

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP1939/2019

CATCHWORDS

RETAIL TENANCY – Construction of lease terms – whether lease is a fixed term lease or a periodic tenancy – whether condition precedent in lease agreement fulfilled.

APPLICANT	Sayde Jafari
RESPONDENT	Mary Ryan
WHERE HELD	Melbourne
BEFORE	Deputy President E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	4 December 2019
DATE OF ORDER	6 December 2019
CITATION	Jafari v Ryan (Building and Property) [2019] VCAT 1938

ORDER

1. I find and declare that:
 - (a) The lease over the premises located at 331 Toorak Road, South Yarra, 3142 (**‘the Premises’**) was a fixed term lease commencing on 26 May 2004 (at the latest) and ending on 26 May 2009 (at the latest), with an option for a further term of five years (**‘the Lease’**).
 - (b) The fixed term of the Lease and any further fixed term crystallising upon renewal of the Lease ended on 26 May 2014 (at the latest).
 - (c) From 27 May 2014 to present, the Tenant has occupied the Premises as a tenant from month to month and on the same covenants and conditions as contained in the Lease, insofar as they are applicable to a monthly tenancy.
2. **This proceeding is listed for a further directions hearing before Deputy President E Riegler (if available) at 10:00 am on 17 January 2019, at which time further orders will be made as to the future conduct of the proceeding.**

3. The parties are at liberty to file short minutes of proposed orders obviating the need for a directions hearing.
4. Liberty to apply generally.
5. Costs reserved.

DEPUTY PRESIDENT E. RIEGLER

APPEARANCES:

For the Applicant Mr M McKenzie of Counsel

For the Respondent Mr T Sowden of Counsel

REASONS

INTRODUCTION

1. The Applicant (**‘the Tenant’**) has been the tenant of retail premises located in Toorak Road, South Yarra (**‘the Premises’**) since May 2003. During that period, the Tenant has and continues to operate a dry-cleaning business from the Premises. The Respondent (**‘the Landlord’**) is the owner and landlord of the Premises.
2. The Tenant’s leasehold interest is evidenced, in part, by a written document dated 28 May 2003, entitled *AGREEMENT* (**‘the Agreement’**) and a standard form REIV lease which is incorporated by reference into the Agreement (**‘the Lease’**).
3. It is common ground that the Lease contemplated that some work was to be undertaken to the Premises or the buildings adjacent to the Premises and that until such time as that work was completed, the Tenant would occupy the Premises under a periodic month-to-month tenancy. Once that work was completed, the Tenant was entitled to a five-year fixed term lease with an option for a further five-year term.
4. The parties are in dispute as to whether the work contemplated by the Lease related to fit-out works undertaken and completed by the Tenant or whether the works related to a development which the Landlord had foreshadowed, and which comprised the construction of residential apartments above the Premises (**‘the Development’**).
5. The Tenant contends that the reference to building work in the Agreement was a reference to the Development. He argues that as the Development has not yet been completed, his corresponding right to a five-year fixed term lease is yet to crystallise. In fact, the Development never commenced, as planning approval was not granted.
6. By contrast, the Landlord contends that the reference to building work in the Agreement was a reference to the work that the Tenant was to undertake before he commenced trading from the Premises. She argues that as the Tenant’s fit-out works have long been completed, the fixed term tenancy has run its course and has now expired. The Landlord further contends that the Tenant is currently over-holding.
7. The dispute is further complicated by the fact that the parties were before the Tribunal in a related proceeding in May 2004, where the Tribunal made declaratory orders and gave injunctive relief restraining the Landlord from re-entering the Premises.
8. According to the Landlord, the findings and orders made by Deputy President Macnamara (as he then was) determined that the date of the orders; namely 26 May 2004, marked the latest possible commencement date of the five-year fixed term lease. Consequently,

even if the option for a further term of five years had been exercised, the Lease would naturally end in May 2014.

9. The Tenant contends that the findings and orders made by Deputy President Macnamara are entirely consistent with his position that the fixed term tenancy would only commence after the Landlord completed the Development.
10. This proceeding was listed before me to answer two preliminary questions; namely, whether the Lease is a fixed term tenancy and if so, what is the commencement date of the fixed term tenancy. Affidavit material has been filed by both parties in support of their respective positions. In addition, written submissions have been filed by the parties to which I have had regard. The proceeding was listed before me on 4 December 2019, at which time Mr McKenzie of Counsel, who appeared on behalf of the Tenant and Mr Sowden of Counsel, who appeared on behalf of the Landlord, supplemented their written submissions with further oral submissions.
11. Having considered the affidavit material and the submissions of the parties together with the authorities referred to by the parties, I find that the terms of the Lease are to be construed in favour of the Landlord. Further, I am of the opinion that the declaration and orders of the Tribunal dated 26 May 2004 determined that the fixed term tenancy of five years commenced, at the very latest, on 26 May 2004. What follows are my reasons for forming that view.

BACKGROUND

12. As indicated above, the Tenant commenced occupation of the Premises in or around May or June 2003, after he purchased some or all of the dry-cleaning equipment from the previous tenant who had also operated a dry-cleaning business from the Premises. At around that time, the Tenant negotiated the terms of the tenancy with Robert Ryan, the son of the Landlord. In the Tenant's affidavit dated 25 November 2019, he deposes to the following background facts:
 6. In early May 2003, Mr Mahmoud Hamidi-Asi informed me that the dry-cleaning shop located at and known as 331 Toorak Road, South Yarra was closing down and selling the machinery as a result. Accordingly, I went there and met with the then owner of the dry-cleaning business, Mr Jong Hawn Kim. After Mr Kim and I agreed on the selling price, I paid \$12,000 to Mr Kim to obtain machinery on the day to conclude our transaction...
 - ...
 8. Shortly after my purchase of the machinery from Mr Kim, I received a call from Mr Robert Ryan, who introduced himself

as the representative of the landlord for 331 Toorak Road, South Yarra. Mr Ryan said that he obtained my phone number from Mr Kim and he wanted to talk to me in person.

9. In or about the middle of May 2003, I met with Mr Robert Ryan at coffee shop near Caulfield. During the meeting, Mr Ryan told me that he was the landlord's son and represented the landlord. Mr Ryan asked me why I purchased the machinery. I informed Mr Ryan of my dry-cleaning business in Caulfield as well as in Como Centre, and that I wanted to have another shop. Mr Ryan then asked me why I would not stay at 331 Toorak Road, South Yarra. I said to Mr Ryan that my understanding from Mr Kim was that the landlord was not willing to lease the shop. Mr Ryan then said to me he was planning to do construction or development works for apartments on top of the shops and the local council would not approve the construction or development works if the shops were leased. Mr Ryan further said to me that he would be starting the construction works soon but did not give me any timeframe. After Mr Ryan said that he was willing to offer me a lease after he completed his construction or development works, I was happy to take over the shop because I would not need to find a new location and then move the machinery to that new location.
10. Once Mr Ryan and I reached the conclusion that I could take over the shop, we started talking about the conditions for the Agreement. In particular:
 - (a) ...
 - ...
 - (c) I asked about when the lease might start and Mr Ryan said that it would start once the constructional development works were completed. I then said to Mr Ryan that I wanted a 5 year lease plus 5 year option, to which Mr Ryan agreed
13. Mr Michael Ryan, the son of the Landlord and brother of Robert Ryan (referred to above), also prepared an affidavit dated 15 November 2019, where he deposed to the following:
 6. At paragraph 3 of my affidavit sworn in this proceeding on 14 October 2019 I gave evidence to the effect that clause 3 of the agreement was drawn in contemplation of the redevelopment. Since I swore that affidavit I found transcript of the hearing and DP Macnamara's reasons for decision in the records kept by Robert. Having read the

reasons for decision I am of the view that clause 3 ought to be read alone so that once the shop was fitted out for operation Mr Jafari became entitled to a long-term lease.

14. It is clear from the extracts of the affidavit material filed in this proceeding that the parties have differing views on what was agreed in May 2003. The Agreement, which was prepared on behalf of the Landlord, states, in part:

Mr Robert Ryan of ... representative of the owners of the shops 329, 331 and 333 Toorak Road agrees to accept:

1. The expenses of relocating the boiler or any equipment to a temporary location to allow for construction work to be carried out. The expenses of relocating any equipment to 333 Toorak Road that the new tenant Mr S. N. Jafari has installed in 331.

2. In the case that due to the construction work the dry-cleaning machinery cannot be used but shop can still operate as an agency the rent will be reduced by 50% if the shop cannot operate as an agency the tenant will not have to pay any rent during that period.

3. If the tenant Mr S. N. Jafari of..., Templestowe pays all rent due on time until the construction of the shop is completed, then the owners will be obligated to a long-term lease as a dry-cleaning business with Mr S. N. that starts immediately after construction of the shop is completed a 5 year lease with a 5 year option.

...

6. The tenant accepts and understand that if the property owners request the tenant to move from 331 Toorak Rd to 333 Toorak Rd the tenant will move.

7. The new tenant Mr N. S. Jafari will take over the same renting condition as the previous tenant that had been on a standard Real Estate Institute of Victoria Commercial Lease, except for the monthly rent being \$2600 plus all outgoings and all the previous clauses on this document.

15. As indicated above, the parties were before the Tribunal in 2004. In that proceeding, the Tenant sought an injunction restraining the Landlord (and others) from re-entering the Premises.¹ In that proceeding, the Landlord alleged that the Tenant had repudiated the Lease entitling the Landlord to terminate the Lease. The Tribunal found that the Tenant had, indeed, repudiated the Lease but that the Landlord had failed to exercise her [their] right to accept that

¹ At that time the Premises were owned by the Respondent and others. The Respondent is currently the sole owner of the Premises.

repudiation and terminate the lease. Accordingly, the Lease remained on foot. The following declaration and orders were made by the Tribunal on 26 May 2004:

1. The Tribunal declares that in the events that have occurred the Applicant [the Tenant] remains entitled to a lease for the term of 5 years with an option to renew for a further term of 5 years in accordance with the terms of an agreement between the parties dated 28 May 2003 with respect to the premises located at 331 Toorak Road, South Yarra.
 2. The Respondents [the Landlord] are restrained whether by themselves their servants and agents or otherwise how whatsoever for [sic] re-entering the premises at 331 Toorak Road, South Yarra during the term of agreement referred to in order 1 or any further term granted in accordance with the provisions of that agreement.
 3. No orders as to costs.
16. The Tenant has remained in occupation since 2003. However, at no time have the parties prepared or executed any documentation evidencing the Tenant's leasehold interest, other than the Agreement dated 28 May 2003, referred to above. Moreover, it is common ground that the Tenant undertook some preparatory or fit-out work upon first occupying the Premises. In fact, the Tenant deposes to having spent more than \$25,000 on that work.²
17. The central question in this proceeding is whether the words *construction of the shop* in clause 3 of the Agreement means the same thing as the phrase *construction work*, referred to in clauses 1 and 2 of the Agreement. As indicated above, the Landlord contends that the right to a five-year fixed term tenancy with an option for a further five-year term crystallised upon the Tenant completing whatever work it undertook before it commenced trading from the Premises. By contrast, the Tenant contends that the right to a fixed term tenancy only crystallises upon the Landlord completing the Development works.

FINDINGS

18. The starting point in construing the Agreement is to consider the words of the Agreement in the context of the surrounding circumstances. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,³ the High Court said:

The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the

² Affidavit of Sayde Jafari dated 25 November 2019, at para 15.

³ (2004) 2019 CLR 165.

text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.⁴

19. The affidavit material filed in this proceeding provides some context in which to construe the Agreement. Clearly, there was some discussion in relation to the Landlord's proposal to redevelop property associated with the Premises. The Agreement contemplated that there may be some disruption to the Tenant's demise and that rent would be reduced or abated in those circumstances. Similarly, the Agreement also contemplated that there would be some work undertaken by the Tenant, prior to commencing its business operations. For example, clause 4 made reference to the Tenant modifying *the present condition of the dry-cleaning shop*. It is within that context; namely, that both parties contemplated work above and around the Premises, that I construe the text of the Agreement.
20. In my view, the phrase *construction of the shop* in clause 3 of the Agreement means something different to the phrase *construction work*, referred to in clauses 1 and 2 of the Agreement. Having regard to the context in which the Agreement was drafted, I find that the phrase *construction work* relates to the Development which the Landlord had proposed and foreshadowed; namely, the construction of residential dwellings above the retail tenancies. Conversely, I find that the phrase *construction of the shop* means the Tenant's fit-out works.
21. I have formed this view based on several factors. First, it is reasonable to assume that the person drafting the Agreement intended for those two phrases to have different meanings. If that were not so, one would expect that the same words or phrases would have been used in all three clauses of the Agreement, which is not the case.
22. Second, the proposed Development was contingent on many variables, including planning approval, building approval, cost and other factors which are endemic in any major construction development. It is unlikely that the author of the Agreement would not have drafted the Agreement in such a way as to leave the commencement date of any fixed term lease so open-ended. Indeed, as it ultimately transpired, planning approval was not given for the proposed Development.
23. Third, interpreting the Agreement to give different meanings to the two phrases gives greater business efficacy to the Lease. On one hand, it means that if the Tenant cannot, for whatever reason, complete fit-out works and begin trading, he will not be bound by a fixed term tenancy for the next five years. Similarly, by marking the commencement date to coincide with the Tenant completing his fit-out works and, presumably starting to trade, brings certainty to the commencement date of any fixed term tenancy.

⁴ Ibid, [40].

24. This reasoning is reinforced by the well-known passage in *Australian Broadcasting Commission v Australasian Performing Right Association Limited*,⁵ where Gibbs J said:

It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with the other. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, and inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate...'⁶

[underlining added]

25. Fourth, clause 3 of the Agreement uses the words *construction of the shop* [emphasis added]. There is no mention of any apartments being constructed in that clause. Similarly, there is no evidence of any discussion between the parties prior to entering into the Agreement that the Landlord would be constructing a *shop*. This reinforces my view that the reference to the phrase *construction of the shop* is a reference to the Tenant's work and not the residential Development contemplated or foreshadowed by the Landlord.

THE TRIBUNAL'S ORDERS DATED 26 MAY 2004

26. My interpretation of the Agreement is consistent with the orders made by the Tribunal on 26 May 2004. Order 2 of those orders restrain the Landlord from re-entering the Premises *during the term of any agreement referred to in order 1 or any further term granted in accordance with the provisions of that agreement*. The agreement referred to in Order 1 is the Agreement.
27. In my view, when the restraining order was made, the Tribunal had accepted that a fixed term tenancy had come into operation. Otherwise, the orders would not have had the intended effect.

⁵ (1973) 129 CLR 99.

⁶ *Ibid*, 109.

28. In particular, if at the time when the orders were made, the fixed term tenancy had not yet come into existence, then the Tenant would have been occupying the Premises under a periodic tenancy. However, the orders only restrained the Landlord from re-entering during the term of the fixed term tenancy. Those orders did not restrain the Landlord from re-entering during any period while the Tenant occupied the premises under a periodic month-to-month tenancy. The orders would not have provided any protection to the Tenant unless the fixed term tenancy had already come into existence. Therefore, the orders must have contemplated that the fixed term tenancy had already commenced.
29. Accordingly, I find that the fixed term five-year tenancy commenced at the very latest on 26 May 2004. I make this finding even though the parties have pointed to inconsistent conduct after the Agreement was made. However, the subsequent conduct referred to in the affidavit material filed in this proceeding and the subjective belief of the parties does not assist me in construing the Agreement. My reasoning is consistent with what the High Court said in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:⁷

This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are to be determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern the contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.⁸

CONCLUSION

30. Given that the Tenant has been in occupation of the Premises for approximately 16 years, I find that from 26 May 2014 (at the latest),⁹ the Tenant has been over-holding, pursuant to the terms of the REIV lease conditions which were incorporated by reference into the Agreement and form part of the terms of the Lease. Clause 3(c) of the REIV lease states:

If the Lessee remains in possession of the Premises after the expiration of the Term, without objection by the Lessor, then as from the expiration of the Term, the Lessee shall be deemed to be a tenant from month to month on the same covenants and conditions,

⁷ (2004) 2019 CLR 165.

⁸ *Ibid.*, [40].

⁹ This assumes that the option for a further term of five years has been exercised.

so far as they are applicable to a monthly tenancy, as our contained in this Lease and at the monthly rental applicable immediately prior to the expiration of the Term. Such tenancy may be determined by either party on the expiration of one month prior notice in writing which may be given to expire at any time.

31. Consequently, I will make orders in the form of a declaration giving effect to my findings set out above.

DEPUTY PRESIDENT E. RIEGLER