VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP176/2018

BUILDING AND PROPERTY LIST

CATCHWORDS

Application for interlocutory injunction - relevant principles - Retail tenancy - tenant in liquidation - representation by Landlords that purchaser of business would obtain an assignment of the lease - nature of representation - whether promissory estoppel – Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7- extent of estoppel - *whether agreement for lease entered into - concurrent lease - nature of - Retail Leases Act 2003 – s.28 - no notice of by landlord of data which option to renew not exercisable – s.12 and s.21l - minimum lease term of five years.*

APPLICANT	En Avant Pty Ltd
RESPONDENTS	Uldis Baltars, Gai Baltars
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Injunction
DATE OF HEARING	1 March 2018
DATE OF ORDER	15 March 2018
CITATION	En Avant Pty Ltd v Baltars (Building and Property) [2018] VCAT 367

ORDERS

1. Upon the Applicant and its Director, Mr Robert Easton, by their counsel, undertaking to abide by any order which the Tribunal or any Court may make as to damages in case the Tribunal or any Court shall be of the opinion that the Respondents have sustained any by reason of this order which they ought to pay, the Respondents are restrained until the hearing of this proceeding or further order, whether by themselves, their servants or agents or otherwise howsoever from:

   (a) Entering into possession of the premises at 10 Thompson Avenue, Cowes;

   (b) Terminating the lease entered into between the Respondents and Veaston Enterprises Pty Ltd (in Liquidation) ("Veaston") on or about 1 April 2012 or any tenancy of Veaston, whether arising from over-holding under the said lease or otherwise;

(c) terminating the said lease by reason of the Applicant being in possession of the said premises.

2. It is a condition of this order that the Applicant or Veaston duly pay to the Respondents all rental and outgoings owing or falling due to the Respondents and otherwise abiding by the terms, covenants and conditions of the said lease.

3. Direct that this proceeding be listed for a directions hearing on a date and time to be determined by the Principal Registrar to determine its future conduct.

4. Liberty to apply.

5. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr K. Mihaly of Counsel
For the Respondents	Mr S. Hopper of Counsel

REASONS FOR DECISION

Background

1 The Respondents are the owners of restaurant premises in the seaside town of Cowes on Phillip Island, Victoria ("the Premises").

2 On 1 April 2012 the Respondents entered into a written lease ("the Lease") with Veaston Enterprises Pty Ltd ("Veaston") to lease the Premises for a period of five years, expiring on 31 March 2017, with three successive options of five years each. The permitted use under the Lease was to operate a restaurant from the Premises.

3 At the time the Lease was entered into, Veaston was already in occupation of the Premises. It had purchased the restaurant business conducted from the Premises some four years earlier from an entity associated with a Mr Higgins ("Mr Higgins") and had taken an assignment of an earlier lease.

4 One of the directors of Veaston was a Mr Robert Easton who also appears to have been the manager of its restaurant business.

5 On 7 August 2017, Veaston was placed into voluntary administration and on 30 August 2017 it went into liquidation. Shortly before that occurred, on 10 July 2017, the Applicant was incorporated. Mr Easton was and remains the sole director of the Applicant.

6 Negotiations then took place between Mr Easton and the liquidator of Veaston with a view to the Applicant purchasing the restaurant business from Veaston. At the same time, there were conversations between Mr Easton and the First Respondent in regard to the Applicant becoming the tenant of the Premises.

Purchase of the business from Veaston (In liquidation)

7 On 9 September 2017 an agreement was entered into between Veaston, through its liquidator, as vendor, and the Applicant as purchaser, for the Applicant to purchase the business for a price of $60,000 plus GST ("the Sale Agreement").

8 The sale agreement provided that title and ownership of the business and the assets sold did not fully vest in the Applicant until payment in full of the purchase price, which was required to be made on or before 15 December 2017.

9 Clause 7.2 of the Sale Agreement provided that, at completion:

(a) Veaston was to deliver to the Applicant, amongst other things, a duly executed assignment of the Lease; and

(b) the Applicant was to pay the purchase price.

10 By Clause 12.6(b), Veaston was required to cooperate with the Applicant in any reasonable arrangement designed to provide for the Applicant to have the benefit of the Lease, either by granting it a sub-lease or by granting a licence to occupy the Premises, subject to the Applicant assuming the

burden of the sub-lease. Notwithstanding that provision, Clause 12.4(a) provided that the Applicant was to use or occupy the Premises as licensee until the transfer of the Lease was completed or completion of the sale occurred.

11 After entering into the sale agreement the Applicant occupied the Premises and has conducted the restaurant business there ever since.

12 By notice in writing from their solicitors dated 10 January 2018, the Respondents gave notice to the Applicant that they required it to vacate the Premises within 30 days of the service of the notice upon it. The introductory part of this notice states:

> "Re-: Oral month to month Lease between Uldis Baltars & Gai Baltars in respect to the property known as 10 Thompsons Avenue, Cowes VIC 3922"

13 This proceeding was commenced by the Applicant in response to this notice, in order to restrain the Respondents from evicting it from the Premises. It was (sensibly) acknowledged during argument that this notice of termination served on the Applicant on 10 January 2018 is invalid. If there were a month-to-month tenancy, as the notice asserts, then a 30 day notice given in January would not be sufficient to determine it.

14 Argument proceeded on the wider question whether, and on what basis, the Applicant was entitled to remain in possession of the Premises.

The application

15 This proceeding was commenced on 13 February 2018 seeking the following relief:

(a) a declaration that the Applicant was the transferee of the Lease;

(b) a declaration that the term of the Lease between the parties, which had expired by effluxion of time on 31 March 2017, had been extended and was subject to the provisions of s.28 of the *Retail Leases Act* 2003 ("the Act"):

(c) a declaration that the notice to vacate served 18 January 2018 was invalid;

(d) a mandatory injunction that the Respondents be prohibited from purporting to evict the Applicant in reliance upon the notice to vacate served 18 January 2018;

(e) costs.

16 Accompanying the application were Points of Claim referring to the granting of the Lease to Veaston, the sale of the business to the Applicant, the taking of possession of the Premises by the Applicant and payment of rental and outgoings by the Applicant to the Respondents.

17 It was pleaded that, from no later than 26 October 2017, the Applicant was the tenant under the Lease and, by reason of an alleged failure by the Respondents to give Veaston a notice of the last date upon which it was to exercise the option to renew the Lease pursuant to s.28(2)(a) of the Act, the term of the Lease was continued pursuant to the provisions of s.28(2)(b) of the Act.

The hearing

18 An application for interlocutory relief in the form of an injunction to restrain the Respondents from entering into possession of the Premises pending the full hearing of this proceeding came before me on 16 February 2018. Mr K. Mihaly of Counsel appeared on behalf of the Applicant and Mr S Hopper of Counsel appeared on behalf of the Respondents.

19 The application was supported by an affidavit affirmed by Mr Easton on 12 February 2018 exhibiting a number of documents. No material was filed on behalf of the Respondents. That is unsurprising. In an application such as this, the main issue to be determined is whether the Applicant has made out a prima facie case. It is not an occasion for determining disputed questions of fact.

20 After hearing submissions it was apparent that the case sought to be relied upon by the Applicant was not well supported by the Points of Claim and the accompanying affidavit. I said that, if I were to dismiss the application on that ground, it would be open to the Applicant to commence further proceedings and present the case that it was then arguing. I decided that the better course was to adjourn the matter and direct the filing of further material so that the Applicant's best case could be dealt with.

21 The matter was therefore adjourned part heard before me to 1 March 2018. Upon the Applicant and Mr Easton providing the usual undertaking, an interim order was made restraining the Respondents from entering into possession of the Premises until 4 PM on the adjourned date.

22 A further affidavit of Mr Easton exhibiting more documents was affirmed on 23 February 2018 and filed, together with Amended Points of Claim.

23 After hearing submissions from Counsel the time allocated was insufficient to enable proper consideration of the matters raised and to make an immediate determination of the application. I informed the parties that a written decision would be provided soon as practicable.

24 Upon the Applicant and Mr Easton by their counsel giving the usual undertaking, the interim restraining order that I had made earlier was continued until further order.

Relevant principles

25 It was not disputed that, in order to grant an interlocutory injunction the Applicant must show that:

(a) there is a serious question to be tried;

(b) the balance of convenience favours granting an injunction; and

(c) damages would not be an adequate remedy if an injunction was not granted.

26 Reference was made to the following extract from the joint judgment of Gummow and Hayne JJ in *Australian broadcasting Corporation v. O'Neil* (2006) 227 HCA 46 where the learned judges said (at para. 65):

> "The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*…. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued:
>
> > *'The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'*
>
> *By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument…. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal…:*
>
> 'How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.'"

27 Since the only evidence that I have is that deposed to by Mr Easton I should assume for present purposes that the facts he alleges will be made out at a full hearing. The first question to be considered is therefore, do those facts establish a prima facie case in the required sense?

A prima facie case?

28 Paragraph 9 of the Amended Points of Claim states:

> "In or about September 2017, but prior to 19 September 2017, the Respondents represented to the Applicant that the Applicant would consent to an assignment of the Lease so long as the Applicant paid the arrears owing by Veaston at that time."

From its context, I understand that the term "Applicant" where appearing for the second time on the second line, was intended to be "Respondents" and I interpret it as such.

29 The particulars provided of this representation are a telephone conversation between Mr Easton and the First Respondent using words to this effect. It is alleged that the representation was repeated to Mr Easton by the First Respondent on multiple occasions between September 2017 and December 2017 on various dates specified.

30 In paragraph 8 of the supporting affidavit affirmed on 12 February 2018, Mr Easton deposes to the following conversations:

> a. "I spoke to the first respondent and said words to the effect that I wanted the same lease that Veaston had;
>
> b. the first respondent replied with words to the effect that the Applicant could get that Lease so long as the applicant also paid the arrears owing by Veaston at that time (which were approximately $10,000);
>
> c. I said words to the effect that the arrears would be paid but I would need time to get through the voluntary administration process to ensure that we could meet the obligations;
>
> d. the first respondent said words to the effect that the respondents would work with us to ensure process and transfer would occur."

31 Mr Easton said that, in reliance upon these representations and conversations the Applicant fully paid all of the arrears that were originally owed by Veaston and also met its obligations under the Lease to the Respondents. He said that it also:

(a) entered into the Sale Agreement with Veaston;

(b) made payments pursuant to the Sale Agreement of $55,450.00 to Veaston, $10,000.00 of which came from his own personal funds;

(c) took possession of the Premises and conducted the business;

(d) made further "goodwill payments" to various creditors of Veaston, totalling approximately $50,000.00.

32 Mr Easton also said that, between September and December 2017, he was in regular contact with the First Respondent about Veaston's arrears and said that the First Respondent told him that, once those arrears were "sorted", the Respondents would agree to the assignment of the Lease to the Applicant.

Assignment of the Lease

33 No assignment of the Lease or other document purporting to transfer the leasehold interest of Veaston has been prepared or executed. The terms of the asset sale agreement make it clear that it does not itself assign or transfer the leasehold interest. A formal assignment of the Lease was not to take place until the whole of the purchase price for the business had been paid. By agreement between the Applicant and the liquidator, payment of the balance has now been extended to 11 May 2018.

34 A memorandum dated 8 February 2018 signed by the liquidator states that he has no objection to the transfer of the Lease to the Applicant but he does not suggest that this has either been done or is intended to be done at any particular time. Unless the asset sale agreement is to be further varied, that will occur on 11 May 2018.

35 In the absence of an assignment, the leasehold interest that was created by the Lease must remain with Veaston. Any direct relationship of landlord and tenant between the Applicant and the Respondents must therefore arise, if at all, pursuant to the dealings and communications passing directly between Mr Easton and the Respondents.

36 The conversations said to have taken place are referred to above. There were also email communications between Mr Easton in the First Respondent.

The email communications

37 In an email dated 12 October 2017 to Mr and Mrs Easton, the First Respondent stated to them that:

(a) between 1 August 2017 and 19 September 2017, Veaston had continued to trade;

(b) the liquidator had paid all rent and disbursements for the period during which Veaston traded; and

(c) an amount of $9,153.12 was due, including October's rent. (This appears to have been with respect to the period before the liquidation).

38 In the email. the First Respondent continued as follows:

> "You have indicated to us previously that after the winding up of Veaston Enterprises you will pay outstanding accounts. If you or En Avant P/L are not yet in a financial position to pay us the $9,153.12 in a lump sum, please let me know and we may be able to come to some arrangement, like payment of instalments.
>
> We do expect En Avant P/L to pay November's rent ($4,287) and the 4th instalment of land tax ($323.75) which is due tomorrow."

39 Mr Easton sent an email in reply the following day, informing the First Respondent about a fire that had just occurred in neighbouring premises and stating:

> "We still have all intentions of forwarding the owed and due amounts to you, and hopefully with GP upon us next weekend we will be able to take a fairly good chunk from that, the smaller continued weekly payments to follow. Of course we will be able to provide a more definite amount to you after the weekend has gone.
>
> We are wondering if you might extend us until Monday 16th to pay the owed Bass Coast rates and the November rent amount? I arrive fairly early on weekdays and hopefully can have our end of week takings

> down and banked to ensure this is transferred to you as owed before 2 pm.
>
> After the GP weekend 19–22nd we can revert to forward plans on providing the remaining amounts due and payable to yourself and Gai with our regular EFT transfers
>
> Hopefully you are okay with us proceeding this way, once GP is over and done with we should be able to ensure much more smooth ongoing practice with our regular automatic EFT transfers for rent amounts communication on forward outgoings."

40 Mr Easton deposes that the extension was given although it does not appear how that occurred because the reply to this email exhibited to his affidavit makes no mention of any extension.

41 On 15 December 2017, the Respondents' solicitors sent a notice to vacate addressed to the Applicant and Mr Easton in the following terms:

> "**Re-breach of oral Lease between Uldis Baltars and Gai Baltars in respect to the property known as 10 Thompson Avenue Cowes VIC 3922**
>
> Take notice that you are in default pursuant to the terms of the lease insofar you have failed to pay arrears of rent of $9,367. Further take notice that if you fail to rectify the default within 14 days of the service of this notice upon you we shall exercise the right of re-entry and forfeiture pursuant to the terms of the said lease."

42 There is nothing in the evidence to suggest that there was any oral agreement for lease between the parties that included a term giving a right of re-entry and forfeiture in the event of non-payment.

43 Mr Easton said that, although he did not accept that the notice was valid or that the amount referred to was overdue, he made full payment by 29 December 2017.

44 Mr Easton said that, on 29 December 2017, he attended the Premises to find that the locks had been changed. Upon calling the Respondents' solicitors he was told that he needed to deal with Mr Higgins, the person from whom Veaston had originally purchased the business.

45 Mr Easton said that he then spoke to Mr Higgins who told him that he had arranged to "purchase the Premises" and that if Mr Easton wanted access to them over the summer period he would have to pay to him, Mr Higgins, $10,000.00 cash straight away and also $5,000.00 per week in January. He said that he paid Mr Higgins $10,000.00 in cash and was then allowed back into the Premises. It does not appear that the $5,000.00 per week had been paid to Mr Higgins.

46 Mr Easton said that, on 5 January 2018, he paid $4,287.00, being a month's rent, to the Respondents.

47 On 8 January 2018, the First Respondent wrote to the Applicant enclosing a cheque in the sum of $4,287.00, under cover of a letter in the following terms:

> **"Re-rent for 10 Thompson Avenue Cowes**
>
> We cannot accept your payment on 5 January 2018 for $4,287.00 for January's rent as the rent has already been paid by Andrew Higgins.
>
> Please find enclosed a cheque for $4,287.00."

The enclosed cheque has not been banked by the Applicant.

48 Since there is no material filed behalf of the Respondents there is no explanation from them as to why they accepted rent from Mr Higgins. It is also difficult to understand on the evidence why Mr Easton paid Mr Higgins the $10,000.00 he demanded if, as Mr Easton deposes, he did not really know what it was for.

49 On 18 January 2018, the Respondents' solicitors sent to the Applicant the notice to vacate referred to above, which prompted the issue of this application.

The submissions

50 At the outset, Mr Hopper submitted that the tribunal had no jurisdiction to deal with the application because, he said, there was no landlord and tenant relationship between the Applicant and the Respondents. However in the course of argument it appeared to be conceded that it was at least arguable that the Applicant was a monthly tenant, albeit, subject to the continued existence of the Lease, which would make the Applicant a tenant under a concurrent lease.

51 Mr Mihaly submitted that I should find that the Respondents made the representations to the Applicant referred to and that, in reliance upon those representations, the Applicant made the payments and acted in the manner described in paragraph 31 above. That is the primary position of the Applicant.

52 He submitted that, in the circumstances, the Respondents were estopped from denying the correctness of the representations they had made and that injunctive relief should be granted in order to avoid the inequity to the Applicant that would arise if the Respondents acted contrary to their representations.

53 Mr Hopper said that the alleged representations were limited in their scope. He said that, if they were made, there was no basis for saying that the Respondents were not willing to "work with the Applicant to obtain a transfer of the Lease" but it should not have been expected that they would be willing to wait indefinitely for that to occur.

54 He said that the statements claimed to have been made lacked certainty and queried how one would enforce them. He also pointed out that the Respondents did not act immediately to terminate the Lease.

Promissory estoppel

55 Reliance was placed by the Applicant upon the principle of promissory equitable estoppel set out in the case of *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7. In that case, Brennan J said at para 12 of his judgment):

> "12. The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to".

and at paragraph 34:

> "34. In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

56 In the same case, in the joint judgement of Mason CJ and Wilson J their Honours said (at para 30):

> "30. One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. …Equity comes to the relief of such a

> plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption".

57 In paragraph 9B of the Amended Points of Claim, it is pleaded that, by reason of the representations, the Applicant assumed that:

(a) the Applicant would receive an assignment of the Lease upon full payment of the arrears owed by Veaston and the confirmation by the liquidator of Veaston's consent to the assignment;

(b) the Lease would not be terminated by the Respondents by reason of Veaston's liquidation or other insolvency; and

(c) the Lease would not be terminated save under its terms and subject to all laws.

58 I think that it is arguable that the second two of these assumptions could be said to have been induced by the representations alleged. Clearly, the Lease could only be assigned if it were not terminated, and so it was reasonable for the Applicant to assume from the representation made, not only that the Respondents would consent to an assignment, but that they would not terminate the Lease in the meantime on the obvious ground that was present at the time the representations were made, namely, Veaston's insolvency.

59 Further, the condition for the Respondents agreeing to the assignment was said to be the due payment to them by the Applicant of what was owed to them. Consequently, the representation would have given rise to a reasonable assumption that, if that condition were fulfilled by the Applicant the assignment would take place. Implicit in that is that the Lease would not be terminated in the meantime if the payments were made and the terms of the Lease were otherwise complied with.

60 The difficulty lies with the first alleged assumption. Since it is asserted by the Applicant that the Lease was not to be terminated, it must follow that it would need to be assigned to the Applicant. The assignment would have to be by the company in liquidation because a landlord does not assign a lease. Consequently, I think that the assumption that would reasonably be induced by the alleged representations would be that the Respondents would consent to an assignment of the Lease.

61 There is no evidence that the Respondents refused to consent to an assignment of the Lease before they served their notice purporting to determine an alleged monthly tenancy on 15 December 2017. No assignment of lease document has ever been submitted to them for approval.

62 It is arguable that the notice of 15 December evidenced a refusal on their part to consent to any future assignment of the Lease to the Applicant because the express purpose of the notice was to evict the Applicant from the Premises if the money said to be owing was not paid. However:

(a) that occurred in mid-December, well after the representations were made; and

(b) eviction was only to occur if full payment of the arrears owed by Veaston was not made.

63 Consequently, I do not think that the service of this notice constituted a failure by the Respondents to fulfil any assumption or expectation that could be said to arise from the representations alleged.

64 Mr Easton said that the Applicant had paid all amounts due by 29 December 2017. There is no contrary evidence and so I must find for present purposes that it is arguable that the notice was complied with.

65 In the absence of any evidence from Respondents, I must find for present purposes that, by:

(a) telling Mr Easton that he had to deal with Mr Higgins;

(b) receiving rental from Mr Higgins; and

(c) returning the rental paid by the Applicant;

it is arguable that the Respondents have treated both the Lease and also any tenancy of the Applicant as being at an end.

66 There is no material from the Respondents to provide any ground for terminating the Lease. The only grounds for termination that appear from the material before me are:

(a) the insolvency of Veaston; and

(b) the failure to pay the amounts that the Applicant had agreed to pay to the Respondents.

67 As to the first, it is arguable that the Respondents are estopped from terminating the Lease on that ground. As to the second, the only evidence that I have is that there has been no such failure.

68 Consequently I think the Applicant has established a prima facie case in the required sense that the Respondents be restrained from terminating the Lease by reason of Veaston's liquidation or other insolvency or otherwise than in accordance with its terms and subject to all laws.

69 There is no occasion for granting any relief in regard to the agreement to consent to an assignment because there has, as yet, been no refusal by the Respondents to give such consent.

70 If the Lease remains in force and is subsequently assigned to the Applicant, the effect of s.28 of the Act is said to be that the option to renew would be available to be exercised by the Applicant. That also is arguable.

71 For these reasons, I am satisfied that, to the extent stated, there is a serious question to be tried.

The claim for a direct lease

72 The alternate claim argued by Mr Mihaly was that there is a prima facie case that a direct lease was entered into between the Applicant and the Respondents. He said that the Lease could be inferred from the conduct of the parties and, in order to give business efficacy, would be for a reasonable time, which in the circumstances, would be no less than one year. He acknowledged that such a finding would then allow the Applicant to claim an entitlement to a 5 year Lease pursuant to s.12 and s.21 of the Act.

73 Mr Hopper said that to establish a lease there must be certainty of land, parties, the term and the rent which were not all present. He said that a lease for a "reasonable term" as urged by Mr Mihaly would be void for uncertainty. He also pointed out that, in the conversations alleged to have occurred, there was nothing said about a direct lease, only an assignment of the Lease.

74 I think Mr Hopper is correct that there is no prima facie case for the existence of a direct lease, apart from, possibly, a monthly tenancy. Further, apart from problems of uncertainty, there are a number of other difficulties with the argument presented on behalf of the Applicant.

75 First, the Applicant maintains that the Lease is still in force. Consequently, any other direct lease between the Applicant and the Respondents could only take effect as a concurrent lease which would, in effect, be a lease by the Respondents of the reversion. A landlord and tenant relationship would be created but such a tenancy would not carry with it a right to possession of the Premises enforceable against the Respondents, although a right to possession under the licence contained in the sale agreement might be enforceable against Veaston.

76 Secondly, I cannot spell out from the representations that are said to have been made, either a specific agreement for a lease or any ground for a reasonable assumption on the part of the Applicant that a direct lease would be entered into by it with the Respondents. The representations were all to do with an assignment of the Lease, not the creation of a new tenancy.

77 If any sort of tenancy were to be inferred from the Applicant's occupancy of the premises and the direct payment of rental and outgoings by the Applicant and its acceptance by the Respondents, that would, at most, create a monthly tenancy which would be terminable on a month's notice. Certainly, the notices served by the Respondents' solicitors would suggest that they believed that such a tenancy had been created.

Misleading and deceptive conduct

78 Mr Mihaly submitted on behalf of the Applicant that the representations alleged were made in trade and commerce, they were as to a future matter and they contravened s.18 of the *Australian Consumer Law*.

79 Mr Hopper pointed out that the statements alleged were vague and it could not be said that they were misleading or deceptive. He said that the

allegations had not been denied in answering material because the prayer for relief in the Amended Points of Claim sought only damages.

80 That is correct, In the Amended Points of Claim damages are claimed under s.236 of the *Australian Consumer Law* but in oral submissions Mr Mihaly also sought injunctive relief on an interim basis.

81 I agree with Mr Hopper that, if there was misleading and deceptive conduct on the part of the Respondents, the Applicant's remedy lies in damages, not injunctive relief.

The balance of convenience

82 It is clear from the material that, if an injunction is refused, the Applicant's business will be destroyed.

83 From the Respondents' point of view, the Applicant is already in possession of the Premises and must continue to pay rent and outgoings and so they should not be prejudiced by the granting of an injunction. If fresh grounds arise warranting the termination of the Lease then the Respondents will have their remedy.

84 In these circumstances it seems to me that to grant an injunction would be the course of least risk. I am satisfied that the balance of convenience favours the granting of an injunction.

Would damages be an adequate remedy?

85 Mr Mihaly submitted that damages would not be an adequate remedy for the following reasons:

(a) Some of the Applicant's losses have not crystallised and it may not be possible to award adequate compensation at the conclusion of the trial;

(b) The eviction may render the Applicant insolvent and not in a position to prosecute a claim for damages;

(c) Although the value of a business can be ascertained, the commercial value does not capture the whole value of a business.

86 Mr Hopper pointed to the history of the tenancy and the difficulties the Respondents have had in obtaining payment in the past.

87 Although Veaston defaulted under the Lease, the payments were, on the material filed, made up and if the relief granted is to be of any value to the Applicant, it will need to pay promptly from now on.

88 I think that the balance of convenience favours the granting of an injunction.

Conclusion

89 Mr Mihaly said that, if I were disposed to grant an interlocutory injunction, he was instructed to give the usual undertakings as to damages on behalf of both the Applicant and Mr Easton until trial. On that basis, the orders sought will be made.

SENIOR MEMBER R. WALKER