VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP866/2014

CATCHWORDS

RETAIL LEASE: *Retail Leases Act 2003* ('RLA'); claim for costs under s 92 of RLA dismissed; late exercise of option to renew lease; consideration of s 28 of RLA; counterclaim regarding validity of rental determination; claim allowed for arrears of rent based on rental determination backdated.

APPLICANT	Mr Qida Fang
RESPONDENT	Aquatab Pty Ltd
FIRST JOINED PARTY	Rastas Nominees Pty Ltd (ACN 005 998 612) (Claim struck out 1 February 2016)
SECOND JOINED PARTY	Monash Vision Pty Ltd (ACN 095 423 153) (Claim struck out 28 October 2015)
THIRD JOINED PARTY	Mr Yuefeng Fang
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	12 and 13 July 2016
DATE OF ORDER	12 December 2016
CITATION	Fang v Aquatab Pty Ltd (Building and Property) [2016] VCAT 2079

ORDERS

1 Under s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* I declare:

(a) it is a term of the lease between the parties that the relevant parts of the demised premises are able to be used as a dwelling or residence; and

(b) the applicant, Mr Qida Fang, has validly exercised his option to renew the lease for 5 years from its expiry; and

(c) the second term of the lease came into effect on 1 October 2013.

2 The applicant's application for an order that the respondent, Aquatab Pty Ltd, pay his costs of the proceeding under s 92 of the *Retail Leases Act 2003,* is dismissed.

3 For the avoidance of doubt, this order covers the applicant's costs up to the start of the hearing on 12 July 2016.

4 In respect of the respondent's counterclaim I declare that:
   (a) Mr Mark Ruttner was duly appointed to determine the market rental as at 1 October 2013 pursuant to clause 11.1.3 of the lease;
   (b) Mr Ruttner's determination made on or about 20 November 2015 in respect of the market rental of the premises as at 1 October 2013 ("the determination") was validly made;
   (c) the determination is binding on both parties;
   (d) the determination applies retrospectively;
   (e) the applicant is liable to pay arrears of rental from 1 October 2013, to be agreed or assessed;
   (f) the arrears of rental are to be paid to the respondent;
   (g) the applicant is liable to pay to the respondent $1,750 being 50% of Mr Ruttner's costs of preparation of his determination.

5 Both parties have liberty to apply after 22 December 2016 for a further hearing regarding assessment of arrears of rental.

6 Costs reserved, with liberty to apply.

MEMBER C EDQUIST

APPEARANCES:

For Applicant:	Mr Q Fang, in person
For Respondent:	Mr S Hopper of Counsel

REASONS

INTRODUCTION

1 The applicant (Mr Fang) leases premises in Mackie Road, Mulgrave ('the premises'). He has had a long-running dispute with his current landlord Aquatab Pty Ltd ('Aquatab').

2 Mr Fang instituted this proceeding on 23 December 2014. There was a hearing on 12 and 13 July 2016. Mr Fang appeared in person, with the assistance of an interpreter. Mr Hopper of counsel appeared on behalf of Aquatab. The third joined party, Mr Yuefeng Fang, was present and gave evidence, but he did not formally appear as the respondent's claim against him was not being pursued at this hearing.

3 At the commencement of the hearing Mr Fang indicated that he wanted three things. The first was to exercise his right under s 28 of the *Retail Leases Act 2003* ('the RLA') to exercise his option to extend the lease. The second was to have an amendment made to the lease so that he could continue to reside in the premises. The third was an order 'for damages caused by the respondent' as a result of its 'inappropriate behaviour'.

4 Mr Hopper responded to the first issue by noting that Aquatab had conceded that the option in the lease had been exercised, and that the lease had been renewed. On the basis of this concession, the first issue raised by Mr Fang does not need to be determined by the Tribunal. However, the status of the lease is relevant to the counterclaim brought by Aquatab, and must be addressed.

5 With respect to the claim for an amendment to the lease, Mr Hopper made two points. Firstly, if the application was to proceed, Mr Fang faced a technical difficulty because the application was really an application for rectification, and Mr Fang was not an original party to the lease. The second issue was that the application was no longer necessary in so far as Aquatab was not now asserting that Mr Fang was in breach of the lease because he was residing in the premises. On the basis of Aquatab's concession, the issue of whether the lease needed to be rectified appeared to fall away. However, at the very end of the second day, Mr Fang raised again his claim for rectification of the lease.

6 In order to bring absolute finality to this element of the dispute, I will make a declaration under s124 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') in the terms conceded by Aquatab in its letter of 24 December 2015[1], namely that it is a term of the lease that the relevant parts of the premises are able to be used as a dwelling or residence.

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[1] Letter from Norton Gledhill to Mr Fang dated 24 December 2015.

7 In respect of the third claim, Mr Fang was asked by the Tribunal whether he was seeking damages for breach of the lease or costs. He confirmed that he was seeking costs only.

8 Aquatab pursued a counterclaim at the hearing. In its points of defence and counterclaim dated 5 February 2016, Aquatab had said that it was seeking a declaration that a rent determination dated 20 November 2016 made by Mr Mark Ruttner assessing the market rental value for the premises as at 1 October 2013 at $23,000 ('the determination') was valid. It also sought an order for payment of:

(a) $15,788.70 in unpaid rent up to and including 31 January 2016;

(b) unspecified damages for arrears of rent and loss of bargain;

(c) $1,750 being the applicant's share of the valuer's fee for the determination; and

(d) costs.

An order for possession was also sought.

9 At the hearing, Mr Hopper qualified Aquatab claims by limiting them to three, namely:

(a) a declaration that the determination was valid and binding on the parties;

(b) an order for damages equivalent to the arrears in rent backdated to 1 October 2013, calculated using the new rent identified in the determination, which was particularised to amount to $18,942.79 in a schedule which was tendered; and

(c) an order that Mr Fang contribute 50% of Mr Ruttner's costs of making the determination, namely $1,750.

10 The bulk of the first day of the hearing was taken up with Mr Fang's submissions regarding costs, and then hearing part of Aquatab's response. On the second day, Aquatab concluded its response to Mr Fang's claim for costs, and presented its counterclaim regarding the rental review determination.

11 I have made orders in relation to both claim and counterclaim above. I now set out my reasons for making those orders.

BACKGROUND

The premises

12 The premises consist of a shop and dwelling. The shop consists of a retail space and a resting area. The dwelling is at the rear and is accessed from the resting area. The dwelling comprises a kitchen, living room, study, bathroom, laundry and two bedrooms.

The lease

13 Rastas Nominees Pty Ltd ('Rastas') leased the premises to Qun Jiang under a lease commencing on 1 October 2008 with a term of five years, and two options for successive terms of five years.

14 On 22 December 2008, Qun Jiang transferred the lease to Rui Lin Bai.

15 On 9 December 2011, Rui Lin Bai transferred the lease to Mr Fang.

The first option to renew

16 The lease required the tenant to exercise the first option to renew by 1 July 2013. Rastas did not give notice to Mr Fang of this date. Mr Fang overlooked the date, and did not give notice of its intention to exercise its right to renew the lease until 24 October 2014.

Sale of the premises

17 By a contract of sale made on or about 8 August 2014, Rastas agreed to sell the premises to Aquatab. The sale settled on or about 7 October 2014. The fact that Mr Fang had not exercised his option prior to the sale of the property is central to the disputes which have arisen between him and Aquatab, and are also to relevant to the disputes between Aquatab and the other parties joined to the proceeding.

Representations allegedly made to Aquatab prior to sale

18 Aquatab alleges that prior to the execution of the contract of sale in August, Rastas represented to it that:

(a) the premises were sold subject to a lease;

(b) Mr Fang had not exercised his option to renew;

(c) Mr Fang did not intend to exercise his option to renew;

(d) Mr Fang was in possession of the property on a month-to-month basis.

The memorandum of understanding

19 A director of Rastas, Mr Richard Zagrzejewski, prior to the settlement of the contract of sale, attended at the premises with a pre-prepared memorandum of understanding, evidently intending to have Mr Fang sign the document. This intention is clear from the opening words, which are: "I am the current tenant". Mr Fang was not present, but his son Yuefeng Fang was. Mr Yuefeng Fang signed the document, making this notation on it:

> Signed on behalf of my father, the lease holder, Qida Fang

20 The memorandum of understanding procured by Rastas was then passed to the agent, Monash Vision Pty Ltd, the second joined party ('Monash Vision').

21 It was Aquatab's case that by the memorandum of understanding Mr Fang confirmed he would not exercise his option to renew, and that he was on a month-to-month tenancy.

Aquatab's attempts to gain possession of the premises

22 Mr Fang, on 24 October 2014, through his solicitors, purported to exercise his option for a further term of the lease. Aquatab responded by having its solicitors write to Mr Fang on 29 October 2014 advising that the renewal of the lease was not effective because the premises were being used "predominantly as a residence rather than as a retail premises".

23 On 29 October 2014, Aquatab's lawyers sent Mr Fang a 'Notice of Termination Residential Tenancy'.

24 Mr Fang initiated a mediation before the Office of the Small Business Commissioner, which was set down for 16 December 2014.

25 On 15 December 2014, Aquatab's solicitors served a further notice, purporting to be a notice under clause 7.6 of the lease and s 146 of the *Property Law Act 1958* ('the PLA') asserting the lease had been breached because the premises were being used other than for the permitted use.

26 The mediation was not successful and on 23 December 2014 Mr Fang instituted this proceeding against Aquatab. He sought:

(a) an order to prevent Aquatab from re-entering the premises until his application for rectification of the lease is determined by the Tribunal;

(b) an order preventing Aquatab from relying upon its termination notices dated 21 October 2014 and 15 December 2014;

(c) leave to apply to rectify the lease;

(d) any further order deemed appropriate by the Tribunal.

27 On 23 February 2015, Mr Fang was successful in obtaining an order restraining Aquatab from entering into possession of the premises in reliance upon its notices dated 29 October 2014 and 15 December 2014. On 23 February 2015, a number of directions were also given regarding steps to be taken prior to the hearing, and the proceeding was listed for hearing on 2 July 2015.

28 Aquatab issued a new notice to quit on 27 March 2015 and terminated what it said was a monthly tenancy.

Joinder of new parties

29 On 17 April 2015, the proceeding was complicated by the joining of three new parties, namely, Rastas, Monash Vision, and Mr Yuefeng Fang. In addition to orders relating to pre-hearing steps, the proceedings was

scheduled for a compulsory conference on 11 June 2015 and listed for hearing on 14 July 2015.

30 In the event the hearing scheduled for 14 July 2015 was vacated. The proceeding did not come on for hearing for another 12 months. One of the reasons for this was that Rastas applied to have Gerald Frederick Lenton (trading is G.F. Lenton & Co) joined. The application to join Mr Lenton was adjourned on 23 July 2015, but was successfully made on 18 August 2015.

Resolution of claims against Mr Lenton, Monash Vision and Rastas

31 On 28 October 2014, Aquatab's claim against Monash Vision was struck out, although Monash Vision was kept as a party for the purposes of apportionment.

32 On 18 January 2016, Rastas' claim against Mr Lenton was dismissed, and on 17 February 2016, Mr Lenton was formally removed as a party to the proceeding.

33 Prior to 1 February 2016, Aquatab reached a settlement with Rastas and the claim against that joined party was struck out.

Aquatab's solicitor's letter dated 24 December 2015

34 By an open letter dated 24 December 2015, Aquatab's solicitors sought to bring the dispute to a close. The letter conceded, amongst other things, that the lease contained a term that the relevant part of the premises could be used as a dwelling, the lease was subject to the RLA, and the lease had been validly renewed by Mr Fang. Enclosed with the letter was a signed counterpart deed of renewal of lease, together with a disclosure statement.

35 Accordingly, when the hearing commenced on 12 July 2016, Mr Fang was entitled to take the view that he had been substantially successful in the proceeding. His claim for costs was made in those circumstances.

MR FANG'S APPLICATION FOR COSTS

36 Mr Fang, in his amended points of claim, based his claim for costs on s 92 of the RLA, s 78 of the VCAT Act and s 109 of the VCAT Act.

37 The power of the Tribunal to award costs in a retail tenancy dispute is derived from s 92 of the RLA. This provides:

> (1) Despite anything to the contrary in Division 8 of Part 4 of the **Victorian Civil and Administrative Tribunal Act 1998**, each party to a proceeding before the Tribunal under this Part is to bear its own costs in the proceeding.
>
> (2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because—

(a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or

(b) the party refused to take part in or withdrew from mediation or other form of alternative dispute resolution under this Part.

(3) In this section, ***costs*** includes fees, charges and disbursements.

38 It is to be noted that s 92(1) of the RLA is expressed in such a way that it is clear that s 109 of the VCAT Act – which sits within Division 8 of Part 4 of that Act – is *not* to apply if s 92 applies. Accordingly, Mr Fang's arguments about the application of s 109 do not need to be addressed if the RLA applies.

39 The situation regarding s 78 of the VCAT Act is similar, but the argument is more nuanced. Section 78 sits within Division 4 of Part 4 of the VCAT Act. Accordingly, it is not directly affected by s 92 of the RLA. Section 78 is concerned with the Tribunal's powers where a party has conducted a proceeding in such a way that another party is disadvantaged. If the section applies, then the Tribunal, under s 78(2)(c), has the power to an order for costs *under* s 109. In this way, the power to order costs under s 78(2)(c) is also affected by s 92.

40 Accordingly, if the RLA applies to the lease, all Mr Fang's contentions about costs have to be assessed having regard to the principles relevant to s 92 of the RLA.

41 Prior to the institution of this proceeding by Mr Fang the parties had engaged in mediation conducted by the Office of the Small Business Commissioner. Accordingly, if costs are to be awarded under s 92 of the RLA, they must be awarded on the basis of vexatious conduct.

APPLICATION OF THE RLA

42 A threshold issue is whether the RLA applies. The respondent conceded in its solicitor's letter of 24 December 2015 that it did. I consider that this was a minor concession. The lease did not state whether the RLA applied or not. Neither alternative at Item 1.13 of the Schedule had been struck out. However, the permitted use was stated to be "MILK BAR, MIXED BUSINESS".

43 Section 4 of the RLA relevantly provides:

(1) In this Act, ***retail premises*** means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—

(a) the sale or hire of goods by retail or the retail provision of services; …

44 Because of this definition, it is clear the premises were *retail premises* within the meaning of s 4 of the Act, with the result that the Act applies.

45 Mr Hopper at the hearing conceded that the fact that Mr Fang was residing within the premises did not mean that the RLA did not apply. In the light of the exclusion from the definition of *retail premises* in s 4 of "any area intended for use as a residence", this concession was appropriate.

46 The upshot is that Mr Fang's claim for costs must be assessed under s 92 of the RLA

WAS THE APPLICATION FOR COSTS BEING MADE PREMATURELY?

47 One of the issues raised at the hearing was whether the claim for costs was being made prematurely. There are two sub-issues behind this question. The first is the argument raised by Mr Hopper as to whether it is appropriate to deal with the application for costs at all, having regard to the fact that such an application was not reflected in the amended points of claim filed by Mr Fang. I consider this argument can be quickly disposed of, for the reason that Mr Fang says that it is clear from the note typed on top of his amended points of claim dated 19 February 2016 that they are in addition to his original points of claim dated 13 March 2016. The amended points of claim clearly make a claim for costs.[2] I accordingly find that the issue was properly raised for determination by the Tribunal on 12 July 2016.

48 The second preliminary issue was whether it was appropriate for the application to be made at the outset of the hearing before any substantive determination had been reached. Mr Hopper ultimately conceded that the application for costs could be dealt with "at any time" under s 92, and that this had, in fact, occurred in *State of Victoria v Bradto*,[3] ('*Bradto*').

FACTORS RELEVANT TO AN AWARD OF COSTS UNDER S 92

49 It is relevant to refer to the decision of Deputy President Macnamara (as he then was) in this Tribunal, *Victorian Education Foundation Ltd v Brislugan Pty Ltd*,[4] where he said this about the operation of s 92 in circumstances where, just before a hearing, an applicant withdrew its claim.

> [21] I turn then to the third of the matters relied upon by Mr McKenzie, the complaint that what has happened now leaves his client all dressed up with nowhere to go having spent a fortune on new clothes. I am very sympathetic to that argument. The question is however whether what has occurred amounts to vexatious conduct. Certainly it is clear that merely bringing a proceeding which is unsuccessful is not in itself vexatious. Section 92 was intended to operate as a very stern restriction on the Tribunal's discretion to award

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2 Amended points of claim dated 19 February 2016, paragraph 1.
3 [2006] VCAT 1813.
4 [2009] VCAT 317.

> costs. Its effect and intent is to make the award of costs as between party and party the exception rather than the rule.

50 As to the meaning of vexatious conduct, Mr Hopper referred to the Victorian Court of Appeal decision in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd)*,[5] ('*24 Hour Fitness'*). Mr Hopper drew the Tribunal's attention to the fact that the Court of Appeal had approved a passage from the decision of Judge Bowman in *Bradto*. The passage reads:

> [4] Section 92(2)(a) was considered by Deputy President Bowman in *State of Victoria v Bradto Pty Ltd and Timbrook Pty Ltd*. He observed that the provision requires the Tribunal to be satisfied that it is fair to order costs because a party conducted the proceeding in a vexatious way and that such conduct unnecessarily disadvantaged another party to the proceeding. Deputy President Bowman referred to the distinction between a proceeding which is conducted in a vexatious manner and the bringing or nature of the proceeding being vexatious. He held that a proceeding is conducted in a vexatious manner 'if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging.' This encapsulates the circumstances in which conduct may be classified as vexatious.[6]

51 Mr Hopper emphasised that *24 Hour Fitness* was a case where the Tribunal had awarded costs against an applicant company which pursued a case which was always going to fail. It pursued losses which had been incurred by another company which was not a party to the proceeding.

52 Mr Fang said that he was familiar with *24 Hour Fitness* and relied on it as demonstrating that Aquatab's behaviour had been vexatious. He said Aquatab's conduct had been "productive of serious and unjustified trouble or harassment".

MR FANG'S ARGUMENTS

53 It is convenient to address Mr Fang's arguments substantially in the order in which they are set out in his amended points of claim.

Breach of the order made on 23 July 2015

54 The first argument was that Aquatab had, after it had obtained an order from the Tribunal on 23 July 2015 that Mr Fang had to give access to the premises to Aquatab's "expert", arranged for an inspection on 4 November 2015 to enable a rental determination to be undertaken. This was said to be a breach of the order because the access was to be limited to "sale market appraisal".

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5 [2015] VSCA 216.
6 Ibid, at [4] (Citations omitted).

55 In my view, a breach of the order of 23 July 2015 is not established. The order refers to inspection by an "expert". The order does not specify which type of expert was to have access.

56 If Mr Fang was advancing a wider contention, namely, that Aquatab's action in pressing for a rental determination was vexatious conduct in the litigation, I do not accept it. The fact that Aquatab pressed on with the rental determination procedure under the lease may, or may not, have constituted a breach of the lease. However, it was not conduct in the litigation itself.

Deceptive conduct

57 Mr Fang's next point was that Aquatab had attempted to deceive both him and the Tribunal, thereby causing disadvantage to him. He gave a number of examples, which I now discuss in turn.

Notice of Termination of Residential Tenancy of 29 October 2014

58 The first was the issuing of a Notice of Termination of Residential Tenancy on 29 October 2014 after Mr Fang gave notice of intention to renew the lease on 24 October 2014. Aquatab denied that the RLA applied and that Mr Fang was entitled to rely on s 28 of that Act.

59 Mr Fang made much of the reference in this notice to quit to s 263 of the *Retail Tenancies Act 2007* (Vic). Mr Fang initially said there had been a fraudulent reliance on a non-existent provision. When it was pointed out to him that the reference to *Retail* might be a typographical error, he relented, and withdrew the allegation of fraud. Nonetheless, he insisted it was a material matter.

60 Mr Hopper's response was that it was a clear mistake, as s 263 of the *Residential Tenancies Act 1997* contained a relevant power. Moreover, the heading of the notice referred to "Notice of Termination of Residential Tenancy". Mr Hopper argued that as Mr Fang had been represented by a lawyer the correct legislation could readily have been identified. I accept Mr Hopper's point.

61 I also consider that as the notice to quit of 29 October 2014 pre-dated the institution by Mr Fang of this proceeding on 23 December 2014, it cannot constitute vexatious conduct of the proceeding.

Invoice of 25 January 2015

62 The next proposition was that when Aquatab sent an invoice seeking, on 25 January 2015, to collect rent allegedly underpaid between 1 October 2013 and 7 October 2014, there was deceptive behaviour because the assignment of the lease between Rastas and Aquatab had not been provided.

63 In my view, the action of issuing the invoice was legitimately taken by Aquatab to enforce rights it asserted under the lease. It was not conduct taken in the proceeding, although it may well have been action taken with the proceeding in mind, insofar as Aquatab may have been intending to introduce evidence about it at the hearing.

64 The fact that the assignment of lease was not sent with the invoice may have been an oversight, and may have been counterproductive, but it was not a failure to make discovery of the document *in* the proceeding.

65 If Aquatab had failed to make discovery of the assignment in the proceeding, its case may have been affected. But any such a failure is not likely to be vexatious to Mr Fang, as it is hard to see how the failure could cause "serious and unjustified trouble or harassment" to him.

Vexatious behaviour in the conduct of the proceeding

The default notice of 15 December 2014

66 The first allegation under this heading made by Mr Fang is that Aquatab served a default notice on 15 December 2014 asserting that he could not use the premises as a residence, and he was in breach of the lease. This notice was said to be contradictory to the Notice of Termination of Residential Tenancy of 29 October 2014, and that Aquatab had been inconsistent because it had sought to rely both on the *Residential Tenancies Act* as well as the RLA. Mr Hopper contended that it was legitimate for the landlord to attempt to shore up its position under both pieces of legislation. I accept Mr Hopper's argument.

67 I consider also that, as the notice was sent before the institution of the proceeding, it cannot be conduct *in* the proceeding.

The notice to quit of March 2015

68 Mr Fang asserts that when Aquatab served an "ambulatory notice to quit" on 30 March 2015(sic) that was vexatious because Aquatab knew it could not succeed, and it "purposely" caused Mr Fang "a considerable amount of trouble and discomfort". The notice had been issued in the context that, on 23 February 2015, Mr Fang obtained an injunction preventing Aquatab from re-entering the premises.

69 Mr Hopper contended that the March notice, which he said was issued on 27 March 2015, was a notice to quit based on the proposition that the tenancy was a periodic tenancy from month-to-month, and had been issued as a matter of caution by Aquatab in order to cover of all arguments which might be raised at the pending hearing. He argued that it was legitimate for the landlord to adopt a "belt and braces" approach.

70 I accept with Mr Hopper's argument that Aquatab was entitled to cover all contingencies. I also consider that Mr Fang's complaint about the March notice to quit is not substantiated for two other reasons. First, the injunction issued on 23 February 2015 prevented Aquatab from re-entering the premises in reliance upon its notices dated 29 October 2014 and 15 December 2014. It did not prevent Aquatab from issuing a notice in respect of any alleged new breach after 23 February 2015. Second, the issuing of the March notice to quit was an action taken to enforce an alleged entitlement of the landlord to re-take possession under the terms of the lease, and was not conduct in the proceeding.

The directions hearing on 23 July 2015 was redundant

71 The next allegation made was that the directions hearing on 23 July 2015 was "redundant" because agreement had been achieved the day before on the orders to be made regarding the application to join the first joined party.

72 On 22 July 2015, Aquatab had raised an issue about access to the premises being granted for rental determination. Mr Fang objected to this. He contended that on 23 July 2015, at about 1.00pm, shortly before the directions hearing, he said he would only agree "to sale market evaluation of the property". He said Aquatab insisted on proceeding with the directions hearing because it wanted an order for access for rental valuation. However, he contends that at the directions hearing, Aquatab's counsel did not raise the issue of access for rental valuation and sought an order for access for property valuation only.

73 In respect of this argument, Mr Hopper referred to an email from Mr Fang's lawyer to Aquatab's lawyer sent at 1.07pm on 23 July 2015. Mr Hopper said that this showed that the relevant orders were still being debated about an hour before the scheduled start time of the hearing. In those circumstances, it could not be said that Aquatab behaved vexatiously when it insisted on going on with the hearing.

74 Mr Hopper conceded that, prior to the hearing, Aquatab had been urging Mr Fang, through his lawyers, to accept that Aquatab should be granted access for the purposes of a rent review as distinct from a market appraisal, but that point was not pressed at the hearing because the argument was not likely to be successful. Mr Hopper said that Aquatab should not be criticised for not making an argument which was bound to be unsuccessful, and he cited the decision of Deputy President Macnamara in *Victorian Education Foundation Ltd v Brislugan Pty Ltd*,[7] in support of this proposition. It is apposite to quote this passage from [21]:

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7 [2009] VCAT 317.

> Should a party therefore be any worse off in acknowledging either weaknesses in its own case or strengths in the opposing case and crying off before final hearing. In my view as a matter of policy, it would be a most unfortunate message to give to litigants that it was better to blast on than to face reality. I think that what Victorian Education Foundation did in determining not to go on with this proceeding was in itself not vexatious but a responsible step.

75 I accept Mr Hopper's argument that, in circumstances where orders were still being negotiated an hour before the directions hearing, it cannot be said it was vexatious to go on with the directions hearing. Furthermore, I accept that it was appropriate, and not vexatious, for Aquatab not to press an application for access for rental valuation at the hearing, in circumstances where such access was unlikely to be granted.

Conduct of the proceeding generally

76 Mr Fang then made a general attack on Aquatab's conduct of the proceeding, saying:

(a) the nature of the proceeding was simple;
(b) the lease was at its centre;
(c) the dispute could have been prevented on several occasions;
(d) the dispute was caused by Aquatab in failing to recognise that s 28 of the RLA gave him a right to renew the lease, and in settling the sale despite its inability to obtain a "waiver letter" that divested his right to renew the lease on the day before settlement; and
(e) he had no role in causing the dispute because he had not been told by his landlord of his "option to renew", and he promptly challenged the memorandum of understanding.

77 As noted, in order to be successful in his claim for costs under s 92 of the RLA, Mr Fang must demonstrate that Aquatab conducted the proceeding vexatiously.

78 As illustrated by the decision in *24 Hour Fitness*, one of the relevant factors is the strength of the case put forward by the party whose conduct is impugned. In that case, Judge Jenkins, sitting as a Vice President in the Tribunal, had referred to a decision of Justice Roden of the Supreme Court of New South Wales in *Attorney-General v Wentworth*,[8] in which his Honour said:

> Proceedings are vexatious if … irrespective of the motive of the litigant, they are [so] obviously untenable or manifestly groundless as to be utterly hopeless.

79 Judge Jenkins adopted this definition of vexatious proceedings, stating at [57]:

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8 (1988) 14 NSWLR 481.

> The Applicant's claim for damages, where no loss could be demonstrated as having been incurred by the Applicant, can properly be described as 'obviously untenable or manifestly groundless as to be utterly hopeless'.[9]

80 In upholding the Tribunal's decision in *24 Hour Fitness* the Court of Appeal said at [28]:

> True it is that the Tribunal also considered the hopelessness of the applicant's claim, but there is no error in that. The strength of the applicant's claim for damages was a relevant factor to take into account

81 In fairness to Mr Fang, it is to be noted that almost exactly a year after he had initiated the proceeding, after many pre-trial steps had taken place, Aquatab's solicitors wrote an open letter dated 24 December 2015 in which they attempted to bring the dispute to an end by openly making key concessions. Relevantly, the letter read:

> Notwithstanding our client's legal position, we are instructed that it is commercially futile to proceed to trial. The parties have had three attempts at settling this matter via mediation. Very reasonable offers have been made and refused. Substantial legal costs have been incurred in a jurisdiction where legal costs are unlikely to be recoverable, regardless of the outcome of the trial.
>
> Accordingly, our client feels it has no choice but to admit the allegations you have made in your points of claim that:
>
> 1 It is a term of the lease that the relevant part of the premises are able to be used as a dwelling or residence.
>
> 2 The lease is subject to the *Retail Leases Act* 2003 (Vic).
>
> 3 The lease has been validly renewed by the tenant.
>
> 4 The notices of default dated 21 October 2014 and 15 December 2014 served by the landlord on the tenant are hereby withdrawn and of no further force and effect.
>
> We enclose a signed counterpart deed of renewal of lease for the Premises together with a disclosure statement. Please sign and return counterparts to us as soon as possible.

82 Although the letter couched Aquatab's decision to withdraw its claims in terms of commerciality, the complete nature of the capitulation raises the question of whether Aquatab's claim was hopeless from the start. At the hearing, Mr Fang argued that the settlement should have occurred much earlier, and complained he was locked in litigation only because the third party claims had not been resolved. He said Aquatab should have settled with him and then continued its pursuit of the joined parties.

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9 [2015]VCAT 596.

83 Mr Fang's case against Aquatab turned on the issues of whether:

(a) the premises were covered by the RLA;

(b) Mr Fang had validly exercised his option to renew; and

(c) Mr Fang could live in the premises.

84 It is necessary to examine these issues in turn to ascertain whether Aquatab's position in respect of each of them was, to adopt the test articulated by Judge Jenkins in *24 Hour Fitness* at first instance so "obviously untenable or manifestly groundless as to be utterly hopeless".

Did the RLA apply to the lease?

85 As has been noted above,[10] the applicability of the RLA was clear from the definition of retail premises contained in s 4 of the RLA. If the only issue in the proceeding had been whether the RLA applied, then I would have concluded it would have been vexatious for Aquatab to have taken the matter to a hearing.

The right to renew the lease

86 As the application of the RLA should have been clear to Aquatab, so should the resolution of the issue of whether Mr Fang could legitimately exercise late his option to renew the lease. In short, the application of the RLA puts the matter beyond doubt.

87 As has been noted, the lease was entered into with effect from 1 October 2008. There were options to renew for two further terms of 5 years each. The latest date for "exercising option for renewal" was 1 July 3013. Mr Fang should have exercised the first option by this date. He did not.

88 Section 28 of the RLA relevantly provides:

> (1) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable—
>
> (a) at least 6 months; and
>
> (b) no more than 12 months—
>
> before that date but is not required to do so if the tenant exercises, or purports to exercise, the option before being notified of the date.

89 Section 28(1) clearly applies because the lease contains an option to renew exercisable by the tenant. As Mr Fang did not exercise or purport to

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[10] See paragraphs 42-45.

exercise the option, an obligation lay on the original landlord Rastas to notify Mr Fang in writing of the last date to exercise the option, at least 6 months but no more than 12 months before that date.

90 In these circumstances s 28(2) of the RLA becomes relevant. It provides:

> (2) If subsection (1) requires the landlord to notify the tenant but the landlord fails to do so within the time specified by that subsection—
>
> (a) the retail premises lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the landlord notifies the tenant as required; and
>
> (b) if that date is after the term of the lease ends, the lease continues until that date (on the same terms and conditions as applied immediately before the lease term ends); …

91 It seems clear that Mr Fang became aware of the need to exercise his option to renew the lease in October 2014 because of the actions of his old landlord, Rastas. It follows, and I find, that Mr Fang had the benefit of a continuing lease when, on 24 October 2014, he gave notice through his lawyers that he was exercising his option to renew.

92 It remains to note that s 28(4) of the RLA provides:

> If an option to renew is exercised because of subsection (2)(b) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease, disregarding for this purpose any period during which that lease continued because of that subsection.

93 I accordingly conclude that Mr Fang's entitlement to renew the lease under the RLA appears to be incontestable.

94 I also formally find that the original lease was renewed by Mr Fang on its expiry, with the result that the second term came into effect on 1 October 2013. I will make declarations under s 124 of VCAT Act to that effect.

The memorandum of understanding

95 The argument put by Aquatab in its defence was that by the memorandum of understanding signed on Mr Fang's behalf by his son, he stated:

(a) he would not be exercising his option for a further term;
(b) he occupied the premises on a month-to-month lease and was happy to continue on that basis until further notice; and
(c) any new lease, if required, is to be negotiated between Mr Fang and Aquatab.

96 In the alternative, it was alleged amongst other things that:

(a) by executing the memorandum of understanding, Mr Fang surrendered his existing lease;
(b) Mr Fang was estopped from resiling from his representation that he occupies the premises as a tenant from month-to-month; and
(c) by the March notice to quit Aquatab gave notice to quit to Mr Fang, and terminated his monthly tenancy.

97 Mr Fang sought to introduce into evidence a statement which had been filed in the proceeding by Mr Zagrzejewski, a director of Rastas. Mr Hopper objected to the admission of the whole of the statement, on the basis that Mr Zagrzejewski had not been called, and was not available for cross-examination. However, he did not object to paragraph 41 of Mr Zagrzejewski's statement being read into the transcript and relied upon by Mr Fang.

98 Paragraph 41 of Mr Zagrzejewski's statement reads:

> I have sighted an exchange of two emails between WRE Lawyers and Lenton-Imbery dated 6 October 2014. The email from WRE Lawyers states, amongst other things,
>
> > "I spoke to the selling agent on 26 September 2014 and she advised that the tenants have written a letter to the landlord advising that they are not taking up an option to renew the lease. Have you received a copy of this letter and if so can you please send a copy to me."
>
> In response, Lenton-Imbery wrote:
>
> > I understand that the agent has written confirmation that the tenant will not be exercising the option to renew the Lease and is occupying the premises on a month to month basis.

99 Mr Fang contended that paragraph 41 of Mr Zagrzejewski's statement was relevant to his argument that Aquatab had conducted the proceeding vexatiously because it demonstrated that Aquatab understood the memorandum of understanding could not be relied on. He said it demonstrated that Aquatab knew that it required a further letter from the tenant. As the memorandum of understanding was central to the proceeding, the requirement for a letter indicated that the proceeding was doomed to fail.

100 Mr Hopper contended that the paragraph did not demonstrate Aquatab was looking for a further letter. He argued that paragraph 41, where it referred to a letter from the tenant, may be referring to the memorandum of understanding.

101 I accept this particular contention of Mr Hopper's. The reference in paragraph 41 to a letter to the landlord from the tenant advising that they

are not taking up an option to renew the lease may well be a reference to the memorandum of understanding itself. Even if this is not the case, and paragraph 41 does refer to an actual letter, the import of the letter would appear to be entirely consistent with that of the memorandum of understanding. The upshot is that paragraph 41 does not demonstrate that the memorandum of understanding could not be relied upon.

102 Mr Hopper contended also that, even if the landlord did want evidence other than that provided by the memorandum of understanding, that matter would not justify an order for costs being made against the landlord just because it conducted litigation in reliance upon the memorandum of understanding only. The memorandum of understanding was a clear statement signed by the tenant's son regarding the tenant's position. It could not be said that proceeding with litigation in reliance upon the memorandum of understanding was vexatious in the sense of maintaining an action which had no prospect of success. I accept this argument, and also accept Mr Hooper's comment that this proceeding was not to be compared with *24 Hour Fitness*.

103 Mr Hopper went on to say there was nothing vexatious about joining the three joined parties as they were each directly connected to the memorandum of understanding. There was nothing vexatious about Aquatab seeking to protect its position by getting to the bottom of the dispute and joining the relevant parties.

104 I consider that the fact that Aquatab continued to rely on the memorandum of understanding as the basis of its third party claims is not evidence that Aquatab's defence to Mr Fang's claim was fatally flawed. The fact that Aquatab joined Mr Fang junior and the vendor Rastas and the agent Monash Vision so that it could hold them responsible for the representations contained in the memorandum of understanding, in the event that it lost Mr Fang's case against it, does not necessarily mean that Aquatab's defence to Mr Fang's case against it was doomed to failure.

105 For all these reasons I am persuaded that it was reasonable for Aquatab to have defended Mr Fang's claim on the basis of the memorandum of understanding. It was a document signed by his son. If it was held to have been signed on Mr Fang's behalf, then it is quite possible that Mr Fang would have been found to have divested himself of his right to exercise his option to renew.

106 I find that it was not vexatious for Aquatab to have persisted with its defence of Mr Fang's claim for as long as it did in reliance upon the memorandum of understanding.

Mr Fang's right to reside in the premises

107 Regarding the final issue, the relevant evidence from Mr Fang is that:

(a) he took an assignment of the lease from Lui Lin Bai dated 9 December 2011;
(b) at this time Mr Bai lived at the premises;
(c) he purchased Mr Bai's milk bar business on the basis that the lease included the shopfront and the dwelling and that he was permitted to live at the dwelling;
(d) he moved into the dwelling on or about 9 December 2011;
(e) he paid rates and outgoings for both the shopfront and the dwelling;
(f) the old landlord, Rastas, was aware he was permitted to live in the dwelling;
(g) he was living in the dwelling when the premises were sold by Rastas to Aquatab in August 2014.

108 Mr Fang articulated his case in this way in his points of claim:

(a) although the original lease described the permitted use a 'Milk Bar, Mixed Business', the lease was intended to embody the condition that the old tenant, Qun Jiang, would live in the dwelling;
(b) the transfer of lease signed by the old landlord, Rastas, and the old tenant in favour of Rui Lin Bai on 22 December 2008 was also intended to embody the condition that the new tenant could live in the premises;
(c) further, or in the alternative, the old landlord and the new tenant, Rui Lin Bai, varied the lease to permit the premises to be used as a dwelling by reason of the landlord's knowledge of, and acquiescence to Rui Lin Bai living in the premises;
(d) it was the common intention of himself and the old landlord that 'all the rights and benefits accruing to the original tenant Qun Jiang and the new tenant Rui Lin Bai would accrue to him';
(e) should it be held that, by reason of the written lease that the permitted use of the premises does not include a dwelling, this was a mistake common to the parties to the lease at the time of transfer of the lease on 9 December 2011, which justifies rectification of the lease.

109 Aquatab met these claims head on in its defence pleading, amongst other things:

(a) any alleged agreement to amend the lease is not evidenced by a memorandum in writing and is unenforceable;
(b) the alleged agreement to amend the lease is personal to the parties to that agreement and does not bind Aquatab;
(c) no consideration was given for the alleged agreement;
(d) no detriment was incurred by the parties to the alleged acquiescence;

(e) any equity arising out of the alleged acquiescence is enforceable by the former tenant and does not run with the lease;
(f) any equity arising out of the alleged acquiescence is enforceable against the former registered proprietor and does not run with the reversion;
(g) the alleged acquiescence is no more than a mere licence from the former landlord to the former tenant to breach the lease;
(h) Mr Fang's subjective intentions are irrelevant; and
(i) the lease speaks for itself.

110 I consider that each the defences raised by Aquatab is at least arguable. Aquatab was entitled to run them at a hearing. Taken collectively, they amount to a set of defences that cannot be said – to adopt the test articulated by Justice Roden in *Attorney-General v Wentworth*[11] – to be obviously untenable or so manifestly groundless as to be utterly hopeless.

111 The fact that Aquatab chose, in December 2015, to concede that Mr Fang was entitled under the lease to live in the premises does not demonstrate the defences raised about that issue were always untenable. The decision to resolve the dispute may well have been made on a commercial basis, having regard to the costs involved in running a lengthy hearing in the Tribunal, where the default position under s 92 of the RLA is that each party is to bear its own costs.

Other arguments raised by Mr Fang

112 Mr Fang also asserted there had been an attempt at forceful entry. Mr Hopper contended there no evidence about that. I accept this point, and find against Mr Fang on this issue.

113 Mr Fang also alleged there had been an allegation that Aquatab had not been sincere in its intention to settle. Mr Hopper argued, in my view successfully, that this had not been demonstrated. I accordingly find against Mr Fang on this issue also.

114 I accordingly dismiss Mr Fang's claim to costs. This ruling covers all of Mr Fang's costs up to the commencement of the hearing on 12 July 2016.

AQUATAB'S COUNTERCLAIM

115 As noted, Mr Hopper at the hearing limited Aquatab's claims to three, namely:

(a) a declaration that the determination was valid and binding on the parties.

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11 (1988) 14 NSWLR 481.

(b) an order for damages equivalent to the arrears in rent backdated to 1 October 2013 calculated at $18,942.79 using the new rent identified in the determination; and
(c) an order that Mr Fang contribute 50% of the cost of obtaining the determination, namely $1,750.

Importantly, the claim for an order for possession made in its points of defence and counterclaim was not pressed at the hearing.

AQUATAB'S POSITION

116 Aquatab's argument as set out in its pleading in respect of the qualified claim (excluding the claim for possession) involves the following propositions:

(a) under the lease, the rent was to be reviewed in accordance with s 37 of the RLA if Mr Fang exercised his option for a further term;

(b) the new rent would start at the commencement of the further term;

(c) Mr Fang exercised his option for a further term commencing 1 October 2013 ("the second term");

(d) on 15 June 2015 Aquatab sent to Mr Fang written notice of the new rent for each of the years commencing 1 October 2013 and 1 October 2014;

(e) on 27 June 2015 Mr Fang informed Aquatab that the proposed rent figure would need to be discussed in the future at an appropriate time;

(f) on 10 July 2015 Aquatab nominated two valuers for the rental determination pursuant to clause 11.1.3 of the lease;

(g) no agreement was reached between the parties as to the appointment of a valuer;

(h) on 4 September Mr Mark Ruttner was appointed by the Small Business Commissioner to determine the market rental as at 1 October 2013 pursuant to clause 11.1.3 of the lease;

(i) Mr Ruttner issued the determination on 20 November 2015;

(j) on 27 November 2015 Aquatab issued a demand to Mr Fang for rent of $6,980, being the rent shortfall for the period 7 October 2014-30 November 2015;

(k) Mr Fang refused to pay that sum;

(l) on 23 December 2015 the previous landlord Rastas assigned its right to claim unpaid rent for the premises to Aquatab by a deed of assignment;

(m) on 27 January 2016 Aquatab served two notices issued under s 146 of the PLA in respect of adjusted rent calculated in accordance with the

determination for the periods 1 October 2013 – 7 October 2014, and 7 October 2014 – 31 January respectively;

(n) Mr Fang failed to pay the amounts set out in the respective s 146 notices; and

(o) Mr Fang is indebted to Aquatab in respect of arrears in rental. $15,788.70 (inclusive of GST) was claimed in the pleading. This figure was, as noted, updated at the hearing.

MR FANG'S POSITION

117 Mr Fang filed points of defence to counterclaim. Relevantly:

(a) he denied the rent was to be reviewed in accordance with s 37 of the RLA if he exercised his option for a further term;

(b) he contended that the market review procedure set out in clause 11 of the lease is not triggered until the renewal of the lease is granted or acknowledged;

(c) although he acknowledged the letter dated 24 October 2014 to Aquatab's lawyers purported to exercise his right to renew the lease, he contended that the lease is not renewed, as Aquatab did not accept the renewal of the lease, and denied his entitlement to renew the lease in its solicitor's letter of 29 October 2015;

(d) he contended there is no review period because the lease has not been legally renewed because of the definition of this term in clause 11.1 of the lease;

(e) he acknowledged that Aquatab had proposed a new rent for the premises as at 1 October 2013, and also as at 1 October 2014, but denied that the notice of 15 June 2015 was issued pursuant to clause 11.1.2 of the lease, because the rent review procedure did not commence until Aquatab approved the renewal of the lease;

(f) he argued that when, on 27 June 2015, he acknowledged that 'the proposed rent figure would need to be discussed in the future at the appropriate time', it was implied that the 'appropriate time' was when the lease had been properly renewed;

(g) he acknowledged that Aquatab had nominated two valuers, but denied the nominations were made under clause 11.1.3 of the lease as his renewal of the lease had not been "approved", so the parties had not "entered" the rent review procedure;

(h) he admitted that no agreement had been reached between the parties as to the appointment of a valuer, but said the market rent review should only be started when the lease was renewed and rectified;

(i) he admitted that the Small Business Commissioner appointed Mr Ruttner to determine the rent for the premises, on 4 September 2015,

but denied the appointment was under clause 11.1.3 of the lease because Aquatab had not approved the renewal of the lease;

(j) he denied Mr Ruttner has been appointed under clause 11 of the lease;

(k) he denied Mr Ruttner has been appointed as he had not consented to the appointment, and to Mr Ruttner's terms including the payment of his costs;

(l) he admitted Mr Rutter determined the market rent of the premises for the period commencing 1 October 2013 is $23,000, but says the valuation was not "accredited" by the Small Business Commissioner and is not binding on the parties;

(m) he also said the determination does not have retrospective effect given that s 37 of the RLA only provides for review to the current market;

(n) he contended the determination is wrong, as Mr Ruttner did not have access to the premises in order to physically inspect them;

(o) he said that pursuant to clause 11.5 of the lease, if the market review is started more than 12 months after the market review date, the market review takes effect only from the date on which it is started;

(p) as there has been no rent review within 12 months after the market review date, there is no rent shortfall;

(q) he denied that there is a rent shortfall of $6,980 for the period 7 October 2014 – 30 November 2015, and he separately contended that there was no rent shortfall for the period 1 October 2013 – 31 January 2016;

(r) he admitted there is a deed of assignment but says that it was only provided to him on 24 February 2016, and that it was not provided when Aquatab served the notice for payment of the adjusted rent on 27 January 2016;

(s) he said the 2 notices served on 27 January 2016 are invalid; and

(t) In addition to denying liability to pay arrears of rent, he denied liability for damages, he denied liability for the sum of $1,750 being his share of the valuer's fee, and he denied liability for costs.

HAS THE LEASE HAS BEEN RENEWED?

118 The key points in Mr Fang's pleading are that Aquatab did not accept the renewal of the lease and denied his entitlement to renew the lease, *and* the market review procedure set out in clause 11 of the lease is not triggered until the renewal of the lease is granted or acknowledged. There is clear tension between the claim that the lease has not been renewed, and the assertion he makes in his points of claim that he had validly exercised his option to renew the lease.

119 Mr Hopper was alive to this, and asserted that Mr Fang was both approbating and reprobating. Mr Hopper argued that Mr Fang had made an election regarding the renewal of the lease. He had argued his claim for costs on the basis that he had validly renewed the lease, and must be held to this election.

120 I have found above[12] that the lease was renewed by Mr Fang on the expiry of the first term, with the result that the second term came into effect on 1 October 2013. These findings resolve the issue, and it is not necessary to consider whether the doctrine of equitable election applies.

121 It remains to consider the other matters raised by Mr Fang.

The operation of clause 11.1 of the lease

122 Clause 11 of the lease deals with rent reviews to market. Clause 11.1 of the lease provides:

> 11.1 In this clause "review period" means the period following each **market review date** until the next **review date** or the end of this lease.
>
> The review procedure on each **market review date** is –
>
> 11.1.1 each review of **rent** may be initiated by either party unless **item** 17 states otherwise but, if the **Act** applies, review is compulsory.
>
> 11.1.2 a party may initiate a review by giving the other party a written notice stating the current market rent which it proposes as the **rent** for the review period. Unless the **Act** applies, if the party receiving the notice does not object in writing to the proposed rent within 14 days, it becomes the **rent** for the review period.
>
> 11.1.3 If –
>
> (a) the **Act** does not apply and the party receiving the notice serves an objection to the proposed rent within 14 days and the parties do not agree on the **rent** within 14 days after the objection is served, or
>
> (b) the **Act** applies and the parties do not agree on what the **rent** is to be for the review period,
>
> the parties must appoint a **valuer** to determine the current market rent. If the **Act** does not apply and if the parties do not agree within 28 days after the objection is served on the name of the **valuer**, the **valuer** must be nominated by the President of the Australian Property Institute, Victorian Division, at the request of either party. If the **Act** applies, the **valuer** is to be appointed by agreement of the parties, or failing agreement, by the Small Business Commissioner.

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[12] At paragraph 94.

11.1.4 In termining the current market rent for the **premises** the **valuer** must –

(a) consider any written submissions made by the parties within 21 days of their being informed of the **valuer's** appointment, and

(b) determine the current market rent as an expert

and, whether or not the **Act** applies, must make the determination in accordance with the criteria set out in section 37(2) of the **Act.**

11.1.5 The **valuer** must make the determination of the current market rent and inform the parties in writing of the amount of the determination and the reasons for it as soon as possible after the end of the 21 days allowed for submissions by the parties.

11.1.6 If –

(a) no determination has been made within 45 days (or such longer period as is agreed by the **landlord** and the **tenant** or, if the **Act** applies, as is determined in writing by the Small Business Commissioner) of the parties

(i) appointing the **valuer**, or

(ii) being informed of the **valuer's** appointment, or

(b) the **valuer** resigns, dies, or becomes unable to complete the valuation,

then the parties may immediately appoint a replacement **valuer** in accordance with sub-clause 11.1.3.

…

123 Mr Hopper contended the lease was a Law Institute of Victoria copyright lease of real estate and that clause 11 had been carefully drafted to take account of the fact that was written to cover both leases of *retail premises* within the meaning of the RLA, and also commercial leases not covered by that Act.

124 In the present case, the parties are agreed that the RLA applies.

125 Under clause 11.1.3, if the RLA applies, and the parties do not agree to the proposed rent to be for the review period, the parties must appoint a valuer to determine the current market rent. If they cannot agree on a valuer, the valuer is to be appointed by the Small Business Commissioner.

126 It is Aquatab's position that this is precisely what has happened in the present case. It said that the determination is valid as the procedure under the RLA had been followed.

127 Mr Fang on the other hand contended that the market review procedure set out in clause 11 of the lease has not been triggered as renewal of the lease was not "granted or acknowledged". In support of this contention he

referred to the definition of **market review date** in the lease. This definition is set out in item 16(i), as "at the commencement of further terms granted". Mr Fang says that clause 11.1 cannot operate because there is no **market review date**, and hence there is no review period.

128 I do not think there is any significance in the fact that **market review date** is defined to be "at the commencement of further terms **granted**". **Granted** in this context must mean "granted by reason of operation of an option to review". My finding that the lease was renewed by Mr Fang and that the second term came into effect on 1 October 2013 means that Mr Fang's argument fails. I find that 1 October 2013 is a **market review date** for the purposes of the lease, and I find that clause 11 has accordingly come into operation.

129 The evidence demonstrates that Aquatab has followed the procedure envisaged by clause 11.1. In particular:

(a) on 15 June 2015, Aquatab sent to Mr Fang written notice of the proposed new rent for the years commencing 1 October 2013 and 1 October 2014;

(b) after Mr Fang informed Aquatab that the proposed rent figure would need to be discussed, in the future at an appropriate time, Aquatab on 10 July 2015 nominated two valuers for the rental determination pursuant to clause 11.1.3 of the lease;

(c) when no agreement was reached as to the appointment of a valuer, Aquatab asked the Small Business Commissioner for the appointment of a specialist retail valuer;

(d) the Small Business Commissioner obliged by appointing Mr Ruttner on 4 September 2015 to determine the market rental for the premises as at 1 October 2013;

(e) Mr Ruttner confirmed his appointment in a letter to both parties via their lawyers dated 8 September 2015; and

(f) Mr Ruttner provided his determination on or about 20 November 2015.

130 In these circumstances, Mr Fang's protestation that the determination is not binding because it was secured without his signed consent, or agreement to Mr Ruttner's terms, is not to the point.

131 I find and declare that Mr Mark Ruttner was duly appointed to determine the market rental as at 1 October 2013 pursuant to clause 11.1.3 of the lease.

SECTION 37 OF THE RLA

132 For any lease falling under the RLA, rent reviews based on current market rent are governed by s 37 of the Act. This section provides:

(1) A retail premises lease that provides for a rent review to be made on the basis of the current market rent of the premises is taken to provide as set out in subsections (2) to (6).

(2) The current market rent is taken to be the rent obtainable at the time of the review in a free and open market between a willing landlord and willing tenant in an arm's length transaction having regard to these matters—

(a) the provisions of the lease;

(b) the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;

(c) the landlord's outgoings to the extent to which the tenant is liable to contribute to those outgoings;

(d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises—

but the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.

(3) If the landlord and tenant do not agree on what the amount of that rent is to be, it is to be determined by a valuation carried out by a specialist retail valuer appointed by—

(a) agreement between the landlord and tenant; or

(b) if there is no agreement, the Small Business Commissioner—

and the landlord and tenant are to pay the costs of the valuation in equal shares.

(4) The landlord must, within 14 days after a request by the specialist retail valuer, supply the valuer with relevant information about leases for retail premises located in the same building or retail shopping centre to assist the valuer to determine the current market rent.

Penalty: 50 penalty units.

(5) In determining the amount of the rent, the specialist retail valuer must take into account the matters set out in subsection (2).

(6) The valuation must—

(a) be in writing; and

(b) contain detailed reasons for the specialist retail valuer's determination; and

(c) specify the matters to which the valuer had regard in making the determination.

(7) The specialist retail valuer—

(a) must carry out the valuation within 45 days after accepting the appointment, or within such longer period as may be agreed between the landlord and tenant, or if there is no agreement, as determined in writing by the Small Business Commissioner; and

(b) may seek to enforce under Part 10 (Dispute Resolution) an obligation of the landlord under subsection (4).

133 Clearly, many of the requirements mandated by s 37 of the RLA are replicated by clause 11 in the lease. An example is clause 11.4, which provides:

> In determining the current market rent for the premises the valuer must–
>
> (a) consider any written submissions made by the parties within 21 days of their being informed of the valuer's appointment, and
>
> (b) determine the current market rent as an expert and, whether or not the Act applies, must make the determination in accordance with the criteria set out in section 37(2) of the Act.

DID MR RUTTNER DETERMINE THE MARKET RENTAL APPROPRIATELY?

134 Mr Fang says the determination is wrong, as Mr Ruttner did not have access to the premises in order to inspect them. I find against Mr Fang on this point, as physical inspection of the premises is not a requirement mandated for the valuation procedure under s 37(2) of the RLA.

135 Mr Fang also attacked the determination on the basis that he said that it does not have retrospective effect given that s 37 of the RLA only provides for review to the current market.

136 The thrust of this criticism appears to be that the "current market" means the market at the time the valuer is appointed. I consider that there is no logic in this position. The review procedure set out in clause 11.1 is a procedure "on each market review date". As I have already found, the relevant market review date is 1 October 2013.[13] The review must be of the market rental as at the market review date. I accordingly do not accept Mr Fang's contention.

137 Mr Fang also argued that the determination was not binding because he was not given a copy of the determination.

138 I do not accept that if Mr Ruttner did not send a copy of the determination to Mr Fang, this would of itself make the determination invalid. There is no specific requirement in s 37 of the RLA for the determination to be sent to the parties within any particular time limit after its completion.

139 This situation is to be compared with that which relates to the appointment of the valuer. Clause 11.1.4 (a) gave the parties a right to make written submissions to the valuer within 21 days of his appointment. Accordingly,

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13 Paragraph 128.

it was critical that the parties be given notice of the valuer's appointment. Mr Fang acknowledged that he had been advised by Mr Ruttner of his appointment in a letter of 8 September 2015. He was accordingly well aware that the determination process was underway from that point. He became aware of the impact of the determination at the latest on 27 January 2016 when the two s 146 notices regarding adjusted rent were served.

140 I find that any failure by Mr Ruttner to deliver the determination to Mr Fang did not render the determination invalid.

141 As I am not convinced by any of Mr Fang's attacks on the determination, I find and declare that the determination was validly made.

142 As I have found that Mr Ruttner was validly appointed, and as I have found also that his determination was validly made, it is necessary to determine whether the parties are bound by it. Mr Hopper, on behalf of Aquatab, submitted that the determination is binding on the parties as this is what they agreed in clause 11.2 of the lease.

143 I consider Mr Hopper's contention on this point is incontestable, as clause 11.2 provides: "The valuer's determination binds both parties".

144 I accordingly find and declare that the determination is binding on both parties.

CLAUSE 11.5 OF THE LEASE

145 Mr Fang's next argument centred on clause 11.5 of the lease. His contention is that its effect is that the market review can take effect only from the date upon which it started, and is not to be backdated to 1 October 2013. Accordingly, he denies that there is a rent shortfall of $6,980 for the period 7 October 2014 – 30 November 2015.

146 Clause 11.5 of the lease provides:

> If the Act does not apply, a delay in starting a market review does not prevent the review from taking place and being effective from the market review date but if the market review is started more than 12 months after the market review date, the review takes effect only from the date on which it is started.

147 Mr Fang asserted that clause 11.5 had scope to apply, notwithstanding that the RLA *did* apply, because the phrase "If the Act does not apply", was restricted in operation, and limited to the situation where the Act did not apply to the subject matter of clause 11.5, i.e. to a situation where there had been a delay in starting a market review.

148 Mr Hopper, on the other hand, contended that the effect of the phrase "If the Act does not apply", was that clause 11.5 simply did not apply to the present situation, because the Act clearly did apply to the lease. He said this was the natural construction of clause 11.5. He also said such a reading was consistent with the general scheme of clause 11, which had been

carefully drafted to cater for leases which were covered by the Act and leases which were not.

149 Mr Hopper also pointed out that the Act, in s 35(5), catered for a situation where there has been a late rent review. Section 35(5) provides:

> (5) A rent review is to be conducted as early as practicable within the time provided by the lease. If the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review.

150 I accept Mr Hopper's contention, and agree that s 35(5) does address the situation where a rent review has been commenced late.

151 The upshot is that even if Mr Fang is right, and the phrase "If the Act does not apply", appearing in clause 11.5 operates to limit the scope of the exclusion created by the clause, the clause cannot apply in any event because s 35(5) of the Act *does* address the subject matter of the clause.

152 Moreover, I think the construction Mr Hopper places on clause 11.5 is the correct one, for these reasons:

(a) there is no apparent reason to limit the operation of the phrase "If the Act does not apply" to a situation where there has been a delay in starting a market review;

(b) such a construction is strained;

(c) the intention argued for by Mr Fang could easily have been achieved by redrafting the clause; and

(d) given that the Act *does* contain s 35(5), it is hard to see how clause 11.5 could ever have any work to do if the construction contended for by Mr Fang is correct.

153 I accordingly find that, as the RLA applies to the lease, clause 11.5 of the lease does not apply.

AQUATAB'S ENTITLEMENT TO BE PAID THE ARREARS OF RENT BACKDATED TO 1 OCTOBER 2013

154 As noted, Mr Fang argued that there was no rent shortfall, as the rent increase was not to be backdated because of the operation of clause 11.5.

155 As I have found that clause 11.5 does not apply, I reject this argument of Mr Fang's.

156 I accordingly find that the determination applies retrospectively, and that rental arrears calculated pursuant to the determination have accrued since 1 October 2013. I will make declarations accordingly.

THE DEED OF ASSIGNMENT

157 It is part of Aquatab's claim that the previous landlord, Rastas, had assigned its right to claim unpaid rent for the premises to it. Mr Hopper said that in circumstances where Aquatab had only become the owner of the property on or about 7 October 2014, it relied on two arguments. The first was that when it purchased the property, it became entitled, as a matter of law, to the benefit of the property, including any entitlement to rent which became due after settlement. Alternatively, it relied on a deed of assignment which it entered into with Rastas on 23 December 2015 ('the deed of assignment').

158 Mr Fang did not, at the hearing, raise any argument against Mr Hopper's contention that as a result of the purchase of the property Aquatab became entitled to the benefit of any unpaid rental. Mr Hopper's contention may well be right, but I make no finding about it, because I consider that Aquatab's entitlement to be paid any arrears in rental accrued as at the date of settlement accrues to it under the deed of assignment.

159 Mr Hopper noted that under the deed of assignment:

> Rastas, as legal and beneficial owner, assigns absolutely to Aquatab all of its right, title and interest in and to the Claims.

160 Mr Hopper then pointed out that "Claims" were defined to mean "any claims (including a right to assert a claim) of Rastas pursuant to the Lease as Landlord (or the former Landlord) of the Premises, including any claim as regards unpaid rent for the Premises (whether that rent is currently owing and unpaid or becomes unpaid and owing in the future)".

161 As noted, Mr Fang admitted there is a deed of assignment, but said that it was only provided to him on 24 February 2016. Notably, he did not dispute the efficacy of the deed of assignment.

162 Giving effect to what I regard to be the clear intention of the deed of assignment, I accept the contention that the deed of assignment vests in Aquatab an entitlement to receive the arrears of rent which have become due and payable under the lease since 1 October 2013. I find accordingly that Aquatab is entitled to receive those arrears.

THE VALIDITY OF THE TWO NOTICES SERVED ON 27 JANUARY 2016

163 Aquatab served two notices under s 146 of the PLA on 27 January 2016. Mr Fang argued that they were invalid because there was no rent shortfall. My findings that the determination applies retrospectively, and that rental arrears calculated pursuant to the determination have accrued since 1 October 2013,[14] dispose of that argument.

164 As noted, Aquatab did not press a claim for possession of the premises at the hearing, and did not specifically argue that each of the respective notices issued on 27 January 2016 was valid for the purpose of supporting an application for possession. I note that the parties did not debate the

[14] Paragraph 156.

accuracy of the respective demands for rent made in the two notices. I accordingly am not prepared to make a finding about the validity of the notices generally.

QUANTIFICATION OF AQUATAB'S CLAIM FOR ARREARS OF RENTAL

165 In its pleading, Aquatab claimed $15,788.70 in unpaid rent up to and including 31 January 2016. At the hearing, Aquatab asked for an order for a revised figure. Mr Hopper handed up a set of calculations. For the period between October 2013 to September 2014, the rental was calculated on the figure assessed by Mr Ruttner, namely $23,000 per annum. The shortfall in rent identified on this basis was $6,930.33. The lease contemplated annual rent reviews based on CPI. For the year October 2014 to September 2015, the adjusted rent claimed was $23,460. On this basis a shortfall in rent of $6,057.03 was identified. For the period October 2015 – July 2016 (inclusive) the rent was adjusted on a CPI basis to $23,929.20 per annum. On this basis, a rent shortfall for the period of $5,325.40 was identified.

166 The total of $6,930.33, $6,057.03 and $5,325.40 is $18,312.76. However, the total claimed for outstanding rent up to and including July 2016 was put at $18,942.79 in the table of calculations handed up by Mr Hopper.

167 Mr Hopper contended that as the calculations relating to arrears of rental were not disputed by Mr Fang at the hearing, they should be accepted.

168 In circumstances where I think there is an arithmetic error in the table of calculations, I am not prepared to make a declaration as to the amount of rental arrears due, let alone an order for payment of money. I have made a series of declarations which will enable the parties to identify the arrears in rental due. In summary, the declarations are:

(a) Mr Mark Ruttner was duly appointed to determine the market rental as at 1 October 2013 pursuant to clause 11.1.3 of the lease;

(b) Mr Ruttner's determination made on or about 20 November 2015 in respect of the market rental of the premises as at 1 October 2013 was validly made;
(c) the determination is binding on both parties;
(d) the determination applies retrospectively;
(e) Mr Fang is liable to pay arrears of rental from 1 October 2013;
(f) the arrears of rental are to be paid to Aquatab;

169 The parties should endeavour to agree the terms of consent orders regarding arrears of rental. If agreement as to such orders cannot be reached by 4.00pm on 22 December 2016 then the parties have liberty to apply for a further hearing regarding assessment of arrears of rental.

MR FANG'S LIABILITY FOR PAYMENT OF HALF THE VALUER'S FEES

170 Mr Fang denied that he was liable for half the valuer's fees. Mr Hopper pointed out that the issue is squarely dealt with in clause 11.3 of the lease,

which provides that the landlord and the tenant must equally bear the valuer's fee for making the determination, and if either pays more than half the fee, the difference may be recovered from the other. On the basis that Aquatab has paid the full valuer's fee, I find that Mr Fang is liable to reimburse to Aquatab 50% of the fee, namely $1,750. I will make a declaration accordingly.

COSTS

171 Costs are reserved. The parties are aware of s 92 the RLA. Any party seeking costs may apply.

MEMBER C EDQUIST