VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP179/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

RETAIL LEASES–Whether an issue estoppel arises from the hearing and determination of a preliminary question–consideration of *Blair v Curran*

Whether a typed notice in writing requesting a lease renewal, not signed by the tenant, but served by the tenant's solicitor with a signed covering letter to similar effect, was a sufficient "request for a renewal in writing" by the tenant within the meaning of the lease.

APPLICANT	Grenville Trading Pty Ltd
RESPONDENT	Robert Braszell
APPLICANT BY COUNTERCLAIM	Robert Braszell
RESPONDENTS BY COUNTERCLAIM	Grenville Trading Pty Ltd and Wayne Clifford Douglas Hall
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
DATE OF HEARING	16 May 2016
DATE OF ORDER AND REASONS	30 May 2016
CITATION	Grenville Trading Pty Ltd v Braszell (Building and Property) [2016] VCAT 877

ORDER

On the preliminary question:

1. The matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 are insufficient to find that the lease between the [tenant] and the [landlord] made 7 August 2009 was not renewed.
2. Costs reserved.

MEMBER A KINCAID

APPEARANCES:

For the Applicant and Respondents By Counterclaim	Mr S Moloney of Counsel, with Mr J Silver of Counsel.
For the Respondent	Mr C R Northrop of Counsel

REASONS

1 I conducted a second further preliminary hearing in this proceeding. The issue is whether one of my findings in the first preliminary hearing,[1] to the effect that the tenant was in breach of a term of the lease requiring it to pay rent, prevents the tenant from now alleging that he was not in breach.

BACKGROUND

2 By an assignment of lease dated 26 February 2010, Grenville Trading Pty Ltd (the "**tenant**") took an assignment of the previous tenant's interest under a lease dated 7 August 2009 (the "**lease**") in respect of retail premises in Vincent Street, Daylesford (the "**premises**").

3 Robert Braszell is the landlord (the "**landlord**").

4 The lease stipulates a term commencing 1 June 2009 to 31 May 2014, together with options in respect of 3 further terms of 5 years each.

5 The rent under the lease is $60,000 plus GST per annum, payable in 12 equal monthly instalments on the first day of each month, plus CPI increases.[2]

6 The tenant traded from the premises as the "IGA Supermarket", until late September 2014. It says that it was then required to cease trading, and vacate the premises, as a consequence of a Building Order dated 5 August 2014. The Building Order, served on the tenant as occupier of the premises, prohibits occupation of the western portion, until stipulated works have been carried out. The tenant says that this has, in effect, prevented the premises from continuing to be used as a supermarket.

7 I am informed that some works have been carried out by the landlord, and that the landlord has now entered into a contract to sell the premises, with settlement later in the year.

8 The tenant has lodged a caveat over the property where the premises are located.

NATURE OF DISPUTE

9 The parties are in dispute concerning what caused structural failure to the sub-floor area of the premises, particularly below the western portion, which was used by the tenant as a loading bay and for other purposes connected with the business.

10 The tenant says that the sub-floor damage was caused by water inundation from a failed box gutter the maintenance of which was the responsibility of the landlord, by a failure by the landlord to manage ground water pooling in the sub-floor, and by the landlord sealing off the ventilation to the sub-floor area.

11 The landlord says that in about 2006, the previous tenant incorrectly installed water collection trays, drainage systems, insulation and waterproof membranes associated with its installation of four new cool rooms and six new freezers. This

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1 *Grenville Trading Pty Ltd v Robert Braszell* [2015] VCAT 985

2 Item 6 of the Schedule to the lease.

resulted, he says, in condensation saturating the floor and sub-floor supporting structures, which was not remedied by the tenant notwithstanding the landlord's requests of it to do so. Therefore, the landlord says, the tenant was obliged under the lease to carry out the necessary structural repairs the subject of the Building Order.

12 The tenant started this proceeding at the Tribunal on 7 August 2014, seeking injunctive relief, and compensation for losses arising from the structural failure of the premises.

13 The tenant seeks the following relief in the proceeding:

(a) that the landlord immediately commence structural repairs to the premises as identified in the Notices of 16 July 2014[3] and 5 August 2014;

(b) that the landlord be injuncted from preventing access to the premises by [the tenant]; and

(c) that the landlord compensate the tenant for losses arising from the structural failures of the premises.

14 By Counterclaim filed on 26 November 2014, the landlord sought declaratory relief, and arrears of rent from the tenant of $20,591.01.

PRELIMINARY QUESTION FOR DETERMINATION

15 Given the events that occurred in 2014, the parties were also in dispute over whether the tenant still had a lease over the premises.

16 As a consequence, paragraphs 32-36 of the landlord's Points of Counterclaim read as follows:

> 32. Further, in breach of the terms of the lease the tenant failed to pay rent in accordance with the terms of the lease.
>
> **PARTICULARS**
>
> The tenant did not pay rent increased by CPI as required by the lease for the period 1 June 2010 to 30 September 2014 totalling $20,591.01. A calculation of the arrears is set out in a notice from the landlord to the tenant dated 3 October 2014, a copy of which may be inspected at the office of the respondent's solicitors by prior arrangement.
>
> 33. Further, in breach of the terms of the lease [the tenant]:
>
> (a) abandoned the premises on 24 September 2014;
>
> (b) failed to keep the premises open for business during normal business hours
>
> **PARTICULARS**
>
> The tenant vacated the premises removing all of its property other than certain items of plant and equipment.

[3] This was presumably intended to be a reference to the amended Building Notice dated 16 June 2014.

> 34. By its conduct referred to above the tenant repudiated the lease, which repudiation was or is hereby accepted by the landlord.
>
> 35. Further and alternatively, by its conduct referred to in paragraph 33 above the tenant surrendered the lease, which surrender was or is hereby accepted by the landlord
>
> 36. Further and alternatively, if the term of the lease continued after the date the tenant abandoned the premises, then on 29 October 2014 the landlord re-entered the premises thereby terminating the lease.

17 The parties considered that if the issue concerning whether a lease was still on foot was determined, they would be better able to resolve whether either party is liable to pay any damages to the other and, if so, how much.

18 By orders made on 15 December 2014, I therefore set the matter down for a preliminary hearing, to hear and determine the following question:

> Whether the lease between the applicant and the respondent made 7 August 2009 has ended by reason of the matters alleged in paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014.

Findings

19 Having heard argument on the preliminary question on 25 February 2015, I found for the reasons I gave, that the tenant had not abandoned the premises, and therefore a surrender a law did not subsequently occur by the landlord's re-entry. [4]

20 I also found that the landlord had failed to give proper notice to the tenant in accordance with clause 7.4 of the lease, prior to re-taking possession on 29 October 2014. Therefore, a termination by the landlord under the terms of the lease had occurred.[5]

21 I also found that the tenant's failure to pay rent in accordance with the terms of the lease, without more, did not constitute a repudiation of the lease, accepted by the landlord by the re-taking of possession.[6]

Orders

22 I made the following order, among others:

> It is hereby declared that the lease between the [tenant] and the [landlord] dated 7 August 2009 in respect of premises at Vincent Street, Daylesford did not come to an end:
>
> (a) by surrender at law;
>
> (b) by a re-entry by the [landlord], purportedly pursuant to the terms of the lease for an alleged failure by the [tenant] to pay rent in accordance with the terms of the lease; or
>
> (c) by the [landlord] purporting to rescind the lease upon the [tenant's] alleged repudiation.

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4 See *Grenville* (supra) at paragraphs [19]-[68].
5 *Grenville* (supra) at paragraphs [69]-[113].
6 *Grenville* (supra) at paragraphs [130]-[138].

FURTHER QUESTION FOR PRELIMINARY DETERMINATION

23 The latest date for the tenant exercising the first option for a 5 year renewal was 1 March 2014.[7]

24 It was not until 19 December 2014 that the landlord gave the tenant notice pursuant to section 28 of the *Retail Leases Act 2003* as to when the option is no longer exercisable, being 6 months after that notification.

25 On 10 June 2015 the tenant's solicitor emailed to the landlord's solicitor a signed letter, that read as follows:

> **Grenville Trading Pty Ltd v Braszell and Ruchel (sic) 26 Vincent St Daylesford VCAT No BP179/2014**
>
> Please find enclosed my client's notice of exercise to renew sent to your client today.
>
> Yours sincerely

26 The attached document (the "**purported exercise of option**") was addressed to the landlord and to the landlord's solicitors, and read as follows:

> **NOTICE OF EXERCISE OF OPTION TO RENEW BY TENANT**
>
> From [the tenant]
>
> **Lease between Robert John Braszell (Landlord) and Grenville Trading Pty Ltd (Tenant) commencing 1 June 2009 in respect of premises known as 26 Vincent Street Daylesford Victoria (the Lease)**
>
> By notice dated 19 of December 2014 the landlord gave notice to the tenant of its option to renew.
>
> The tenant hereby exercises its option to renew the lease described herein above
>
> **DATED**: 10 June 2015

27 The Amended Points of Counterclaim dated 22 March 2016, filed on behalf of the landlord, set out the reasons for the landlord's contention that the lease has not been renewed by the tenant, as follows:

> 40. Further, there were terms of the lease that the tenant had an option to renew the lease for a further term of five years if:
>
> (a) there was no unremedied breach of the lease by the tenant of which the landlord has given written notice;
>
> (b) the tenant had not persistently committed breaches of the lease of which the landlord had given written notice; and
>
> (c) the tenant requested the renewal in writing
>
> **PARTICULARS**
>
> The terms are contained in clause 12

[7] Item 19 of the Schedule to the lease.

41. By notice dated 19 December 2014 the landlord gave notification under s 28 of the [Retail Leases Act] of the last day for the exercise of the option to renew the lease.

42. In the premises the lease continued to 19 June 2015 pursuant to s 28(20(b) of the [Retail Leases] Act on the same terms and conditions as set out in the lease.

43. In June 2015 the solicitors for the tenant sent to the solicitors for the landlord a document purporting to be notice of the tenant's exercise of the option to renew the lease.

PARTICULARS

The document a sent with a letter dated 10 June 2015.

44. The document did not constitute a request in writing within the meaning of the lease by the tenant to renew the lease.

PARTICULARS

The document was not signed by any party.

45. Further, at the time the document was sent to the landlord:

    (a) there were unremedied breaches of the lease by the tenant of which the landlord had given written notice;

    (b) the tenant had persistently committed breaches of the lease of which the landlord had given written notice.

PARTICULARS

The tenant was in breach of the lease by its failure to pay all rent in accordance with the lease and its persistent insistence that it was not liable to pay and would not pay all rent under the terms of the lease.

The breaches were the subject of a preliminary hearing in this proceeding before Member A Kincaid.

The landlord relies on the findings made in this proceeding in the Member's reasons for decision published on 3 July 2015.

The written notices of the failure to pay rent in accordance [with the lease] are referred to in the reasons for decision and are also contained in the points of counterclaim filed in this proceeding in November 2015.

The tenant did not pay and refuses to pay all rent owed under the lease as found by Member Kincaid.

…

46. By letters sated 24 June and 7 July 2015 the landlord's solicitors advised the tenant's solicitors that the lease had not been renewed.

47. By reason of the matters referred to above the tenant was not entitled to and did not renew the lease and the lease ended on 19 June 2015.

48. By a caveat lodged on 28 January 2016 the tenant claimed a leasehold interest in the land on which the premises are located.

PARTICULARS

Caveat number AM504664T (the **caveat**)

49. By reason of the matters referred to above the tenant did not in January 2016 and does not have a leasehold interest in the land and the caveat should be removed.

50. The tenant refuses to remove the caveat.

AND THE LANDLORD CLAIMS

…

BA A declaration that the lease ended on 19 June 2015.

BB An order that the [tenant] immediately withdraw the caveat.

28 As a result of submissions made at a directions hearing held before me on 9 May 2016, it became clear to me that neither party was ready to proceed with a hearing, then fixed to commence on 16 May 2016. Among other outstanding matters, each party sought further discovery from the other.

29 The landlord submitted, at the directions hearing, that some of the time then set down for the hearing might still be usefully taken up by the hearing of the following further preliminary question:

> Whether the lease between the [tenant] and the [landlord] made 7 August 2009 was not renewed by the [tenant] by reason of the matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 (the "**further preliminary question**").

30 The landlord submitted that in the event that the proposed further preliminary question was determined in favour of the landlord, it would considerably reduce the size of the damages claim. That is, if the tenant is found to have been in breach of the lease at the time it purported to renew the lease, it would follow that the lease was not renewed. It would then follow that the tenant's damages would be confined to the period up to 31 May 2014, and possibly 19 June 2015. If, however, there is a finding that the tenant was not in breach of the lease at the time it purported to renew the lease, it would follow that the tenant's possible damages may be claimed for the period up to the date of expiration of the first 5 year option period (i.e. 31 May 2019) and beyond.

31 I noted that the tenant has filed a report of Mr Bruce Wilkinson, Chartered Accountant, estimating past loss of operating profit to 12 March 2016 at $340,000 and calculation of further future losses from then to May 2019 (the end of the 5 year renewal period, assuming the lease to have been validly renewed) at a further $580,000.

32 Having agreed with the landlord's reason for seeking a determination of the further preliminary question, by Order in Chambers dated 12 May 2016, I fixed the further preliminary question for hearing on 16 May 2016.

Landlord's Submissions

33 The landlord submits that the purported exercise of option was ineffective, and therefore the tenant has not had a lease since 19 June 2015.

34 The first ground relied on by the landlord is that the tenant was in breach of the lease when he purported to exercise the option, of which breach the landlord had given notice.

35 The second ground relied on is that the purported exercise of the option was not signed by the tenant.

Landlord's First Submission-Alleged Breach

36 Clause 12 of the lease provides:

> 12. **FURTHER TERM(S)**
>
> 12.1 The tenant has an option to renew this lease for the further term or terms stated in item 18 and the landlord must renew this lease for that further term or further terms if,
>
> **12.1.1 there is no unremedied breach of this lease by the tenant of which the landlord has given the tenant written notice**,
>
> 12.1.2 the tenant has not persistently committed breaches of this lease of which the landlord has given written notice during the term, and
>
> 12.1.3 the tenant has requested the renewal in writing not more than 6 months nor less than 3 months before the end of the term. The latest date for exercising the option is stated in item 19 (**emphasis added**).

37 The landlord also relies on section 27(2) *Retail Leases Act 2003* ("the **Act**") , which states:

> (2) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if-
>
> (a) **the tenant has not remedied any default under the lease** about which the landlord has given the tenant written notice; or
>
> (b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

38 The landlord submits that the question whether there was an "unremedied breach of [the] lease by the tenant", alternatively an unremedied "default under the lease" at the time of the purported exercise of option, has been finally determined by this Tribunal.

39 The landlord relies on the Tribunal's findings in paragraphs 123, 128 and 129 of the Reasons dated 3 July 2015. I include these paragraphs in the extract from the Tribunal's Reasons below, with the parts relied on by the landlord highlighted:

> 114. For the sake of completeness, and if I am wrong in my finding that the landlord failed to give proper notice to the tenant in accordance with clause 7.4 of the lease, prior to re-taking possession on 29 October 2014, I will consider whether the landlord was, but for the failure to give the required notice, entitled to take possession when he did.

115-122 [The Tribunal found that the tenant was not obliged to pay such amounts claimed by the landlord for GST as were not also claimed by a valid tax invoice].

123. It follows that of the total of $20,591.01 claimed by the Notice to Tenant dated 3 October 2014, $1,871.90 were GST payments. **The tenant was on 3 October 2014 liable to pay rent to the landlord, within the meaning of clause 7.1 of the lease, in the amount of $18,719.11.**

Was the tenant entitled to suspend payment of the whole of the rent due on 3 October 2014 (net of GST) because the premises allegedly could not be used or accessed for the permitted use, pursuant to Clause 8.1 of the lease?

124. Clause 8.1 of the lease provided:

> If the premises or building are damaged so that the premises cannot be used or accessed for the permitted use
>
> 8.1.1 a fair proportion of the rent and building outgoings is to be suspended until the premises are again wholly fit and accessible for the permitted use.
>
> 8.1.2 the suspended proportion of the rent and building outgoings must be proportionate to the nature and extent of the damage or inaccessibility.

125. Again, putting to one side my finding that the Notice to Tenant dated 3 October 2014 failed to comply with clause 7.4 of the lease, I now consider whether the tenant was, in any event, entitled under clause 8.1 of the lease to suspend payment of the whole of the rent (being the claimed CPI increases), because the premises allegedly could not be used or accessed for the permitted use.

126. The CPI increases were claimed in respect of the period 1 June 2010-30 September 2014. The tenant claims not to be obliged to pay the CPI increases because the premises allegedly could not be used or accessed for the permitted use.

127. I have concluded that there is no evidence that at any time, prior to service of the Building Order on or about 5 August 2014, the premises could not be used or accessed by the tenant for the purpose of licensed grocery store, sufficient to entitle the tenant to suspend any proportion of the rent payable prior to that date. The most the tenant asserts, in the correspondence to which I have referred, is that "the first occasion of the floor failing was in 2010 and that there have been "ongoing issues with access with significant sections of the supermarket having to be closed off in 2010"[8].

128. **It follows that in relation to the CPI increases amounting to rent claimed by the landlord for the period to the end of July 2014, the tenant did not have any right pursuant to clause 8.1 of the lease to suspend its obligation to make payment pursuant to clause 2.1 of the lease.**

129. **In summary, I have concluded that the tenant was not entitled set off against the rent claimed by the Notice to Tenant dated 3 October 2014,**

[8] Letter tenant's solicitor to the landlord's solicitors dated 30 October 2014.

> **any amount on account of GST other than $1,871.90. I have also concluded that the tenant was not entitled to suspend any part of the rent allegedly payable for the period to the end of July 2014 by reference to clause 8.1 of the lease. But for the failure by the landlord to give the required notice, he was therefore entitled to take possession of the premises when he did.**

40 The landlord submits that the Tribunal having made a "final determination" that the tenant had breached the lease by failing to pay rent, the tenant cannot now contest the proposition that it was in breach of the lease when it purported to exercise its option to renew.

41 It follows, the landlord says, that (subject to the landlord having given notice to the tenant of the breach) the purported exercise of the option by the tenant was ineffective, and no renewal occurred.

Tenant's Submission in response

42 The tenant submits that whether or not the tenant was entitled to withhold rent under clause 8.1 of the lease was not a matter that arose on the hearing of the preliminary question. The nature of the preliminary question, he says, did not call for the tenant to fully argue its case on its claimed entitlement to withhold rent, and therefore the findings made by the Tribunal were not such as to give rise to an issue estoppel of the type contended for by the landlord.

43 The tenant submits that it is still gathering evidence concerning the landlord's alleged knowledge of the condition of the premises when it took an assignment of the lease, and of other matters as may add to the factual circumstances at that time and subsequently.

44 In reply, the landlord submits that the tenant has not adverted to the obtaining of any further evidence concerning the issue whether, by reason of the landlord's alleged breaches, "the premises or the building cannot be used or accessed for the permitted use". This is the only basis, the landlord correctly submits, which gives rise to an entitlement in favour of the tenant to suspend a proportion of the rent and building outgoings.[9]

Issue estoppel

45 As appears from what follows, I have decided against the landlord in any event, by the application of the principle of issue estoppel, which I address below.

46 Issue estoppel arises in a subsequent proceeding when "a state of fact or law is alleged or denied the existence of which is necessarily denied by the prior judgment, decree or order". The classic exposition of the principle is that stated by Dixon J in *Blair and Anor v Curran*:

> A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. **The estoppel covers only those matters which the prior**

[9] See clause 8 of the lease.

judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.

Nothing but what is **legally indispensable to the conclusion** is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J in *R v Inhabitants of the Township of Hartington Middle Quarter*, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters **cardinal** to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

In the phraseology of Lord Shaw, "a fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established (*Hoystead v Commissioner of Taxation* (2)). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

The difficulty in the actual application of these conceptions is to distinguish the matters **fundamental or cardinal** to the prior decision or judgment, decree or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order (**emphasis added**). [10]

47 While there have been a number of judicial clarifications of the difference between a finding of fact or law that is fundamental or cardinal to a judgment and

[10] [1939] HCA 23; 62 CLR 464 at 531-532.

one that is not, it is clear that only a decision about a matter "which it was necessary to decide" can create an issue estoppel.[11]

48 Having regard to these statements of law, I find that the passages from my decision quoted above to the effect that the tenant had breached the lease by failing to pay rent, do not amount to a final determination, and therefore no issue estoppel arises against the tenant. This is because that determination was not "fundamental or cardinal" or "necessary" for the purpose of my answering the preliminary question-whether the lease between the applicant and the respondent made 7 August 2009 had ended by reason of the matters alleged in paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014.

Balance of the Landlord's First Submission-Notice Given by Landlord

49 The landlord therefore fails on the first limb of its first submission, and the first submission fails.

50 It is therefore unnecessary for me to deal with the second limb of the first submission to the effect that the landlord gave the required written notice to the tenant of the alleged breach pursuant to clause 12.1.1 of the lease and section 27(2)(a) of the Act.

Landlord's Second Submission-Alleged Failure by the Tenant to give Written Notice of Exercise of Option

51 The landlord submits that the tenant has not made a request in writing for renewal of the lease within the meaning of clause 12.1.3 of the lease.

52 The landlord relies on the absence of any signature on the document enclosed with the tenant's solicitor's letter dated 10 June 2015. The landlord submits that the typed words:

> The tenant hereby exercises its option to renew the lease described herein above

are insufficient to constitute the required written request by the tenant.

53 I accept the submission of the tenant that the natural and ordinary meaning of the words in clause 12.1.3 of the lease does not impose a requirement that any request for renewal must be accompanied by the signature of the tenant.

54 I also note that sections 7 and 9 of the Act, respectively referring to:

(a) when a retail premises lease is taken to be "entered into or assigned"; and

(b) the "renewal of a rental premises lease"

draws a distinction between the entry into or assignment of a lease. Signature by all the parties to the lease or assignment is one of the means by which a lease may be entered into or assigned: there is no such requirement set out in section 9 in the case of a renewal of a lease.

55 I consider that the formal requirements of clause 12.3 of the lease will have been met where, as in this case, a known agent of the tenant provides to the landlord a

[11] See *Murphy & Ors v Abi-Saab & Ors* (1995) 37 NSWLR 280 at 288 per Gleeson CJ (with whom Kirby p and Rolfe AJA agreed)

written notice that would convey to a reasonable person in the position of the landlord that the tenant is exercising its option under the lease to renew the lease.

56 I reject the landlord's second submission.

57 It follows that my answer to the further preliminary question is that the matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 are insufficient to find that the lease between the [tenant] and the [landlord] made 7 August 2009 was not renewed.

58 I make the attached orders.

MEMBER A KINCAID