VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP300/2017

CATCHWORDS

Lease - purported exercise by tenant of option to renew - whether landlord obliged to grant further term - was the tenant in default under the lease when option exercised - had the landlord given the tenant written notice of a default under the lease when the option was exercised - *Retail Leases Act 2003* (Vic) Section 27

APPLICANT	Leonard Joel Pty Ltd
RESPONDENT	Australian Technical Approvals Pty Ltd (ACN 161 643 385)
WHERE HELD	Melbourne
BEFORE	Member B. Josephs
HEARING TYPE	Hearing
DATE OF HEARING	29 June 2017
DATE OF ORDERS & REASONS	31 October 2017
CITATION	Leonard Joel Pty Ltd v Australian Technical Approvals Pty Ltd (Building and Property) [2017] VCAT 1781

ORDERS

1 I find and declare that the tenant has validly exercised an option for a further term of the lease.

2 The Principal Registrar is directed to fix a further hearing before me as soon as possible for one hour for the parties to be heard as to appropriate orders.

3 Costs reserved.

B. Josephs
Member

APPEARANCES:

For Applicant:	Mr R. Hay QC with Mr B. Harding of Counsel
For Respondent:	Mr M. Heaton QC with Mr F. Cameron of Counsel

REASONS

Issues

1 The applicant, Leonard Joel Pty Ltd ("the tenant"), is the tenant of retail premises at 325 – 367 Malvern Road South Yarra ("the premises"). The respondent, Australian Technical Approvals Pty Ltd, is the landlord ("the landlord").

2 There is no dispute that the lease between the parties is a retail lease to which the *Retail Leases Act 2003* (Vic) ("RLA") applies.

3 The tenant seeks a declaration from the Tribunal that it has validly exercised an option for a further term of the lease as it was not in default under the lease at the time it exercised the option. Alternatively, the tenant maintains that if it was found to have been in default, the landlord had not given it written notice about the default prior to it exercising the option.

4 Although the application, the subject of the proceeding, also includes a dispute between the tenant and landlord about guttering repairs, that issue was not the subject of the hearing and will abide the Tribunal's determination about the option. The hearing therefore only dealt with the option issue.

5 Four affidavits were sworn, filed and served by John Albrecht, managing director of the tenant, and three affidavits were sworn, filed and served by George Palatianos, sole director of the landlord, and submissions were made by counsel. I reserved my decision after the hearing on 29 June 2017.

Background

6 The tenant is an auction house and valuer of fine objects, art, furnishings and jewellery. It was established in 1919 and has been trading from the premises since 1994. It employs 36 full -time staff and 13 casual staff. The building at the premises has two storeys and is heritage-listed. Mr Albrecht became managing director in 2009 and majority shareholder in 2011. Warren Joel formerly owned the tenant's business and he and Mr Albrecht have had a long-standing friendship and had also worked together in the tenant's business. Warren Joel Nominees Pty Ltd owned the premises and entered into a lease dated 10 November 2011 with the tenant ("the original lease").

7 After the tenant exercised its first option to renew under the original lease, on 19 August 2014 Warren Joel Nominees Pty Ltd and the tenant entered into a further lease until 9 June 2017 ("the lease").

8 Warren Joel Nominees Pty Ltd then sold the premises and on 19 November 2015 it assigned the lease to the landlord.

9 In 2014, Mr Albrecht decided that the tenant should undertake restorative works to the interior of the building and commenced discussions with

Atticus & Milo, architects. In his second affidavit sworn 30 May 2017 ("the second tenant affidavit"), he stated that the lease permitted the tenant to carry out works contained in Annexure B to the lease. He described them as a "wish list" of works to be undertaken to the premises. However, due to the significant cost in restoring a heritage building, the tenant has only to date carried out works to a portion of the ground floor.

10 Exhibited to Mr Albrecht's fourth affidavit sworn 28 June 2017 ("the fourth tenant affidavit"), is a letter dated 16 June 2017 from Atticus & Milo which confirmed that the works undertaken were non-structural interior repairs and maintenance located in the ground floor entrance area and including the main stairwell. They were undertaken in 2014, were concluded in May 2015 and the final Certificate was issued in 2016. The letter also noted that some listed items from the contracted scope of works were deleted from the builder's scope at the tenant's request due to cost and time limitations and that all structural items were removed from scope. Mr Albrecht deposed that the works undertaken had cost approximately $380,000 and that while all the works set out in Annexure B have not yet been completed, given the significant cost, the tenant intends that all the works will be completed in the next two to three years once it has saved a further sum of money.

The Lease

11 The lease includes provisions of the original lease but it also contains some variations. The original lease provided for two further terms of three years each. The lease varied this by providing for three further terms of three years each. The latest date for exercising the first option was changed to 9 March 2017.

12 The permitted use of the premises remained as auction rooms and associated storage, offices and showrooms trading as Leonard Joel.

13 Clause 7 of the lease (Events of Default and Landlord's Rights) includes:

> 7.1 The landlord may terminate this lease, by re-entry or notice of termination, if –
>
> 7.1.2 the tenant does not meet its obligations under this lease
>
> …
>
> 7.3 For the purpose of section 146 (1) of the *Property Law Act 1958* (Vic), 14 days is fixed as the period within which the tenant must remedy a breach capable of remedy and pay reasonable compensation for the breach.

14 Clause 12.1 of the lease (Further Term[s]) says:

> 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 those 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.

15 Additional Provision 13 (AP 13) of the original lease was headed "Alterations to the Premises" and read as follows:

AP13.1 Unless the landlord otherwise expressly agrees in relation to the relevant alterations, any alteration to the premises made by the tenant (which alteration must not be carried out unless the landlord's prior consent is obtained) must:

(a) be carried out by the tenant at its own risk;

(b) not be carried out unless the tenant has first obtained and given to the landlord all permits required at law in relation to the alterations;

(c) be carried out in accordance with all laws and requirements of all relevant authorities;

(d) be carried out using first grade quality materials;

(e) be carried out in a proper and tradesmanlike manner;

(f) be carried out and completed promptly when started.

AP 13.2 When alterations involve structural work or alterations to electrical, water, gas, drainage, sewerage, or other services the tenant must immediately after completion:

(a) give to the landlord all permits and certifications usually obtained in connection with the relevant alteration, e.g. Occupancy Permit, Certificate of Final Inspection, Certificate of Electrical Safety; and

(b) give to the landlord a complete and accurate set of as – built plans relating to the alterations.

16 The lease varied the original lease by adding the following as Additional Provisions 13.3 – 13.6:

AP 13.3 The landlord consents to the tenant undertaking the alterations to the premises as described in Annexure B (the alterations).

AP 13.4 The tenant must undertake the alterations in accordance with the provisions of this lease.

AP 13.5 At the end of the term or any further term, the tenant will not be required to reinstate the premises to their condition before the tenant conducted the alterations except as provided by clause 5.1.1 and clause 5.1.2 as amended by AP4.1 of the original lease.

AP 13.6 The alterations will not be taken into consideration in determining the market rent of the premises at a market review date.

17 The lease also varied the original lease by inserting Additional Provision AP 18 (Tenant's Works) as follows:

AP 18.1 Definition:

In this clause "Tenant's Works" means the items contained in Annexure B.

AP 18.2 Tenant's Pre – Work Obligations:

Before any of the Tenant's Works are carried out the tenant must at its cost:

(a) obtain all necessary permits, consents, approvals and other similar authorities that may be required and give copies to the landlord;

(b) insure the Tenant's Works and the premises for all the usual builders and contractors risks and give copies of the insurance policies or certificates of currency to the landlord;

(c) obtain the landlord's written consent for the Tenant's Works in accordance with Clause 2.2.11;

(d) obtain the written consent of the Owners Corporation (if any affecting the premises) for any part of the Tenant's Works that affect the structure or external appearance of the building and give a copy to the landlord; and

(e) obtain the written approval of the landlord's consultants for any part of the Tenant's Works that affect the structure or external appearance of the building.

AP 18.3 Tenant's Works Obligations

The tenant must:

(a) carry out the Tenant's Works in a proper and tradesmanlike manner;

(b) in carrying out the Tenant's Works use good quality new materials;

(c) in carrying out the Tenant's Works comply with all relevant laws;

(d) in carrying out the Tenant's Works comply with the Guide to Standards and Tolerances 2007 published by the Building Commission Victoria;

(e) bear all risks associated with the Tenant's Works;

(f) carry out and complete the Tenant's Works as quickly as possible;

(g) give the landlord promptly after completion of the Tenant's Works copies of:

(i) as built plans relating to the premises;

(ii) all occupancy permits and/or certificates of final inspection or similar certificates or permits that may be required under any law in respect of the Tenant's Works.

AP18.4 Other Rights and Obligations

Nothing in this clause will be regarded as limiting any of the tenant's obligations or the landlord's rights under other provisions in this lease.

18 Annexure B is page number 36 of the lease and is set out as follows:

Annexure B

Tenant's Alterations

Ground Floor

- Entrance, Reception Area & Consultation Room
  - ❖ new floor treatment
  - ❖ new feature lighting
  - ❖ selection of fixed feature for nominated zones
  - ❖ new wall treatment either paint colour or wallpaper
  - ❖ general paint of all walls and timber beams
  - ❖ review location and design of reception and cashier counter
- Main and secondary staircase
  - ❖ new treatment to stairs
  - ❖ paint balustrade
  - ❖ feature wall colour
  - ❖ feature pendant to main staircase
- Female and Male Toilets
  - ❖ new floor and wall tiles
  - ❖ new fittings where necessary
  - ❖ new lighting where necessary
- main auction rooms
  - ❖ review finish of existing floor
  - ❖ review options for existing ceiling and proposed concepts based on budget and state of substructure
  - ❖ review existing lighting and proposed options once ceiling been resolved
  - ❖ feature wall colours
  - ❖ general paint of all walls and timber trims

First floor

- 2 main auction rooms
  - ❖ review finish of existing timber floor
  - ❖ review existing lighting and proposed options
  - ❖ feature wall colours
  - ❖ general paint of all walls and timber trims
- Female and Male Toilets
  - ❖ new floor and wall tiles
  - ❖ new fittings where necessary
  - ❖ new lighting where necessary
- Main Corridors
  - ❖ review finish of existing timber floor
  - ❖ review existing lighting and proposed options
  - ❖ feature wall colours

The dispute

19 In his first affidavit sworn 4 May 2017 ("the first tenant affidavit"), Mr Albrecht stated that the tenant had complied with all reasonable requests from the landlord in a timely manner and that it had validly exercised the option on 8 February 2017 for a further term of three years as per its letter of that date to the landlord sent by email and post.

20 The first affidavit of Mr Palatianos which is dated 23 May 2017 ("the first landlord affidavit") responds to the first tenant affidavit with Mr Palatianos disputing both that the tenant had complied with all reasonable requests from the landlord in a timely manner and that the option for a further three years had been validly exercised by the tenant.

21 In this regard, Mr Palatianos refers to the following portions of AP 13.2(b) and AP 18.3 (g) (i) of the lease:

> AP 13.2 When alterations involve structural works or alterations to electrical, water, gas, drainage, sewerage or other services, the tenant must immediately after completion give……
>
> (b) to the landlord a complete and accurate set of as-built plans relating to the alterations. (emphasis added in affidavit)
>
> AP 18.3 (g) (i) states:
>
> The tenant must give the landlord promptly after completion of the Tenant's Works copies of as built plans relating to the premises. (emphasis added in affidavit).

22 The landlord claims that the tenant is in breach of its obligations under the lease as it has not complied with AP 18.3 (g) (i) in relation to the works

undertaken by the tenant in 2014 and completed in 2015 as it has not provided to the landlord as built plans ("ABPs) relating to the premises.

23 Both parties then refer to correspondence between them which, omitting formal and irrelevant parts therefrom, is set out immediately below.

24 By letter dated 28 July 2016, the landlord's then lawyers wrote to the tenant's lawyers, Michael Sharp Legal:

> We understand the tenant conducted works and alterations to the premises in or about late 2014.
>
> Pursuant to Additional Provision 18.3 (g) of the Lease Renewal, kindly provide our clients with copies of the following documents relating to the Tenant's work and alterations to the premises as itemised in Annexure B of the Lease Renewal:
>
> (i) as built plans relating to the premises;
>
> (ii) all occupancy permits and/or certificates of final inspection or similar certificates or permits that may be required under any law in respect of the Tenant's works.

25 In response, the tenant wrote to the landlord on 9 August 2016 stating:

> i. We would suggest in the first instance any queries relating to period prior to your purchase of the building be directed to the former owner. We would have supplied them as the landlord at the time with any requests for this information.
>
> ii All of our records are stored offsite for previous periods and to reproduce any data prior to this financial year will come with an associated cost, which we would be seeking you to cover.

26 On 2 September 2016 the landlord wrote to the tenant:

> 3 Tenant's Works and Alterations
>
> 3.1 We are not concerned about what you 'would have' done with the previous landlord. We request evidence of your compliance with Additional Provision 18.3. Should you fail to provide evidence that the Tenant's Works were performed in accordance with the lease, we will assume you have failed to meet your obligations under the lease. Once again, we remind you that clause 7.1 entitles us to terminate the lease if you have failed to meet an obligation under the lease.
>
> 3.2 Please provide this information to us by 16 September 2016 otherwise we will presume that this information does not exist.

27 On 15 September 2016 the tenant wrote to the landlord stating:

> 3 Tenant's works and alterations
>
> In regard to your request for documentation with respect to Additional Provision 18.3, we confirm that on 19 May 2014 (sic) we completed non-structural works at the Premises.

> We attach a copy of the builder's contract, the architect's agreement, and the final certification of work by the builder.
>
> We confirm the following:
>
> 1 The works were carried out using good quality new material.
>
> 2 The works comply with all relevant laws at the time of completing them.
>
> 3 The works were completed in accordance with the Guide to Standards and Tolerances 2007 published by the Building Commission Victoria where relevant.
>
> 4 As the works were non – structural no permits were required and/or certificates of final inspection or similar certificates or permits were required. We attach a letter from Department of Environment, Land, Water & Planning which confirmed that no permit pursuant to the *Heritage Act 1995* was required either.
>
> Finally, we have attached the plans of the works for your records as supplied to our original landlord at the time. The original landlord accepted these plans as satisfaction of AP 18.3 (g) (i).

28 In the first landlord affidavit, Mr Palatianos stated that he had not seen any document setting out the previous landlord's acceptance of any of the tenant's plans as satisfaction of AP18.3(g) (i). He noted in relation to the building contract that the tenant engaged the contractor to perform certain works described at Item 6 of the building contract to include 'Internal Demolition, Fit-outs, Refurbishment/Maintenance' works. He referred to the letter dated 9 February 2015 from the Department of Environment, Land, Water & Planning to the tenant, in which he noted that the Department stated: "……..the following works or activities do not negatively impact on the cultural heritage significance of the place and do not require a permit pursuant to section 66 (3) of the *Heritage Act 1995*……..completion of a range of interior refurbishment works, in accordance with the documents referred to above, excluding works to the east staircase which is described as a 'future phase' to be the subject of a future approval application."

29 Mr Palatianos, in the first landlord affidavit, also referred to a portion of a letter from Atticus & Milo to the tenant dated 26 May 2016. However, the portion quoted in the affidavit is not as it appears in the letter. It appears in the letter as follows:

> "Congratulations, your refurbishment project officially reached completion on 19 May 2016……. please find enclosed the final contract certification documents:
>
> - Final Certificate No. 1 (ref.CP31) dated 26 May 2016.
> - Release of Contractors Security Certificate No 2 (ref. CP33) dated 26 May 2016.
> - Builders Final claim Invoice dated 19 May 2016….."

30 On 26 September 2016, the landlord wrote to the tenant stating:

> Thank you for providing the additional information. Could you please also provide the as-built drawings pertaining to these works.

31 In the first tenant affidavit, Mr Albrecht stated, after reference to the letter of 26 September 2016, that the tenant engaged Warren Lee Architecture to prepare "as built plans relating to the premises of the Tenant's Works."

32 On 7 October 2016 the tenant wrote to the landlord stating:

> We are having 'as built' plans drawn up and will provide these to you as soon as possible.

33 On 24 October 2016 the tenant sent an email:

> Further to your request, I attach 'as built' plans for the refurbishment work.

34 On 25 October 2016, the landlord emailed the tenant in response stating:

> The attached as builts appear to be incomplete, they do not show the entire ground floor, they also exclude the first floor and remainder of the building.
>
> Could you please provide full and complete as built drawings.

35 By an email sent eight minutes later, the tenant stated:

> I am not sure now as to why you would expect to receive the first floor plan or the remainder of the building given no work occurred in these areas.

36 On 3 February 2017, the landlord wrote to the tenant stating:

> 1 As Built Drawings
>
> Pursuant to clause AP 18.3 (g) of the 19 August 2014 Lease, you are required to give the landlord copies of as built plans relating to the premises. We have requested this before (email of 25 October 2016) however, we believe you may have misunderstood your obligation as tenant as you asserted (in your 25 October 2016 email) that you have provided "as built" drawings for the refurbishment work (emphasis added in affidavit). Clause 18.3 (g) does not require you to provide "as built" drawings of the 'tenant's works', also known as the 'refurbishment works': it expressly states that you are to provide "as built" drawings of the premises.

37 On 8 February 2017, the tenant wrote to the landlord as follows:

> Premises: 325 – 367 Malvern Road South Yarra 3141
>
> Lease Agreement with Leonard Joel Pty Ltd
>
> We advise that despite the Tenant having not received a notice in writing setting out the date after which the option is no longer exercisable from the Landlord, as required under section 28 of the *Retail Leases Act*, the tenant, Leonard Joel Pty Ltd, hereby exercises the Tenant's option under the Lease dated 19 August 2014 for a

> further term of three (3) years commencing on 9 June 2017 on the same terms and conditions as the Lease.
>
> The Tenant has two (2) further terms of three (3) years each remaining under the Lease.
>
> Accordingly, please arrange for the appropriate Renewal of Lease to be prepared for the Tenant review.

38 On 17 February 2017, the tenant then wrote to the landlord responding to the landlord's letter of 3 February 2017, stating:

> 1 As built plans CLAUSE AP 18.3 (g) (i)
>
> The context of the clause is in reference to the Tenant's Works which were non-structural works relating to only part of the whole Premises and to interpret the meaning of AP 18.3 (g) (i) to apply to the whole Premises is unreasonable. Accordingly, Leonard Joel will not be providing any further built plans other than has been provided.

39 On 28 February 2017, the tenant's solicitors filed an application with the Tribunal which resulted in the commencement of this proceeding. This initial application related to the roof dispute which continues and to a tree dispute which has subsequently been resolved by the parties.

40 By letter dated 10 March 2017, the landlord, among other matters, confirmed receipt of the tenant's renewal letter of 8 February 2017.

41 On 3 April 2017, the landlord responded to the tenant's letter of 17 February and stated:

> 1 As Built Plans
>
> Your opinion as to the 'intention' of the meaning of the clause is of no relevance. The clause is expressly stated. Your opinion as to its reasonableness is also of no relevance. Your declaration that you will not meet your obligations under the lease is duly noted.
>
> Breach of Lease
>
> You are in breach of your lease for failing to give the Landlord as built plans relating to the Premises, as is required under clause AP18.3(g) (i). Clause AP 18.3 (g) (i) does not require the Tenant to provide as built plans for the Tenant's Works, it expressly requires as built plans for the Premises. You have declared that you will not be providing as built plans of the Premises. Pursuant to clause 7.3 of the Lease, you are hereby given 14 days to remedy your breach. The Landlord reserves all rights in the event that you fail to give the Landlord as built plans relating to the Premises by the expiration of 14 days of this letter.

42 The tenant responded by letter dated 10 April 2017 to the landlord's letter of 3 April 2017 stating:

> In regard to your comment in respect of the Built Plans we advise as follows:

1 The Tenant's Works were completed in 2014. The Landlord at the time completed an inspection and advised they were acceptable and did not seek any further information including "as built plans.". We have been instructed that under equity that the current Landlord is now barred from demanding the "as built plans" and asserting rights which were previously waived.

2 We have provided to you previously, at a considerable expense as built plan relating to the premises of the Tenant's Works. Additional Provision 18.3 deals exclusively with the Tenant's Works and provides that the Tenant must provide to the Landlord "as built plans relating to the premises" not as you have asserted in your letter "as built plan of the premises." Therefore, we have complied in our view with both the literal meaning of the clause and the clear intended reading of the clause.

Accordingly, we will not be providing any further as built plans and do not believe we are in breach of any of our obligations under the Lease.

43 On 1 May 2017, the landlord wrote to the tenant as follows:

We refer to your letter dated 10 April 2017 (received on 12 April 2017), wherein you claimed that the Tenant's Works were completed in 2014. You also state that the Landlord at the time completed an inspection and advised that they were acceptable, essentially 'waiving' any entitlement in the current landlord to demand "as built" plans. You have concluded your letter by advising the Landlord that the Tenant would not be providing any further as built plans, and did not believe the Tenant was in breach of any of its obligations under the Lease.

We refer to the following documentation in our possession:

1 Atticus & Milo Client Agreement with the Tenant which refers to it being taken in conjunction with a letter dated 17 October 2014;

2 Commercial Cost Plus Contract between A. J. Hewitt Construction and the Tenant dated 28 November 2014. The estimated date for practical completion is stated as 15 March 2015;

3 Letter dated 9 February 2015 from Tim Smith, Director of Heritage Victoria, responding to a permit exemption request from the Tenant;

4 Letter dated 26 May 2016 from Atticus & Milo enclosing final contract certification documents including a Builder's Final Claim invoice dated 19 May 2016.

As you would be aware, Additional Provision 18.3 of the Lease provides that the Tenant must…….

"(g) give the landlord promptly after completion of the Tenant's works copies of : (i) as built plans relating to the premises;

(iii) all occupancy permits and/or certificates of final inspection or similar certificates or permits that may be required under any law in respect of the Tenant's Works."

Completion of the Tenant's Works can only be determined once the Certificate of Final Inspection is issued. This was done on 26 May 2016. We note that Australian Technical Approvals Pty Ltd become (sic) Landlord of the premises on 19 November 2015. It is therefore clear that the Landlord at the time that the Tenant's Works were completed was not Warren Joel Pty Ltd, but rather the current Landlord. Accordingly, your assertion that the previous Landlord waived any entitlement to demand as built plans of the premises, as required under AP 18.3 of the Lease is simply not supported on the documentation and/or factual chronology. The Tenant simply has not complied (sic) it (sic) obligations under AP18.3, and has thus breached, and continues to breach, the Lease.

We note that in your earlier letter dated 8 February 2017 you gave notice that the Tenant was exercising its option under the Lease for a further term of three (3) years commencing 9 June 2017.

Pursuant to sub-clause 12.1 of the Lease, relating to Further Terms, the Landlord must renew the lease for the further term if:

'12.1.1 there is no un-remedied breach of this lease by the tenant of which the landlord has given the tenant written notice.'

We have previously provided written notice to the Tenant of this un - remedied breach and accept that, through your recent correspondence, and particularly your letter of 10 April 2017, you have evinced an intention to continue to breach the Lease. Accordingly, whilst you are entitled to give notice of your intention to exercise the option, the Landlord does not have an obligation to renew the Lease. To make it clear, the Landlord will be exercising its rights under sub-clause 12.1 to not renew the Lease.

In the circumstances, we have no other option but to advertise the premises for a new tenancy commencing on or after 9 June 2017. A board will be erected on the Malvern Rd border of the property by 4pm on Friday 5 May 2017. We shall ensure that, in doing so, the Landlord will not interfere with the Tenant's entitlement to quiet use and enjoyment of the premises until the cessation of the current Lease period.

44 The tenant responded the same day:

We again note that we have provided to you previously, at a considerable expense as built plan relating to the premises of the Tenant's Works. Additional provision 18.3 deals exclusively with the Tenant's Works and provides that the Tenant must provide to the Landlord 'as built plans relating to the premises' not as you have asserted in your previous letter "as built plan of the premises."

> Therefore, we have complied in our view with both the literal meaning of the clause and the clear intended purpose by the parties at the time of the clause.

45 On 1 May 2017, the tenant also wrote to Warren Lee, an architect, to prepare as built plans of the entire premises.

46 On 3 May 2017 a 'for lease' sign was erected at the premises. After the tenant's lawyers contacted the leasing agent, the tenant removed the sign and placed it at the rear of the premises for collection. The tenant's lawyers, Michael Sharp Legal, also made an urgent application in this proceeding to the Tribunal seeking an injunction that the landlord be restrained from erecting the 'for lease' board outside the premises on the grounds that it would cause irreparable harm to the tenant's business. By consent, the injunction was granted and continues, subject to further orders, until 4.00 pm on 7 November 2017.

47 On 16 May 2017, the landlord wrote to the tenant as follows:

> We write to offer you a licence to occupy the premises until 31 December 2017.
>
> The purpose of offering you a licence is to provide you some relief from any difficulties your business may encounter if the lease is not renewed and you leave the premises on 30 June 2017. The 6 month licence period will provide you with sufficient time to find alternative premises from which to operate your business.
>
> We are cognisant that the question of whether the landlord has an entitlement to not renew the lease will be the subject of debate before the VCAT on 29 June 2017. We are cognisant of your position on this issue and we will proceed with our position. The purpose of our offer is not to detract from the VCAT proceedings, but rather, to address you as a businessman who may be facing the prospect of your business being left without a premises to operate from on 30 June 2017.
>
> If it is found that the landlord does not have an entitlement to not renew the Lease, then naturally, there will be no need to proceed with any proposed licencing (sic) arrangement.
>
> Please let me know if you are interested in a licence arrangement and I can provide you a draft licence for your consideration.

48 Michael Sharp Legal on behalf of the tenant responded to the landlord's letter by a letter to the landlord's solicitors, Macpherson Kelley dated 22 May 2017, which letter relevantly stated:

> We refer to the letter dated 16 May 2017 from the Landlord in which the Landlord proposed the parties enter into a licence for six (6) months should VCAT decide that the option for a further term of the Lease was not exercised. Without prejudice to our client's claim that the option was exercised, our client agrees to the proposed licence on the basis that the licence fee will be calculated in accordance with the current net rent…….and that the commencing date of the licence

is the date on which VCAT signs any order dismissing our client's claim. There is no enforceable licence until a licence agreement is signed by the parties.

Please provide a draft licence for our consideration.

Similarly, as the Landlord indicates in its letter, out (sic) client maintains its position on the issue of the exercise of option and will pursue this at the VCAT proceedings.

As built plans

Our client maintains that it was under no obligation to provide you with as built plans of the entire premises. However, given that this work has now been undertaken, please find enclosed copies of the as built plans of the entire Premises for the Landlord's records.

Relevant legislation

49 Below is legislation relevant to the lease and to the parties' submissions.

RLA – section 27 (1) and (2)

Option to renew

(1) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the lease must state –

(a) the date until which the option is exercisable; and

(b) how the option is to be exercised; and

(c) the terms and conditions on which the lease is renewable under the option; and

(d) how the rent payable during the term for which the lease is renewed is to be determined.

(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.

RLA – section 28(1)

Obligation to notify tenant of option to renew

(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.

RLA – section 94 (1)

The Act prevails over retail premises leases, agreements etc.

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

Transfer of Land Act 1958 ("TLA") – section 76 (1)

Procedure in case of default in payment of moneys secured

(1) If default is made in payment of the principal sum interest or annuity secured or any part thereof or in the performance or observance of any covenant express or implied in any such mortgage or charge and continues for one month or such other period as is therein expressly fixed, the mortgagee or annuitant may serve on the mortgagor or grantor of the annuity and such other persons as appear by the Register to be affected notice in writing to pay the money owing or to perform and observe the covenants (as the case may be).

Property Law Act 1958 ("PLA") – section 146 (1)

Restrictions and relief against forfeiture of leases and under - leases

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease or otherwise arising by operation of law for a breach of any covenant or condition in the lease, including a breach amounting to repudiation, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any breach, requiring the lessee to make compensation in money for the breach –

and the lessee fails, within a reasonable time thereafter, or the time not being less than fourteen days fixed by the lease to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Tenant's Submissions

50 Counsel for the tenant provided an outline of submissions dated 16 June 2017. Mr Hay spoke to this document at the hearing.

51 He noted that if all renewal options provided for in the lease were validly exercised and it ran full term it would continue until midnight on 9 June 2026. He confirmed that while clause 12 of the lease is in similar terms to section 27 of the RLA, it is not quite the same, and accordingly by virtue of s 94 of the RLA, in determining whether the tenant has exercised the option, the Tribunal must consider and apply section 27 of the RLA.

52 In *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* (1994) V ConvR 54 -492 ("Figgins"), Hayne J considered an identical provision to s 27 of the Act under the former *Retail Tenancies Act 1986* (Vic):

> "It follows that s 14(5) of the *Retail Tenancies Act* [s 27 of the *Retail Leases Act*] applies and that 'the only circumstances in which the option' in the lease is not exercisable is if the tenant remains in default notwithstanding notice to remedy it or has persistently defaulted under the lease throughout its term and the landlord has given written notice of those defaults."

53 In Figgins, the tenant rented premises in a city retail property. The property was mortgaged to a bank which had taken the mortgage subject to the tenant's lease. The landlord defaulted under the mortgage. Subsequent to the default the tenant exercised its option to renew the lease for a further term. After this, but still within the further term, the mortgagee bank sought to enforce the mortgage and to sell the property. The tenant argued that it remained a tenant at the property. The bank alleged that the tenant had not validly exercised the option because when it had done so, the tenant had been in default under the lease. However, the Court held that the lease was subject to the application of the then *Retail Tenancies Act 1986*, that under that Act the bank was the "landlord" of the property and because it had not given the tenant notice of default under section 14(5) of that Act, the tenant's exercise of the renewal option was good against the bank although it was in substantial default under the lease.

54 Consequently, the Tribunal must decide two questions:

When the option to renew was exercised (on 8 February 2017), was the tenant in default under the lease?

If yes to the first question, had the landlord given the tenant written notice of that default?

55 If the answer to either question is 'no', the tenant has validly exercised the option.

Was the tenant in default?

56 The tenant wants to remain at the premises and it has always paid rent and outgoings as and when they fall due.

57 AP13.1 of the lease permits the tenant to alter the premises provided it obtains the landlord's prior consent and the works are carried out in

accordance with sub-clauses (a) to (f). AP13.2 (b) only requires the tenant to give the landlord ABPs 'relating to the alterations.'

58 AP13.1 of the lease is a 'generic alterations provision' and does not contemplate any specific works to be undertaken to the premises by the tenant.

59 However, AP13.3 to the lease, which was a variation to the original lease, permitted the tenant to undertake the specific works described in Annexure B to the lease.

60 AP18 is also a variation to the original lease. 'Tenant's Works' are defined in AP18.1 of the lease as 'the items contained in Annexure B'. AP18.3 refers to the Tenant's Works Obligations which include that the tenant must:

> (g) give the landlord promptly after completion of the Tenant's Works copies of: (i) ABPs 'relating to the premises.'

61 AP18.3(g) is accordingly enlivened only after 'completion' of all the 'tenant's works': the clause is not enlivened where the 'tenant's works' are not completed in their entirety. If only some of the works are completed then the tenant is only required to provide ABPs relating to the alterations as contemplated by AP 13.

62 In 2014 the tenant carried out part of the tenant's works referred to in Annexure B, being work on a portion of the ground floor.

63 The contents of the tenant affidavits about post – contract conduct and conversations cannot be used to construe the lease. However, they state that works have been undertaken to the ground floor and the tenant wants to undertake further works but only when it has more money and is in a position to undertake the further works.

64 On 28 July 2016, the landlord requested that the tenant provide copies of the ABPs relating to the premises, and all occupancy permits and/or certificates in accordance with AP18.3(g).

65 However, as at 28 July 2016, the landlord was not entitled to ABPs relating to the premises because the tenant had not completed all the tenant's works referred to in annexure B. The 'Tenant's Works' had not been 'completed'.

66 On 24 October 2016, the tenant provided the landlord with ABPs for the works actually undertaken.

67 On 3 February 2017, the landlord requested that the tenant provide it with ABPs of the entire premises.

68 After a lengthy period of dispute about to what ABPs the landlord was entitled, on 22 May 2017 the tenant provided the landlord with ABPs for the entire premises.

69 The landlord has never been entitled to ABPs for the entire premises. Therefore, there has been no default by the tenant.

70 As clause AP13.2 had been enlivened, there was no default under the lease because the tenant had provided the landlord on 24 October 2016 with those ABPs concerning the alterations to the premises and had therefore done so well before the tenant exercised its option.

71 The actual descriptions of the works in Annexure B need to also be considered. Some were to 'review' specified areas or items which contemplated them being performed over a period of time as the tenant looked over particular issues and decided the works it might then undertake.

72 The structure of the lease (to which the landlord was not initially a party) was for ABPs for the entire premises to be provided only when the works were completed. If the works were undertaken in stages, then ABPs relating to each stage of alterations had to be provided after the completion of each stage. To date, only to the ground floor has there been works performed. Accordingly, the tenant had not breached the lease or been in default at the time it exercised the option. It is logical and sensible that only at the completion of the Tenant's Works, if and when that occurs, should ABPs be provided by the tenant relating to the entire premises.

73 However, if the Tribunal finds that the tenant was in default, the option was nevertheless exercised because when the option was exercised the landlord had not given written notice of the default.

Had the landlord given written notice of the default?

74 The answer to this question must be 'no'. The option was exercised by letter dated 8 February 2017. The landlord did not inform the tenant of any default until 3 April 2017.

75 The intention of the RLA is to protect small tenants who cannot match the bargaining strength of large landlords. The RLA is 'ameliorating or remedial legislation' and should be given a beneficial construction in favour of the tenant [*Peppercorn Nominees Pty Ltd v Loizou* (1997) V ConvR 54 – 560, 66,37 ("Peppercorn") and *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd* (2013) VSC 344, [42] (Croft J) ("Fitzroy Dental")]. This does not mean that the Tribunal should not need to look at the words used and give them a reasonable construction based on those words. However, those parts of s 27(2) that disentitle the tenant from exercising the option should be construed strictly.

76 For a notice to constitute 'written notice' of a 'default under the lease' in accordance with s 27, the notice must clearly assert an existing default so that the tenant understands that serious consequences may follow if the default is not remedied promptly. In this regard, such consequences as would befall the tenant would include loss of nine years of the lease, potential loss of the business and employees out of work.

77 The decision of His Honour Justice Croft in *Whild v GE Mortgage Solutions Ltd* (2012) VSC 212 ("Whild") concerning the content of notices given to mortgagees under s 76 of the TLA is apposite to notices given

under s 27. In Whild, the Court examined a number of notices, some of which complied with section 76 and some of which did not so comply. Croft J. at [56] said:

> Although it is the position that the Victorian legislation, ss 76 and 77 of the TLA, does not specify the form or contents required of a default notice, its provisions do, nevertheless, contemplate that something in the nature of a "notice": (whether styled as a notice or demand) must be served on the mortgagor. As the High Court indicated in *Barns v Queensland National Bank Ltd*, the object of the notice is to guard the rights of the mortgagor. In my opinion, it follows that the "writing" constituting the notice must make it clear that its purpose is not merely to provide information, but that, rather, the mortgagee is taking a step which may result in the exercise of the statutory power of sale under the TLA and that, if the mortgagor wishes to prevent this course being taken, then action needs to be taken to attend to compliance with the notice. This may involve communication with the mortgagee to establish the quantum of any amount or amounts claimed with respect to the default or defaults specified in the notice and, if necessary, the taking of proceedings to enjoin the mortgagee from taking any further steps. Clearly, the exercise of the mortgagee's power of sale is a very drastic remedy; it is a remedy involving a process of notification and execution which significantly affects, or has the potential to significantly affect, the rights of the mortgagor with respect to his, her or its property the subject of the mortgage. Consequently, although the Victorian legislation does not contain some of the specific requirements with respect to default notices as are contained in s 57 of the *Real Property Act 1900* of New South Wales, it is implicit in the Victorian provision that a notice given under sub-s 76(1) of the TLA be drawn as a "notice" (whether styled as a notice or demand) which meets the objective of guarding the mortgagor's rights by providing a clear indication, and thereby a warning, of the course upon which the mortgagee is embarking.(emphasis added in submissions)

78 In Whild, Croft J held that some of the notices served did not constitute notices under s 76(1) of the TLA because they merely furnished the mortgagor with information about what it was required to do but they did not refer to the consequences if it did not perform the requirements.

79 The tenant should have been told straight away in any of the purported 'notices' that something serious could happen. The letters from the landlord to the tenant had not contained reference to any default or breach until after the tenant had exercised the option.

80 The first time the landlord requested that the tenant provide it with ABPs for the entire premises was in its letter of 3 February 2017. However, this letter does not mention a default but merely provides information and requested the ABPs for the entire premises. Had a default been expressly alleged and that something serious could follow if the default continued, the tenant may have prepared the ABPs for the whole of the premises so as to

ensure that there was no doubt that it could exercise the option by 9 March 2017.

81 By letter dated 10 March 2017 the landlord acknowledged that the option had been exercised and commenced negotiations concerning rent for the renewed term.

82 The landlord did not allege a breach until 3 April 2017 and then wrote its letter of 1 May 2017 confirming it would not renew the lease.

83 Because the breach letter and the 1 May letter post-date the exercise of the option neither of them disentitle the tenant to a declaration that the option was exercised on 8 February 2017.

Landlord's submissions

84 Counsel for the landlord provided submissions dated 16 June 2017 and then submissions 'in reply' dated 23 June 2017. Mr Heaton spoke to these submissions at the hearing.

85 The issue for the Tribunal's determination is whether the landlord is entitled not to renew the current lease for a further three year period pursuant to the option to renew purported to be exercised by the tenant on 8 February 2017 based upon the tenant's failure to have provided ABPs relating to the premises as of the date of the purported exercise of the option.

86 As a matter of construction it is a condition precedent to renewal that there is no un-remedied breach of the lease by the tenant, of which written notice has been given by the landlord, at the time the option is purportedly exercised.

87 There are therefore two elements – first, an un-remedied breach by the tenant and, secondly, of which written notice has been given to the tenant by the landlord. In relation to the notice, the issue is about its sufficiency and not its validity as in Whild.

88 The Tenant's Works comprise the "Tenant's Alterations" being Annexure B to the lease.

89 It would appear the alterations set out therein for the first floor were not carried out.

90 There are clearly three requirements of the tenant under Clause AP18.3(g)(i):

- "promptly" after completion of the Tenant's Works
- to provide "as built plans relating to the premises" and
- to provide all occupancy permits etc. in respect of the Tenant's Works.

91 The words "as built plans relating to the premises" are clear in AP18.3(g)(i).

92 The ‘premises’ defined in the lease as 325 – 367 Malvern Road South Yarra being in the land described in Certificate of Title Volume 10240 Folio 860 and the fixed improvements and the landlord’s installations within the premises leave no doubt as to the premises to which the ABPs must relate.

93 AP18.3(g)(i) sits with AP13.2 in the Additional Provisions in the original lease which required the tenant in respect of the alterations to electrical, water, sewerage and other services to give to the landlord a complete and accurate set of ABPs relating to the alterations.

94 The Tenant’s Works being the Tenant’s Alterations in Annexure B to the lease are within additional provisions AP18.1 to AP18.4 and additional provisions AP13.1 to 13.6. AP18.3(g)(i) required fulfillment of AP13.2(b).

95 Accordingly, there is a new regime for the Tenant’s Alterations comprising the Tenant’s Works, being alterations in Annexure B in the lease, and it is therefore clear that the ABPs must be of the whole of the premises (“relating to the premises”) including “complete” and “accurate” ABPs of services such as electrical, water, drainage, sewerage and other services.

96 The tenant disputes it had to provide ABPs relating to the premises and says it only had to provide ABPs relating to the Tenant’s Works that is, the Tenant’s Alterations as per Annexure B in the lease. This is totally inconsistent with the plain meaning of the words defined in the lease of the ‘premises’ and the regime created by additional provisions AP18.1-18.4 which include AP13.2 of the current lease.

97 No ABPs relating to the premises were provided at the time of the purported exercise of option. The only ‘ABPs’ provided by the tenant was the plan provided by it to the landlord on 24 October 2016, which plan was only an as built floor layout plan of part of the ground floor and, as such, was not an as built plan and nor did it comprise ABPs (in the plural) relating to the premises. The plan provided on 24 October 2016 did not include “complete” and “accurate” ABPs of electrical, water, sewerage and other services’ alterations to show the existing as built situation of the services on the ground floor or relating to the rest of the premises. This is even more apparent when it is compared with the plans in the building contract between the tenant and AJ Hewitt Construction Pty Ltd and with the purported ABPs ‘of the entire premises’ provided by the tenant in its letter to the landlord of 22 May 2017, the latter of which are also not properly ABPs.

98 After considering various building and construction dictionary and glossary definitions, and in the context of the lease and, in particular, clauses AP18.3(g)(i) and AP13.2, ABPs relating to the premises must:

> (a) in relation to all electrical services, show not just the alteration to the electrical services, but also the location of switches, data points, fans, reflective ceiling, switchboards and a plan of the electrical cabling and wiring to and from the switchboards and to which electrical circuits then relate;

(b) in relation to hydraulic services, show not just the alterations to hydraulic services, but also the sewerage outlets and where sewer lines and pipes run;

(c) in relation to the mechanical services, show the position of air-conditioning units in the roof and where ducting runs to the inlets and the location of the inlets in the premises and similarly in respect of any lift;

(d) in relation to gas services, show not just the alterations to gas services but also the location of gas appliances and the gas lines to the appliances and the location of gas meters and gas lines to the meters.

These are in addition to detailed plans showing floor layouts, location of columns and any penetrations.

99 It is important for a landlord to know the effect and impact of any tenant's works on, or alterations to, leased premises and to have up-to-date ABPs of the whole of the premises. Reasons for this include insurance, supply to any local or statutory authorities if required, fire, health and safety emergencies, preparation of tax depreciation documentation, the undertaking of building works and alterations, a sale of the premises, and, at the end of a lease, identification of make good obligations and any unauthorised works.

100 There were no ABPs provided as at 8 February 2017.

101 There can be no dispute that notice was given by the landlord to the tenant of the breach of clause 18.3(g)(i). The issue of the provision of ABPs relating to the premises has been the subject of correspondence and interchange between the parties since 28 July 2016 including notice by the landlord to the tenant by the letters of 28 July 2016, 2 September 2016, 25 October 2016 and 3 February 2017.

102 The relevant time at which there should no un-remedied breach is at the time of giving of the notice of exercise of the option which was 8 February 2017. This is not disputed by the tenant.

103 Waiver is irrelevant to the consideration whether there has been compliance with the conditions precedent to the exercise of an option. This is not disputed by the tenant.

104 The tenant's argument that as it had only carried out part of the Tenant's Works, AP18.3(g) was not enlivened, is incorrect. There is no "all" before the "Tenant's Works" in clause AP18.3(g). Annexure B of the lease is vague, particularly given the number of items for "review" which makes it apparent that it was contemplated that some of the intended Tenant's Works might not be carried out. Clause AP18.3 must be construed bearing in mind the description of the Tenant's Works in Annexure B. Mr Albrecht described the Tenant's Works in Annexure B of the lease as a "wish list" depending on costs. The lease should be looked at in the context that it is a lease for a term of three years and not as a lease for 12 years, after including all the potential renewal options. Finally, if this argument of the tenant is

correct, it is in breach of the lease in not carrying out works to the other part of the ground floor and to the first floor and by not carrying out an item of the Tenant's Works (in breach of the lease), it would never have to supply ABPs which is contrary to the intention of AP18.3(g) and AP 13.2. This could leave the landlord with a vacant building seeking to be tenanted without knowledge of the Works undertaken in 2014-2016 as the tenant never provided ABPs. Accordingly, clause 18.3(g), properly construed, applied to the Tenant's Works that were carried out.

Notice about default

105 Notice under section 27(2)(a) of the RLA is not confined to one document. This is in contrast with notices required under section 146 of the (PLA) and section 76 of the TLA which require "a" notice. The reference to notice in section 27 (2)(a) is to notice in a more general sense.

106 Section 27 of the RLA is headed "Option to renew". Section 146 of the PLA is headed "Restrictions and relief against forfeiture of Leases and under leases". Section 76 of the TLA is headed "Procedure in case of default in payment of monies secured".

107 Section 146 of the PLA and section 76 of the TLA reflect steps to be taken when a landlord or mortgagee wishes to take positive action for forfeiture or possession. However, conditions precedent for the exercise of an option do not require a landlord to take any positive action. The landlord is passive.

108 The legislation has intervened to require a tenant to be notified about a default which presumably might otherwise invalidate an exercise of an option to renew unless remedied. Notices under section of the 146 PLA and section 76 of the TLA do not have to state under what section of the relevant Act they are given or what might be the consequence of non-compliance. Section 27(2)(a) of the RLA does not require the section or consequences of non-compliance to remedy default to be stated.

109 Under section 146 of the PLA and section 76 of the TLA the notice to pay or perform and observe covenants is a notice to remedy default. Under section 27(2)(a) of the RLA the landlord has to give the tenant notice "about" the default. This is all that is required. Nevertheless, in this case, the correspondence demonstrates that the landlord was insisting on the tenant producing ABP's relating to the premises to comply with the lease and which is, in effect, the same as a notice to remedy.

110 The wording in section 27(2)(a) of the RLA requires the landlord to give the tenant notice about the default not notice to remedy as suggested by Hayne J in Figgins. Consequently, section 27(2)(a) of the RLA is different to section 146 of the PLA and section 76 of the TLA.

111 Further, it follows that the statement of Croft J in Whild at [56] quoted in the tenant's submissions is not applicable under section 27(2)(a) of the RLA. Even if it is applicable, the tenant was notified about the default, the

need for it to be remedied, and knew and was warned the lease or its renewal could be in jeopardy.

112 It is incorrect to say that 3 February 2017 was the first time the landlord had requested the tenant to provide it with ABPs for the entire premises, that the correspondence up until 3 April 2017 was only information and requests, and that breach was not alleged until 3 April 2017.

113 The totality of the correspondence from 28 July 2016 to 17 February 2017 demonstrates that the tenant was aware of (had notice of) the default and, if it is necessary to establish, was in no doubt as to the seriousness of its default and possible consequences.

114 In purporting to exercise the renewal option on 8 February 2017, it is inconceivable that the tenant was not aware of clause 12.1.1 of the lease when the landlord did not give the tenant the notice required under section 28 of the RLA and yet the tenant exercised the option in accordance with the time under clause 12.1.3.

115 The letter of 3 April 2017 is the type of notice required by s. 146 of the PLA and refers to clause 7.3 of the lease. This is the type of notice referred to by Croft J in Whild at [56]. Whilst it might double as notice under section 27(2)(a) of the RLA, the consequences of the notice of 3 April 2017 are in relation to positive acts by the landlord as to possible forfeiture of the lease.

116 A fair and objective reading of the correspondence generally, and, in particular, of the letters of 28 July 2016, 2 September 2016, 25 October 2016 and 3 February 2017 could not result in any tenant being in doubt that the landlord was giving notice "about" default in providing ABPs under clause 18.3(g)(i). Additionally, the tenant made it clear it was not going to provide further ABPs in both its letters of 17 February 2017 and 12 April 2017.

117 The correspondence demonstrates continuous default and notification thereof by the landlord. It is also clear the tenant knew that non-compliance with the terms of the lease put at risk the tenancy and any further tenancy pursuant to an option to renew.

118 Submissions of the tenant refer to ameliorating legislation and, in that regard, to Fitzroy Dental and to Peppercorn which referred to High Court authority that ameliorating legislation still has to be construed within the confines of the actual language employed and what is fair and open on the words used. In this case the tenant was a sophisticated longstanding commercial operator with 36 full time staff and 13 causal staff. It was also represented or assisted by solicitors during this dispute.

119 Even if Whild is applicable as submitted on behalf of the tenant, it should have been clear to the tenant that notice of default which had continuously been given since July 2016 was a serious matter and one that required attention and action if the process was not to proceed to putting the lease

and its renewal in jeopardy. The tenant in some of its communications seemed casual and almost flippant in its attitude to the requirement to comply with the lease, despite being warned about it.

120 *In Computer & Parts Land Pty Ltd v Property Sunrise Pty Ltd (Retail Tenancies)* [2012] VCAT 1522 {"Computer & Parts"), which had some factual and chronological similarities to this proceeding, the tenant sought orders declaring it had validly exercised its option to renew the lease. The landlord claimed that it was not obliged to grant a lease for a further term because of the tenant's defaults under the lease. Shortly after receiving the tenant's letter exercising its option to renew the lease, the landlord, among other matters, informed the tenant that because of its default in relation to provision of a bank guarantee, it was not obliged to grant a further term. The lease was to end in March 2012.

121 The landlord's solicitor, in Computer & Parts, wrote a letter to the tenant dated 18 May 2011 which included the following:

> Pursuant to Clause 12.1 of the Lease, you are required to maintain at all times a bank guarantee in favour of the landlord, and if the rent has increased, you are to provide a supplementary or replacement bank guarantee so that the amount under the bank guarantee is …….. We note this issue has been outstanding for some time, and to date a replacement bank guarantee has not been provided. As Clause 12.1 is an essential term of the lease, the landlord is entitled to treat a breach of this term as a repudiation of the Lease. You are hereby put on notice in that regard.

122 On 26 May 2011, the landlord's solicitor, in Computer & Parts, then wrote to the tenant's solicitor stating:

> As you are also aware, the previous landlord has lost your client's Bank Guarantee that was purportedly provided. Since our client's purchase settlement occurred in May 2009, we have made every attempt to obtain a copy of the Bank Guarantee and to co-operate with your client to secure a cancellation of the Bank Guarantee. On 2 September 2009 we provided to you a letter from the previous landlord that it no longer required the Bank Guarantee and authorized its cancellation. Your client failed to take the appropriate action……We therefore put your client on notice that it continues to be in breach of the terms of the lease until it has provided a replacement Bank Guarantee in favour of our client.

123 The Tribunal in Computer & Parts found that the landlord was entitled to give the notice of default which it gave on 26 May 2011 and as that default had not been rectified when the tenant purported to exercise the option to renew the lease, the landlord was not obliged to grant a lease for a further term since the tenant had failed to rectify a default of which the landlord had given it written notice. Accordingly, the application for orders for renewal of the lease was dismissed.

Tenant's submissions in response

124 The letters in Computer & Parts on behalf of the landlord dated 18 May 2011 and 26 May 2011 were clear and in the form that the landlord's notices in this proceeding should have been and, if they had been, then the tenant in this proceeding could not have complained about them.

125 The form of the ABPs provided by the tenant was not relevant to the dispute as that was not the alleged default.

Findings

126 The first issue is whether the tenant was in default at the time it exercised the renewal option on 8 February 2017.

127 At the time of entry into the lease, the landlord was not a party. There is no direct evidence of the intentions of the parties then or of the reasons for the variations from the original lease. As such, the first issue for determination depends upon a construction of the lease of the premises with attention to its form and content.

128 AP13 of the lease is headed 'Alterations to the Premises.' I accept the tenant's submission about AP13.1, which was also in the original lease, that it is a 'generic alterations provision' and, as such, it does not contemplate any specific works being undertaken to the premises by the tenant.

129 AP 18 is, in its entirety, a variation to the original lease. It specifically defines 'Tenant's Works' to mean the items contained in Annexure B. APs 18.2 -18.4 thereafter continue using the identical term ' Tenant's Works' in its identical form.

130 AP 13.3, which is also a variation to the original lease, records that 'the landlord consents to the tenant undertaking the alterations to the premises as described in Annexure B (the alterations).' Thereafter, 'the alterations' remains the wording used in APs 13.4 to 13.6, being further variations to the original lease. This is consistent with the original AP13.1 and AP 13.2 and therefore sits with AP 18.1 despite Annexure B itself bearing the heading 'Tenant's Alterations.'

131 Despite any apparent inconsistency with AP 18.2 (c), by application of AP18.4, AP 13.3 would seem to obviate the necessity for the tenant to otherwise obtain the landlord's consent to undertaking the works itemised in Annexure B. Also, from its wording, AP13.3 is not exhaustive in confining alterations to the premises to the items contained in Annexure B. However, having regard to the provisions of AP 18.1, the items contained in Annexure B are an all -inclusive description of what falls within 'Tenant's Works.'

132 Although the word "all" does not appear before 'of the Tenant's Works' in AP 18.3 (g), I find that the landlord is entitled to ABPs relating to the premises only upon completion of all of the items contained in Annexure B.

That follows from the definition used in AP18.1 and the introduction into the lease of the specific concept and category of 'Tenant's Works.'

133 There is no preclusion in the lease preventing the items in Annexure B from being undertaken in stages. The landlord is entitled at the completion of each stage to ABPs relating to the alterations undertaken during that stage pursuant to AP13 which will include some of the items in Annexure B. Such a construction still results in AP 18.3 (g) (i) sitting with AP13.2 (b). I find that this is the structure of the lease. The tenant therefore complied with its obligations by provision of the ABPs supplied by it on 24 October 2016.

134 While not being a factor in my finding about the structure of the lease, on any objective consideration, it is a reasonable construction when regard is then had to the nature, history and extent of the relationship between the former landlord and the current tenant at the time of entry into the lease.

135 Accordingly, I find that the tenant was not in breach of the lease at the time it exercised the option to renew.

136 I will now turn to the second issue of whether the landlord had given notice about the default at the time the option to renew was exercised.

137 The landlord contends that the notice it gave in its written communications between 28 July 2016 and 3 February 2017 about the alleged default was sufficient. I have noted Mr Heaton's submissions about the 'active' roles required of a landlord pursuant to section 146 of the PLA and section 76 of the TLA on the one hand and the 'passive' role permitted of a landlord in relation to the exercise of a renewal option on the other hand. I also accept that even the notices under section 146 of the PLA and under section 76 of the TLA do not have to be in all circumstances entirely comprehensive and accurate as to detail.

138 However, the potential consequences to the tenant of the landlord not being required to grant the option to renew are significant and serious and as such I find that a more narrow interpretation has to be applied to the sufficiency of the notice of any default under the lease 'about' which the landlord has given. It is necessary therefore that the landlord applies some rigour in its giving of notice which should both make it expressly clear that a breach by the tenant is alleged and should be clear and consistent in its description of the nature of the breach, all of which is alleged to constitute the default.

139 Computer & Parts was referred to by Counsel for the landlord. It is not a decision that binds this Tribunal. However, it provided a very appropriate example of a notice given on behalf of the landlord by its solicitors which had been prepared with an appropriate level of care resulting in a communication of obvious clarity and sufficiency.

140 I do not regard the landlord's letters prior to the exercise of the option as being sufficiently clear or consistent about even "the first base" of any alleged default. In this regard, they variously refer to 'the Tenant's work

and alterations,' 'the Tenant's Works', and to the 'tenant's works,' also known as 'the refurbishment works.'

141 Despite the landlord's submissions, the landlord's letters do not in any way refer to the possible consequence of the landlord not granting the renewal option if the alleged default of the tenant is not remedied. In fact, the only consequence mentioned in the letters of the landlord prior to the exercise of the option is a relatively oblique reference to clause 7 of the lease which governs its termination.

142 Again, contrary to the landlord's submissions, I also find that the only reference to "breach" is in the landlord's letter of 3 April 2017, which post - dates the exercise of the renewal option. Again, this reference is made in connection with clause 7 and purported termination of the lease.

143 Mr Heaton also refers to the circumstances of compliance by the tenant with clause 12.1.3 of the lease and that it is inconceivable to believe that the tenant would not therefore have been aware of the wording of clause 12.1.1. This contention does not grow out of any notice given by the landlord and cannot be a relevant consideration when determining compliance by the landlord with section 27 (2) (a) of the RLA.

144 Finally, I agree with Mr Hay that issues about the sufficiency and form of the ABPs provided by the tenant on 24 October 2016 are also not a relevant consideration as that was not a subject of the alleged default.

145 Accordingly, I find that the landlord had not given the tenant notice about default prior to the exercise of the option.

146 I find and declare that the tenant has validly exercised an option to renew the lease for a further term and orders are made accordingly.

B. Josephs
Member