiced the landlord for this time or that his time was an expense of the landlord. Oliver gave evidence that he was the property manager for the landlord. No further evidence was given as to how Oliver's time might be an expense of the landlord for which AZW should compensate. The landlord bears the onus of proof and I am not satisfied that Oliver's time has caused any loss to the landlord. Furthermore, I do not consider this claim to be a recoverable loss;
 - viii **Item 8** – The landlord claimed penalty interest. The lease provides for payment of interest on overdue amounts calculated according to the Penalty Interest Rate Act 1983 (Vic) ("**the Act**"). The landlord acknowledged that it had not calculated the interest according to the Act and did not provide an updated calculation of the correct interest for the Tribunal. In the absence of any other evidence, I allow interest under the Act on the sum of \$25,840.63 (the item 1 claim) from 1 July 2017 to 29 August 2018 at the rate of 10% being an amount of \$3008.84. I allow interest under the Act on the amount of \$1700 (see item 6 above) from 30 November 2017 to 29 August 2018 at the rate of 10% being an amount of \$127.15; and
 - ix **Item 9** – The landlord claims rental arrears up to the date of abandonment of the premises by AZW of \$4983,70. The landlord gave evidence that the amount remains unpaid. The landlord is entitled to recover this amount. The landlord is also entitled to interest on this amount (as provided for in the lease) from 2 March 2016 until 29 August 2018 based on the Act being an amount of \$1219.86.
- 45 A second table of "Amounts Due and Unpaid" was produced on the final day of hearing by the landlord claiming an additional \$46,020.48 being the rent and outgoings from November 2017 to August 2018.
- 46 For the reasons stated in relation to the rent shortfall claim, AZW is not responsible for Pink's abandonment of the premises. It is unclear what has occurred since Pink abandoned the premises in November 2017. I am not satisfied that the landlord has mitigated its loss following that vacation. It is

unusual that the premises have been vacant for 9 months without explanation.

- 47 I have assessed the landlord's damages as set out above in the amount of \$60,248.72.

GUARANTORS LIABILITY

- 48 It is not in dispute that by Deed of Variation & Transfer of Lease dated on or about 22 August 2011 the second, third and fourth respondents agreed to indemnify the Landlord for losses resulting from AZW's breach of the lease.
- 49 Accordingly, having assessed the landlord's loss at \$60,248.72, the second, third and fourth respondents by counterclaim are liable under the Deed of Variation & Transfer of Lease to indemnify the landlord for this amount.
- 50 I find in favour of the landlord on its counterclaim in the amount of \$60,248.72.

L. Forde
Senior Member