VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1316 OF 2018

CATCHWORDS

Applications by the respondents for dismissal of the proceeding under sections 75 and 78 *Victorian Civil and Administrative Tribunal Act 1998*–relevant considerations–proceeding dismissed under section 75.

APPLICANT	Marc & Adam Station Pier Pty Ltd (ACN 617 676 276)
FIRST RESPONDENT	Schiavello Bros Properties Pty Ltd (ACN 004 952 005)
SECOND RESPONDENT	Schiavello Group Pty Ltd (ACN 004 745 608)
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Application by the respondents for dismissal of the claim in the proceeding.
DATE OF HEARING	9 November 2018
DATE OF ORDER	30 November 2018
CITATION	Marc & Adam Station Pier Pty Ltd v Schiavello Bros Properties Pty Ltd (Building and Property) [2018] VCAT 1905

ORDER

1. On the respondents' application under section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, the claim made by the applicant in the proceeding is dismissed.
2. The respondents' application for dismissal or strike out of the claim under section 78(2) of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
3. The applicant must vacate the premises at 1 Station Pier, Port Melbourne, being the land in Certificate of Title Volume 10389 Folio 933 by 4 pm on **14 December 2018**.
4. The applicant must pay the second respondent damages for the continued occupation of the premises by the applicant since 1 September 2018, to be assessed.

5. Costs reserved.

6. The hearing of the proceeding, fixed for 3 December 2018, is vacated.

7. A directions hearing will instead take place at 10:00 am on 3 December 2018 before Member Kincaid, estimated duration 30 minutes.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr A Sandbach of Counsel
For Respondents	Mr Jonathan Evans QC with Ms Reegan G Morison of Counsel

REASONS

1. The respondents have applied for orders under sections 75 and 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**") dismissing the proceeding, and for consequential orders including the granting possession of restaurant premises to the second respondent.

Background

2. Mr Marc Manpreet Singh Chadha ("**Mr Chadha**") is the sole shareholder and director of the applicant.

3. The applicant conducts a restaurant business at premises known as 1 Station Pier, Port Melbourne, being the land in Certificate of Title Volume 10389 Folio 933 (the **"premises"**).

4. The second respondent is the lessee of the premises, by a head lease dated 1 March 2001 (the "**head lease**") with the Port Philip City Council ("**the Council**").[1]

5. I was informed that the first respondent is a company associated with the second respondent.

6. Riverbank Quest Pty Ltd (now in liquidation) ("**Riverbank**") was previously the lessee under the head lease. From about 20 June 2014, a company called One Station Pier Pty ("**OSP**") sub-leased the premises from Riverbank. At that time Mr Chadha was the sole director of OSP.[2]

7. The second respondent acquired its interest as sub-lessor to the applicant by way of an assignment in about April 2015 from Riverbank.

8. OSP surrendered its sub-lease with effect from 31 July 2017, enabling Mr Chadha's related company, the applicant, to occupy the premises from 1 August 2017 under a sub-lease granted by the second respondent dated 31 July 2017 (the "**sub-lease**").

9. The sub-lease was for the 364-day period from 1 August 2017-30 July 2018 (the "**sub-lease**")[3].

10. In April 2018 the second respondent purported to terminate the sub-lease pursuant to the terms of the sub-lease,[4] relying on the alleged non-payment by the applicant of rent and outgoings for the month of April 2018. Following a demand by the second respondent for delivery up of the

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1 See First Affidavit of Mr Karvela dated 8 May 2018, Exhibit BK-1, pp 41-101. On about 27 May 2015.

2 Witness statement of Mr Chadha dated 1 November 2018.

3 First Affidavit of Mr Karvela dated 8 May 2018, Exhibit BK-1, pp 115-194. I am not satisfied, from the evidence to which I have been referred, being the material referred to in fn 4 to the respondents' written submissions, that the second respondent granted a "licence" to the applicant for this period.

4 The respondent's written submissions state that the termination was pursuant to "clause 22.4 of the first licence": I have not been able to identify that clause in the sub-lease, being what I have found was the operative agreement.

premises, the applicant filed an application on 3 April 2018 for injunctive relief preventing the second respondent from re-entering the premises (the "**first proceeding**").[5]

11. On 16 May 2018 the parties entered into Terms of Settlement (the "**Terms**") in compromise of the first proceeding.

12. The Terms provided, in essence, that:

    (a) the parties having acknowledged that the sub-lease had been terminated by the second respondent on 1 April 2018, the second respondent granted a further right to the applicant to occupy the premises for a 4-month period from 1 May 2018 to 31 August 2018 as licensee, for a licence fee of $15,000 plus GST per calendar month (the "**licence**"); and

    (b) the applicant was granted an option, which must have been exercised by the applicant in writing by notice to the second respondent's solicitors on or before 30 June 2018, to acquire the second respondent's interest as lessee under the head lease, at a price of $7 million (plus any applicable GST) payable to the second respondent, with settlement to be completed on a date nominated by the applicant but which was required to be on or before 31 August 2018 (being the expiry of the licence period) (the "**option**").

13. Consent orders were consequently made in the first proceeding on 16 May 2018, providing that the applicant must immediately vacate the premises. The order was stayed until 31 August 2018, so as to allow the licence and the option to work.

14. Clause 3(b) of the Terms provided:

> [The applicant] and [Mr Chada] unconditionally and irrevocably acknowledge and agree that neither of them can make any application to set aside the [orders made 16 May 2018]. This clause 3(b) operates as an absolute bar to any such application and [the respondents and Mr Schiavello] can produce this document as evidence of the bar to any such application.

15. I accept the applicant's contention that it was open to the applicant, instead of exercising the option, to sell its restaurant business during the licence period to 31 August 2018.

16. The applicant did not exercise the option on or before its expiry date of 30 June 2018.[6] The applicant has not suggested that any conduct of the respondents caused it not to do so.

17. On 30 August 2018, the second respondent gave the applicant notice that it did not consent to any period of overholding.[7]

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5 See proceeding BP479 of 2018.
6 Third Affidavit of Mr Karvela dated 11 September 2018, paragraph [23].
7 Third Affidavit of Mr Karvela dated 11 September 2018, paragraph [28]; Exhibit BK-3, pp 48-49.

18. On 31 August 2018, the licence expired.[8]

19. In this proceeding filed on 3 September 2018, the applicant seeks the setting aside of the consent orders made on 16 May 2018 in the first proceeding, on the basis that the applicant entered into the Terms, and subsequently consented to the orders on the basis of alleged misleading and deceptive conduct on the part of the respondents.

20. The second respondent has filed a counterclaim seeking, among other things, possession of the premises.

21. At the request of the parties, on 5 October 2018 I set down the proceeding on a fast-track basis for hearing on 3 December 2018, with 2 days allocated. Given the proximate hearing date, the second respondent did not challenge my orders that, in effect, allowed the applicant to remain in occupation of the premises as licensee, provided it paid the agreed licence fee.

22. On 9 November 2018, the respondents' counsel expressed a desire to proceed with its dismissal applications, notwithstanding the hearing having been fixed for 3 December 2018.

The applicant's claim

23. The applicant alleges that prior to entering into the licence, the first and second respondents expressly represented, or alternatively represented by their silence, that the second respondent's interest as lessee under the head lease "had more than 70 years to run".[9] The applicant alleges that the representation was false.

24. Paragraphs 13-14 of the Amended Points of Claim state:

> 13 The basis for the Applicant agreeing to enter into [the] Consent Orders [dated 16 May 2018] was its understanding, based upon representations made to it by the Respondents, that the head lease had more than 70 years to run. This would allow the Applicant to seek to obtain refinance in order to allow it the opportunity to purchase [the second respondent's interest in] the head lease for circa $7 million, being the reason why the 364-day Sublease was entered into in the first place.
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> 13A Alternatively, to paragraph 13 hereof, the Respondents negotiated with the Applicant a licence agreement relating to the premises ("the **licence agreement**") in terms that the Applicant would exercise an option to purchase the head lease for circa $7 million, or sell its business during the term of the licence agreement.
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> 13B As the head lease had only 2 years to run, the Respondents must have been aware that the value of the head lease is far less than

[8] Third Affidavit of Mr Karvela dated 11 September 2018, Exhibit BK-3, pp 15 and 24; being clause 3 and item 4 of Schedule 1 of the terms of settlement.

[9] See Amended Points of Claim dated 8 November 2018.

\$7 millions and that the Applicant was negotiating under a severe misrepresentation as to the term of the head lease.

13C The respondents failed to disclose to the Applicant at any time before the execution of the licence agreement, that the value of the head lease is far less than \$7 million or that the head lease has only 2 years to run.

13D In the circumstances set out in paragraphs 13A-13C hereof, the Respondents' failure to disclose the matters set out in paragraph 13C constituted a misrepresentation by silence ("**the misrepresentation by silence**").

14 It recently came to light that the head lease only has 2 years left to run. The issues related to this revelation have affected the Applicant's ability to obtain refinance.

25. The applicant says that on 2 August 2018, finance for the purpose of the applicant exercising the option and purchasing the second respondent's interest was declined because, contrary to the alleged representations made by the respondents, the head lease did not have "more than 70 years to run".

26. The applicant seeks final relief in the nature of an order varying the licence pursuant to section 243(b) of the *Australian Consumer Law (Victoria)*, such that it will not expire until 31 March 2019.

27. The applicant's rationale for seeking an extension to the licence period is that it will provide the applicant with an extended opportunity to sell its business, undistracted by what turned out to be the forlorn pursuit between 16 May 2018 and 2 August 2018 of seeking finance for the purpose of buying the second respondent's interest as lessee. The applicant says that had it not continued to rely on the alleged representations during that period, it would instead have concentrated its efforts on "selling its business".[10]

Jurisdiction

28. The Tribunal is conferred with jurisdiction to hear and determine a retail tenancy dispute as defined.[11]

29. The various types of such disputes are defined in section 81 of the *Retail Leases Act 2003*. The only applicable dispute described in section 81 that may apply here is between a landlord and tenant arising under a or *in relation to* a retail premises lease to which the *Retail Leases Act 2003* applies.[12]

30. The sub-lease is for a term less than a year, and therefore the *Retail Leases Act 2003* does not apply to it.[13] Notwithstanding that the dispute may

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10 Amended Points of Claim, paragraphs 13A 16B.
11 See section 89 *Retail Leases Act 2003*.
12 See section 81(1)(a)(i) of the *Retail Leases Act 2003*.
13 See section 12, *Retail Leases Act 2003*

therefore, broadly speaking, be "in relation to it",[14] it is therefore not "a dispute between a landlord and tenant arising under or in relation to a retail premises lease to which [the] Act applies".[15] It follows that it is not a "retail tenancy dispute" within the meaning of section 81 of the *Retail Leases Act 2003.*

31. Insofar as the dispute is in relation to the licence, that is not a lease, such as to give rise to a retail tenancy dispute.[16]

32. The applicant's cause of action is under the *Australian Consumer Law (Victoria),* which the Tribunal can hear and determine.[17]

33. The counterclaim of the second respondent arises from a dispute between a purchaser and supplier of "services" within the meaning of section 182(1) of the *Australian Consumer Law and Fair Trading Act 2012,* which the Tribunal may also hear and determine.[18]

First basis for the respondents' strike-out applications-section 75

34. The respondents submit that the proceeding should be dismissed because the applicant has failed to set out any legal basis for the application and it is therefore "frivolous, vexatious, misconceived or lacking in substance or otherwise is an abuse of process" within the meaning of section 75 of the Act. They seek orders on their counterclaim.

35. One of the grounds relied on is that the applicant is barred by clause 3(b) of the Terms from bringing the proceeding

36. Section 75 of the VCAT Act provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
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> (a) is frivolous, vexatious, misconceived or lacking in substance; or
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> (b) is otherwise an abuse of process.
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> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
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> …
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> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in

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14 Within the meaning of section 81(1)(a) of the *Retail Leases Act 2003.*
15 See section 81(1) *Retail Leases Act 2003*.
16 Section 81 *Retail Leases Act 2003.*
17 Section 224 *Australian Consumer Law and Fair Trading Act 2012*.
18 Section 184(1) *Australian Consumer Law and Fair Trading Act 2012.*

substance or is otherwise an abuse of process is a question of law.

Section 75 applications: the authorities

37. I first summarise the approach of the Tribunal to applications under section 75 of the Act.[19]

38. The power under section 75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under section 75 is very high. Judge Bowman stated in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[20]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:
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> > The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court…
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> …
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> 34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added].

39. In considering a section 75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[21] Garde J considered recent authorities:

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19 In this respect, I adopt Deputy President Aird's observations in *Lu v Oakmont Properties Pty Ltd* (Building and Property) [2018] VCAT 1276 at

20 [2005] VCAT 306.

21 [2015] VCAT 1683.

8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:

   (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or

   (b) the action must be 'so clearly untenable that it cannot possibly succeed'.

   Kaye J also held that:

   (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and

   (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.

9 In *Ausecon Developments Pty Ltd v Kamil*, Judge Davis noted that for a strike out application to be successful, the proceeding must:

> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.

10 In *Fancourt v Mercantile Credits Pty Ltd* ('Fancourt'), the High Court held that:

> … the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.

[citations omitted]

Silence as misleading deceptive conduct

40. Section 18 of the *Australian Consumer Law (Victoria)* provides:

> **Misleading or deceptive conduct**
>
> (1) [**Misleading and deceptive conduct prohibited**] A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

41. The applicant alleges that there was an express representation to the effect alleged. It also relies on the alleged silence of the respondents in respect of what it says was a relevant matter that should have been disclosed.

42. Whether silence on any matter constitutes misleading and deceptive conduct is a matter to be assessed having regard to all the circumstances. In *Demagogue Pty Ltd v Ramensky*[22] Black CJ stated:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist, they will be disclosed.[23]

43. In *Winterton Constructions Pty Ltd v Hambros Australia Limited & Anor*[24] Hill J put it this way:

> …it is difficult to see how a mere silence could, of itself, constitute conduct which is misleading or deceptive. However, if the circumstances are such that a person is entitled to believe that a relevant matter affecting him or her would, if it existed, be communicated, then the failure to communicate it may constitute conduct which is misleading or deceptive because the person who ultimately may act to his or her detriment is entitled to infer from the silence that no danger or detriment existed. Thus, where a duty to speak is imposed, silence may constitute misleading and deceptive conduct.[25]

44. There is no general obligation on a commercial party to disclose all matters material to any negotiation. In *Lam v Ausintel Investments Australia Pty Ltd*[26] Gleeson CJ said:

> …Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause the other party to take a different negotiating stance. This does not of itself impose any obligation on the first party to bring the information to the attention of the other party and failure

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22 (1992) 39 FCR 31.

23 (ibid) at 32. Knowledge of all of the circumstances regarding any allegation of misrepresentation by silence is therefore an important assessment to be undertaken by the Court or Tribunal: see, eg, *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369-370 (French CJ and Kiefel J); *Poseidon Ltd v Adelaide Petroleum NL* (NL) (1991) 105 ALR 25, 26 (Burchett J).

24 *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97

25 at 114.

26 (1990) 97 FLR 458.

to do so would not, without more, ordinarily be regarded as dishonest or sharp practice.[27]

The respondents' section 75 strike-out application-discussion and findings

Alleged representation that sub-lease "had 70 years to run" not a false representation.

45. The head lease, on its face, grants an initial term to the second respondent of 20 years, and options in respect of three further terms of 20 years each, and a fourth final term of 19 years. If all options are duly exercised, the lease expires on 28 February 2100.[28]

46. Whatever dispute there may be concerning whether the applicant had a copy of the head lease at the time it entered into the sub-lease,[29] or whether Mr Chadha's company OSP had earlier received a copy of it,[30] the second respondent admits that it received a copy of the sub-lease on about 16 March 2018 from the second respondent's solicitor.[31] The applicant also acquired such knowledge from the terms of its own valuation report dated 29 March 2018, then provided to the applicant.[32]

47. It follows, therefore, that to the extent that there is an allegation in the material filed by the applicant to the effect that, at the date of its entry into the Terms, it had an imperfect knowledge of the terms of the head lease with respect to the length of the lease, because either:

    (a) it had "had no proper opportunity [between 15 May 2018, when the licence agreement proposal was reached and 16 May 2016, when the Terms and the licence were entered into, to consider whether [it] ought closely peruse the terms of the head lease which had been provided to [the applicant] for the first time on 16 March 2018"; [33] or

    (b) the head lease was not annexed to the licence[34]

    such allegation, in my view, must fail.

48. On one view, therefore, because of its own knowledge, the applicant was at all relevant times fixed with knowledge that the head lease has "more than 70 years to run".

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27 Ibid at 475 (with whom Samuels AJA and Meagher JA agreed).

28 In this respect, I have adopted the calculation that appears in blue on the first page of a Deed of Variation to the head lease dated 16 July 2006.

29 The head lease was annexed to the sub-lease, and expressly referred to in clause 22.2(a) of the sub-lease.

30 Mr Chadha asserts that he did not receive a copy of the sub-lease at the time of his company OSP entering into its sub-lease; see Witness statement of Mr Chadha dated 1 November 2018, paragraphs 5-6: but see contradictory assertion in his affidavit sworn 3 September 2018, paragraph 2(c).

31 Witness statement of Mr Chadha dated 1 November paragraph 6

32 See Charter Keck Cramer Pty Ltd valuation report dated 29 March 2018 at 3rd page

33 See Witness statement of Mr Chadha dated 1 November, paragraphs 18-19.

34 See Witness statement of Mr Chadha dated 1 November, paragraph 20

49. Contrary to this proposition, however, he applicant alleges the existence of particular facts and matters it claims to have discovered subsequent to its entry into the Terms, that support its conclusion that the sub-lease does not have 70 years to run,[35] and which allegedly should have been disclosed by the respondents, as follows:

> On or about 30 July 2018 [Mr Chadha] spoke with Mr Matthew Longhorne, the [council's] senior property adviser who advised [Mr Chadha] that the first term of the Head Lease will expire after 20 years and, having commenced on 21 March 2001, there were only about 2 years remaining, with the options to continue as follows: 4 x 20 years + 19 years; 18 years already have run. Mr Longhorne explained to [Mr Chadha] that the grant of the options are dependent upon the Council's decision, meaning that [the applicant would] not [be] guaranteed further options and an 81-year (sub)lease.[36]

50. It is therefore alleged by the applicant that this information puts a lie to the proposition that the lease "had more than 70 years to run", and imposes a limitation on the tenure of the second applicant in the premises; that is to say, the alleged overriding claimed discretion of the Council means that the lease allegedly has "only 2 years to run" until the end of the first term. The applicant alleges, therefore, that notwithstanding the availability of the options, it cannot be said that the head lease has "70 years to run". It alleges that the respondents "must have been aware" of the facts and matters that give rise to the conclusion that the head lease did not have 70 years to run, leading to an obligation to disclose it to the applicant.

51. I have not been referred to any provision in the head lease that grants to the Council a residual discretion in respect of granting an extension of the head lease, upon the due exercise of an option pursuant to the terms of the head lease.

52. Further, I have not been referred to any provision by which the council is able to terminate the lessee's interest under the head lease by the council giving 28 days' notice.[37]

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35 I apprehended the submissions by counsel for the applicant on 9 November 2018, that what is meant by the allegation that the applicant thought the sub-lease had "more than 70 years to run" is that Mr Chadha of the applicant had been led to believe (by Riverbank, it was conceded) that the initial term under the head lease "had more than 70 years to run", and that the second respondent failed to disclose otherwise. If this were the length of the initial term, there may have been an expectation on the part of the applicant that the second respondent was already "locked in" for this period, without its assignee (the applicant) having to go through the process of renewing the sub-lease. On analysis however, and given my finding concerning the applicant's knowledge of the terms of the head lease, this cannot have been the case, because the applicant was already aware that the head lease only granted the initial term, and the further options to which I have referred. Such an argument would therefore have no prospect of success.

36 See Witness statement of Mr Chadha dated 1 November, paragraph 16.

37 See also Affidavit of Marc Manpreet Singh Chadha dated 3 September 2018, paragraphs 2(e), 2(t), 2(x).

53. Whatever position the Council has adopted in regard to its rights, the proposition that the head lease "has more than 70 years to run" is arguably therefore, a correct description of the position at law provided, of course, all the options under the head lease are properly exercised in accordance with terms of the head lease.

54. I am not satisfied that there is any satisfactory evidence advanced by the applicant that the contractual entitlement of the lessee under the head lease to exercise options in respect of the further terms under the lease is subject to any overriding unfettered discretion in the Council.

55. I have therefore concluded that the claim that there was a false representation to the effect that the head lease "had 70 years to run", upon which the applicant allegedly relied, is hopeless and bound to fail, as a matter of fact and law, within the meaning of the authorities to which I have referred.

Alleged express misrepresentation by the respondents that sub-lease "had 70 years to run" bound to fail

56. The unparticularised allegation in paragraph 13 of the Amended Points of Claim that there was an express representation by the respondents that the second respondent's interest as lessee "had more than 70 years to run", whatever the applicant may have understood that expression, must fail.

57. This is because Counsel for the applicant conceded during submissions on 9 November 2018 that Mr Chadha of the applicant had not been led to believe not by the respondents that the sub-lease "had more than 70 years to run" but by Riverbank, the previous sub-lessor to his company OSP. This was well prior to the second respondent becoming sub-lessor.

Claim that the respondents must have been aware of alleged discretion in the council bound to fail

58. Even if there is a residual discretion in the council as to whether to allow a renewal of the head lease, the applicant provides no particulars as to why as a matter of fact or inference, the respondents "must have been aware" of it and also aware, therefore, that the value of the head lease is "far less than $7 million".

59. In my view, such claimed imputed knowledge on the part of the respondents is, on the pleadings and affidavit material, bound to fail.

If there is a residual discretion in the Council to decline a renewal, should the respondents have disclosed it?

60. If, as matter of fact or law, there is a discretion in the council as to whether to grant a new term upon the exercise of an option, and the respondents were aware of this (the proof by the applicant of which propositions I have already found is hopeless), is there a reasonable argument that the particular circumstances surrounding the parties' entry into the Terms and the licence, should have given rise to a reasonable expectation on the part of the

applicant that the respondents' knowledge of the discretion would be disclosed.

61. The most that can be argued at the hearing by the applicant in this respect is that the respondents failed to disclose to the applicant that the Council took the view that it held a residual discretion not to grant a further term of the sub-lease, and notwithstanding that:

    (a) the sub-lease on its face, had 70 years to run, provided the options were duly exercised.

    (b) the terms of the head lease grant no such overriding discretion to the Council;

    (c) the respondents had no knowledge of the applicant's understanding, given to it by Riverbank, that the head lease had "more than 70 years to run" (whatever the applicants may have understood by that expression);

    (d) the applicant was legally represented at all relevant times in a commercial bargaining process.

62. Additionally, the Tribunal must take into account all other circumstances during which the bargain was struck; namely that the applicant, and/or its controlling mind Mr Chadha:

    (a) had been in possession of the head lease since 22 June 2014 or at the very latest, 16 March 2018;

    (b) had been represented by the same lawyers at all relevant times before, during and after OSP's signing of the sub-lease from Riverbank, the subsequent sub-lease from the second respondent and the licence from the second respondent;[38] and

    (c) was in a position itself to approach the Council about the view it takes in relation to its rights under the head lease, as was indeed demonstrated by subsequent events.

63. I have concluded that, if the respondents were aware that the Council held a view concerning its claimed residual discretion to grant a new term of the head lease, having regard to the above authorities, the allegation that the applicant was entitled to have a reasonable expectation that that would be disclosed is obviously unsustainable, and is bound to fail within the meaning of the authorities to which I have referred.

<u>On no reasonable view is the applicant entitled to the relief claimed</u>

64. The respondents also submit that even if the applicants case in respect of alleged misleading and deceptive conduct on the part of the respondents is reasonably arguable, and I have found that it is not, there is no reasonable basis that can justify the relief being sought.

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38 Third Affidavit of Mr Karvela dated 11 September 2018, paragraph [14].

65. The applicant asserts that it only became aware on 30 July 2018,[39] alternatively, 2 August 2018,[40] that the sub-lease allegedly had only 2 years to run, and that it had therefore negotiated the licence under a "severe misrepresentation"

66. The Amended Points of Claim state that, until then, it had sought finance in order that it could exercise the option,[41] and did not take steps to sell its business.[42]

67. The terms of the licence (as well as the first licence and the sublease) provided that time was of the essence.[43]

68. There is no evidence that the applicant undertook any action, prior to 30 June 2018, to extend beyond 30 June 2018 its ability to exercise the option. On 1 July 2018, therefore, it must be taken to have known at law that, absent a new agreement with the second respondent, it had to sell its business during the term of the licence, or risk eviction under the terms of the Tribunal's orders dated 16 May 2018.

69. There is also no evidence that between 1 July 2018 (when, on any view, its ability to exercise the option had expired) and 31 August 2018, it took any demonstrable steps to sell its business.

70. On the applicant's own case, therefore, it did not seek to exercise the option before 30 June 2018, even though it did not then know that as a result of the Council's declared position, the head lease only had 2 years remaining. The Amended Points of Claim do not allege that applicant was acting under any misapprehension caused by the second respondent as to the date that the option was to be exercised, and which may have affected the applicant's decision, to its detriment, not to exercise the option. I find that it is clear that from 1 July 2018, the applicant must be taken to have known that the option period had expired, but it appears to have taken no steps to sell its business. Instead, by continuing through to the end of July 2018 to seek finance in order that it could buy the second respondent's interest, it was apparently seeking to rely on a potential willingness on the part of the second respondent to agree to an extension of the period within which the option might be exercised. The applicant did not have any legal right to require this of the second respondent. Also, relief from forfeiture of an option will generally not be available.[44]

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39 Witness statement of Mr Chadha dated 1 November 2018, paragraph [16].

40 Affidavit of Mr Chadha dated 3 September 2018, paragraph [2(w)].

41 Amended Points of Claim dated 8 November 2018, paragraph [16A].

42 Ibid, paragraph [16B].

43 Third Affidavit of Mr Karvela dated 11 September 2018, Exhibit BK-3, p 9: Terms of Settlement, clause 13.

44 There is generally no right to relief against forfeiture in respect of an option, particularly where time is of the essence. The option-holder can only accept the offer, and hence have any rights in relation to what is offered, by complying strictly with the terms of the offer. See *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18,085; [2000] NSWSC 459 [18]. See also a discussion of the relevant principles in *BS Stillwell & Co Pty Ltd v Budget Rent-A-Car System Pty*

71. The applicant can claim no legal interest in the premises under the option, which was extinguished from 30 June 2018, and no interest under the licence, which came to an end on 31 August 2018.

72. At its highest, therefore, if it were found that the applicant entered into the terms and the licence agreement in reliance on the misleading and deceptive conduct of the respondents, and that this was discovered by the applicant prior to 30 June 2018, the latest date for the exercise of the option, the applicant may then have been entitled to a remedy. It would then have been arguably entitled to an extension of the licence of 1 month beyond 31 August 2018, to allow it a total period of 3 months to sell its business. Having not exercised the option, however, the applicant knew on 1 July 2018 that, barring the agreement of the second respondent to grant a further option, the applicant had to sell its business, and not continue making what it came to realise was a hopeless search for finance.

73. In summary:

    (a) the applicant had originally agreed to a term under the licence of 3 months to enable it to sell the business, if it did not otherwise exercise the option by 30 June 2018;

    (b) the option has expired;

    (c) notwithstanding the expiry of the option, and without any extension of the option having been granted by the second respondent, the applicant continued to pursue financing as would have allowed it to seek to exercise it;

    (d) the applicant has had a further 4 month period from 2 August 2018, the latest date upon which it says it realised that it would not be funded in respect of any attempt by it to exercise the option; and

    (e) in addition to this period of time, the applicant seeks a further period to sell its business, from the date of a determination in the proceeding to 31 March 2019.

74. I accept the second respondent's submission there can be no basis upon which the Tribunal could reasonably require the licence to be amended pursuant such as to allow the applicant to remain in occupation of the premises for a period of 8 months beyond the date when, on its own evidence, it was no longer labouring under the effects of the alleged misleading and deceptive conduct. This is particularly so when one considers that under the terms of the licence, the applicant considered it needed only 3 months to sell its business.

75. Seen in this light, there is no reasonable basis in my view that can justify the relief that is being sought by the applicant.

Ltd [1990] VR 589; *Lontav Pty ltd v Pineross Custodial Services Pty Ltd* (No 2) [2011] VSC 485 at [107] ff.

76. I find for the reasons I have discussed, that the claims in the proceeding, together with the relief sought, are frivolous, vexatious, misconceived and lacking in substance, and that they must be dismissed under section 75 of the Act.

Second basis for the respondents' strike out applications- section 78 of the Act

77. Section 78 of the Act provides:

> 78 **Conduct of proceeding causing disadvantage**
>
> (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as–
>
> (a) failing to comply with an order or direction of the Tribunal without reasonable excuse: or
>
> (b) failing to comply with the Act, the regulations, the rules or an enabling enactment; or
>
> (c) asking for an adjournment as a result of (a) or (b); or
>
> (d) causing an adjournment; or
>
> (e) attempting to deceive another party or the Tribunal; or
>
> (f) vexatiously conducting the proceeding; or
>
> (g) failing to attend mediation or the hearing of the proceeding
>
> (2) If this section applies, the Tribunal may–
>
> (a) order the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
>
> (b) if the party causing the disadvantage is not the applicant–
>
> (i) determine the proceeding in favour of the applicant and make any appropriate orders; or
>
> (ii) order that the party causing the disadvantage be struck out of the proceeding;
>
> (c) make an order for costs under section 109.
>
> …

78. The respondents submit that the applicant, by its conduct:

(a) failed to comply with orders of the Tribunal (including the First Undertaking and the Second Undertaking) without reasonable excuse, within the meaning of section 78(1)(a) of the Act; and

(b) attempted to deceive the respondents and the Tribunal within the meaning of section 78(1)(e) of the Act, and by representing to the Tribunal that it had complied with an undertaking to the Tribunal, when it had not done so;

(c) vexatiously conducted the proceeding within the meaning of section 78 (1)(f) of the Act

which conduct has unnecessarily disadvantaged the respondents, and that the proceeding should therefore be dismissed or struck out pursuant to section 78(2)(a) of the Act.

79. The respondents rely on the course of events between 5 October 2018 and 9 November 2018, which it is necessary for me to summarise.

Directions hearing on 5 October 2018

80. On 5 October 2018, I conducted a directions hearing in respect of the applicant's application and the second respondent's cross-claim.[45] Both parties were represented by counsel.

81. One of the orders I made was setting the matter down, on a fast-track basis to suit the parties, for a final hearing on 3 December 2018.

82. I also made orders requiring the applicant, among other things, to file and serve by 17 October 2018 Amended Points of Claim fully particularising its claim, and stating the legal basis of its claim.[46] I agreed with counsel for the respondents that the way that the applicant was then putting its case was not entirely clear.

83. At the directions hearing, the applicant informed the Tribunal that it had paid the September licence fee of $15,000 plus the applicable GST of $1,500. It subsequently became clear that $1,500 GST had not been paid.

84. The applicant also gave an undertaking to pay to the second respondent the licence fee of "$15,000 plus [$1,500] GST due for the month of October 2018 no later than 19 October 2018, and to pay the licence fee for the month of November 2018 no later than 19 November 2018" (the "**First Undertaking**").[47]

85. The First Undertaking was expressed in the Notes preceding my written orders made that day:

> A Mr Manpreet Singh Chadha, director of the applicant alleges this day that the applicant has paid the licence fee of $15,000 plus GST due for the month of September 2018.
>
> B Mr Chadha undertakes to the Tribunal this day on behalf of the applicant that the applicant will pay to the respondent the licence fee of $15,000 plus GST due for the month of October 2018 no later than 19 October 2018, and will pay the licence fee due for the month of November 2018 no later than 19 November 2018, and the respondent will hold such payments in its solicitor's trust account pending the hearing and determination of this proceeding, without prejudice to its rights under the licence agreement and at law.

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45 Defence and cross-claim dated 11 September 2018.
46 Order 2 of the order of Member Kincaid dated 5 October 2018
47 Order of Member Kincaid dated 5 October 2018, B.

86. I accept the parties' subsequent submissions that the undertaking referred to in Note B of my orders was made by the applicant itself through its Counsel (and not by Mr Chadha personally), and that the relevant payments were to be made to the second respondent.

Subsequent events

87. The applicant failed to file its Amended Points of Claim by 17 October 2018.

88. On 18 October 2018, because the Tribunal had taken the view that the applicant had failed to serve witness statements, also required by my orders made 5 October 2018, the Registrar gave notice to the parties of a compliance hearing fixed for 2 November 2018.[48]

89. By email dated 25 October 2018, the second respondent applied for an urgent directions hearing in respect of the applicant having also failed by 17 October 2018 to file and serve Amended Points of Claim.

90. On 31 October 2018, the applicant filed and served a list of documents, although, at that date, it had still not set out the legal basis of its claim.

Compliance hearing 2 November 2018

91. At the compliance hearing on 2 November 2018, the applicant was represented by Mr Lopez, its solicitor. He informed me that the applicant's counsel, who was present at the hearing on 5 October 2018, was unable to be present because of his having to attend court.

92. On that occasion, the second respondent by its counsel Mr Evans QC, informed the Tribunal that part of the First Undertaking requiring the payment by the applicant of the October licence fee no later than 19 October 2018 had not been complied with.

93. Mr Lopez disputed this, and provided print-outs of two Westpac "payment summaries", said to record the making of 2 payments of $7,500 by the applicant to the second respondent on 19 October 2018. I observe that such payments, if made, would only have been in partial compliance with the First Undertaking (that is to say, only $15,000 of the required $16,500 had allegedly then been paid).[49] The payment summaries purported to show that the respective payments had been made into a Westpac account of the second respondent number 013-442 xxxxx4505. The second respondent admits that it has a Westpac account number 013-442 305614505 (the "**second respondent's bank account**").

94. No explanation was able to be given on behalf of the applicant as to why the full amount of $16,500 for the October licence fee had not been paid.

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48 The Notice did not also refer to non-compliance with order 2, the applicant's compliance with which had then not occurred.

49 Fourth Affidavit of Mr Karvela sworn 8 November 2018, paragraphs [3]-[7].

95. The hearing proceeded on the assumption that the two alleged payments of $7,500 each had in fact been made.

96. At the hearing on 2 November 2018, the applicant by its director, Mr Chadha, also undertook to pay $18,000 into the second respondent's solicitor's trust account *that day,* comprising:

    (a) $1,500 GST in respect of the October licence fee payment allegedly made by the applicant to the second respondent on 19 October 2018; and

    (b) $16,500 (including $1,500 GST) in respect of the November licence fee[50] (the "**Second Undertaking**").

97. The Second Undertaking was recorded as a note to the written orders.

98. I also made orders that the applicant pay by 4pm on 8 November 2018 the second respondent's costs of the hearing on 2 November 2018, fixed in the sum of $3,000 (the "**Costs Order"**).

99. I extended the time for the applicant to file Amended Points of Claim to 8 November 2018, and fixed a further directions hearing for 9 November 2018.

100. The respondents had announced an intention to seek summary orders against the applicant, such was their view of merits of the claim as then expressed. I indicated in my orders that it would be open to them to make an application for summary orders on 9 November 2018, depending upon their view of the contents of the Amended Points of Claim.

Subsequent Events

101. On 8 November 2018, the applicant served its Amended Points of Claim.

102. By his fourth affidavit in the proceeding, sworn on 8 November 2018,[51] Mr Karvela, lawyer on behalf of the respondents provided an account of enquiries subsequently made by his staff, showing that:

    (a) notwithstanding the representation to the Tribunal at the hearing on 2 November 2018 on behalf of the applicant that the $15,000 October licence fee (excluding GST) had been paid, no payments of $7,500 had been paid into the second respondent's bank account on 19 October 2018, as required by the First Undertaking, and indeed no such payments had been made; and

    (b) no payment of $18,000 had been paid into the second respondent's solicitor's trust account by the close of business on 2 November 2018 as required by the Second Undertaking.

103. On the evening of 8 November 2018, the respondent's solicitors emailed the applicant's solicitors to the effect that:

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50 This effectively brought forward the date for payment of the November 2018 licence fee from 19 November 2018 being required by the first undertaking.

51 But dated 8 November 2018.

(a) the applicant had persistently failed to comply with its undertakings to the Tribunal, and the orders of the Tribunal;

(b) the Amended Points of Claim did not, in the respondents' view, disclose any arguable basis for relief, which would entitle the applicant to remain in possession of the premises past 9 November 2018;

(c) a fifth affidavit to be sworn by Mr Karvela was being prepared, as would demonstrate "the fact of non-payment by [the applicant] of amounts both the subject of its two undertakings to the Tribunal, and also its non-compliance with orders of the Tribunal."

104. By his second affidavit in the proceeding, sworn on 9 November 2018, the day of the directions hearing before me, and in response to the fourth affidavit of Mr Karvela, Mr Chadha deposed that:

(a) "in relation to the two payments of $7,500 each [required to be paid by the First Undertaking, for the licence fee payable for October 2018) which allegedly bounced, my friend Andrew R Maclean did thereafter pay $15,000 on behalf of the applicant on or about 6 **September** 2018" [emphasis added];

(b) $16,500 for the October licence fee had, in any event, been paid into the second respondent's solicitor's trust account at about 12:30 pm on 8 November 2018;

(c) $1,500 was paid into the second respondent's solicitor's trust account at about 3:30 pm on 8 November 2018 (I find that this was the outstanding GST in respect of the September licence fee);

(d) $3,000 (being the amount of the costs order made on 2 November 2018, to be paid by 4:00pm on 8 November 2018) was also paid into the second respondent's solicitor's trust account at about 3:30 pm on 8 November 2018.

105. Mr Chadha also deposed in his second affidavit sworn 9 November 2018 that the $16,500 payment should clear "in the next day or so, accounting for the fact that this payment was to a new payee". I find from Counsel's submissions on 9 November 2018 and an email from the second respondent's lawyers to the Tribunal dated 20 November 2018, that the amount was in fact received in clear funds on 8 November 2018.

106. Mr Chadha deposed that clearance of the other payments of $1,500 and $3,000 would, in effect, depend upon whether the applicant's own receivables were received, as anticipated. Delayed clearance of the $1,500 and $3,000 payments in fact occurred. I find from an email dated 20 November 2018 to the Tribunal from the solicitors for the second respondent that it did not receive these amounts in cleared funds until 12 November 2018.

Hearing on 9 November 2018

107. On 9 November 2018, I heard the respondents' strike out applications, and reserved my decision.

108. In respect of the alleged failure by the applicant to comply with the undertakings, Mr Sandbach of counsel, plainly on instructions from Mr Chada who was present, confirmed to the Tribunal that a payment of $15,000 made by the applicant on about 6 September 2018 was not a payment towards the September 2018 licence fee, as had been understood at the directions hearing on 5 October 2018,[52] but was in fact a pre-payment of the licence fee for the month of October 2018.[53]

109. Mr Sandbach indicated that, in effect, therefore, the applicant had therefore already complied with that part of the First Undertaking to pay "$15,000 plus GST due for the month of October 2018 no later than 19 October 2018".

110. The respondents were in no position, at the hearing, to verify these matters.

Subsequent Events

111. By his fifth affidavit in the proceeding, sworn on 9 November 2018 after the hearing, Mr Karvela deposed, by reference to the accounting records of the second respondent, that the submission of Mr Sandbach, to the effect that there had been a pre-payment in September 2018 of the October 2018 licence fee was plainly wrong.

112. I find from the records exhibited to the fifth affidavit of Mr Karvela, that at the date of the hearing on 9 November 2018:

    (a) that, the applicant had not "pre-paid" the October licence fee in September 2018, contrary to its representations on 9 November 2018 that it had done so, but that the $16,500 October licence fee was not paid until 8 November 2018;

    (b) the applicant had failed to pay by 2 November 2018, $1,500 GST in respect of the October licence fee by 19 October 2018, as required by the Second Undertaking;

    (c) the applicant had failed to pay by 2 November 2018 the November licence fee of $16,500 including GST, in accordance with the Second Undertaking.

113. Having also considered the contents of a third affidavit sworn in the proceeding by Mr Chada on 12 November 2018, I find that:

    (a) the applicant paid $1,500 GST in respect of the September licence fee on about 8 November 2018; and

    (b) the applicant paid $16,500 being the October licence fee (including $1,500 GST) on about 8 November 2018 ($15,000 had therefore not

[52] See Note A to the orders dated 5 October 2018.
[53] This argument was just discernible from the second affidavit of Mr Chada.

been paid on 19 October 2018 pursuant to the First Undertaking, and as represented on 2 November 2018);

(c) $1,500 GST on the October licence fee had not been paid by 2 November 2018 as required by the Second Undertaking);

114. I find from an email from the respondents' solicitors to the applicant's solicitors dated 20 November 2018 that:

(a) the applicant paid to the respondents the Costs Order on about 12 November 2018 (not 8 November 2018, as ordered on 2 November 2018); and

(b) the applicant paid $16,500 being the November licence fee (including $1,500 GST) on about 19 November 2018 (not 2 November 2018, as also required by the Second Undertaking).

Analysis-Alleged failure to comply with an order of the Tribunal (including the First Undertaking and the Second Undertaking) without reasonable excuse, within the meaning of section 78(1)(a) of the Act

115. The respondents submit that the applicant has failed to provide a reasonable excuse as to why the First Undertaking was not complied with by 19 October 2018.

116. The respondents also submit that the applicant has failed to comply with that part of its Second Undertaking to pay the November licence fee of $15,000 plus GST by 2 November 2018 (being the amended obligation with respect to the November licence fee, therefore superseding my orders dated 5 October 2018), and therefore sought unilaterally to revert to the date ordered on 5 October 2018 for payment of the November licence fee, that is to say 19 November 2018.

117. The respondents submit that the applicant has not offered any reasonable excuse as to why it has habitually failed to serve its amended points of claim by the date required, and to comply with the First Undertaking, the Second Undertaking or the Costs Order.

118. I find that the undertakings amount to directions of the Tribunal within the meaning of section 78(1)(a) of the Act.

119. I also note the respondents' submission that non-compliance with an order of the Tribunal constitutes an offence pursuant to section 133 of the Act.

120. Mr Chadha also states in his third affidavit sworn 12 November 2018 that his payment of $16,500 made on 8 November 2018 was in respect of the October 2018 licence fee (due to be paid no later than 19 October 2018 pursuant to the First Undertaking) and the $1,500 GST still then payable in respect of September 2018.

121. He also deposes in paragraph 9 that he "does not have any knowledge as to why the two payments of $7,500 made on or about 19 October 2018 each "bounced", and that [he] did cause for such payments to be made on 19

October 2018 with the intention of complying with the [First Undertaking]".[54]

122. In his third affidavit, Mr Chadha sincerely apologises on behalf of the applicant for inconvenience caused to the respondents by the late payments made by the applicant, and for the applicant's failure to comply with the orders for the filing and service of an amended points of claim. He states that neither he nor the applicant nor any of its officers wished to be in contempt or found to be in breach of an undertaking to the Tribunal.

123. I find from the terms of the two payment summaries, and paragraph 9 of Mr Chada's third affidavit, that the applicant set up a "scheduled payment date" of 19 October 2018 for the payments of $15,000 in accordance with the First Undertaking as he contends, and that the instruction to his bank was dishonoured due to lack of funds. I have not been able to conclude that the subsequent failure to comply with the First Undertaking by reason of the two alleged payments of $7,500 having been dishonoured, amounts to a failure to comply with an order or direction without reasonable excuse.

124. A most unusual aspect of Mr Chadha's third affidavit is his statement, in regard to payment of the November licence fee:

> I do also confirm that the Applicant shall make payment of the November 2018 licence fee by the date required [19 November 2018] by the Tribunal's order dated 5 October 2018…which sums shall be paid by bank cheque and delivered directly to the respondent's solicitors at their Melbourne office, if required.[55]

125. Mr Chadha appears to have entirely overlooked that by my orders dated 2 November 2018, and because of the various defaults of the applicant that led to the compliance hearing required to be held that day, he undertook on behalf of the applicant that the November licence fee would be paid by the applicant *that day*.

126. A letter to the Tribunal dated 13 November 2018 from the solicitors for the applicant indicates that they themselves had also failed to have sufficient cognizance of the amended undertaking with respect to payment by the applicant of the November licence fee by 2 November 2018 and not, as previously undertaken, 19 November 2018.

127. Both Mr Chadha's understanding, and that of the applicant's lawyers as to the applicant's obligations with regard to payment of the November licence fee appear to proceed from a proposition that the Second Undertaking never occurred.

128. Having regard to the plain terms of the Second Undertaking contained in the Tribunal's order, and that it was clearly given by the solicitor for the applicant, there can be no reasonable excuse for the respondent having

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54 Third Affidavit of Mr Chadha sworn 12 November 2018 at paragraph [9].
55 Third Affidavit of Mr Chadha sworn 12 November 2018 at paragraph [13].

failed to make payment of the November licence fee until 19 November 2018.

129. I am not however satisfied that the respondents have been unnecessarily disadvantaged by the failure by the applicant to have complied with the undertaking such as to order that the proceeding should be dismissed or struck out. I am prepared to entertain any application that the second respondent may wish to make for interest by reason of the late payment of the November licence fee.

Analysis-Allegedly attempting to deceive another party or the Tribunal within the meaning of section 78(1)(e) of the Act

130. The respondents submit that I should find that on 2 November 2018, the applicant attempted to deceive the Tribunal and/or the second respondent, with respect to the alleged making of the two payments of $7,500 pursuant to the First Undertaking. It submits that the applicant has shown a contumelious disregard for the Tribunal's authority.

131. In order to find conduct falling under section 78(1)(e) of the Act, I must find that the applicant deliberately misled the respondents or the Tribunal.[56]

132. I have carefully reviewed the "payment summaries" proffered by the applicant's solicitor on 2 November 2018. I have also considered and accept the account of Mr Chadha, to the effect that he attempted to make the required payments on 19 October 2018 pursuant to the First Undertaking, as evidenced by the payment summaries. I also accept that he was mistaken in not including the GST component.[57] I find that the intended payments were not received by the second respondent in cleared funds because, in the event, there were insufficient funds in the account of the applicant.

133. I am not satisfied that, in these circumstances, there is sufficient evidence of matters necessary to found a strike or dismissal claim relying on section 78(1)(e) of the Act.

134. The respondents also submit that the applicant also has not satisfactorily explained why it gave instructions to its counsel at the hearing on 9 November 2018 to the effect that partial payments of the October licence fee had in fact been made in September 2018.

135. By way of response, by paragraphs 4-7 of his third affidavit sworn 12 November 2018, Mr Chadha concedes that he was mistaken in instructing his lawyers that his friend, Mr McLean, had made payment of the licence fee for October 2018 on or about 6 September 2018, and that the payment made on that date was in fact for the September licence fee. Having carefully considered the contents of those paragraphs, I have concluded that

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56 See also *Bevendale Ltd v Look Melbourne Pty Ltd* (unreported) 22 March 1999.per Deputy President McNamara (as he then was) "To make a finding of intentional deception is a very strong thing and I refrain from doing so".

57 See paragraph 9 of the Mr Chadha's third affidavit.

there is no evidence from which I can fairly conclude that the "pre-payment" representation that he conveyed to his counsel was anything other than a genuine error on his part.

136. I am unable, on the evidence, to find that the applicant has engaged in conduct of the type described in section 78(1)(e) of the Act.

Analysis-Allegedly vexatiously conducting the proceeding within the meaning of section 78(1)(f) of the Act

137. In *State of Victoria v Bradto Pty Ltd* his Honour Judge Bowman held that a proceeding is conducted in a vexatious matter "if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging". The Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[58] agreed that his Honour's description "encapsulates the circumstances in which conduct may be classified as vexatious".

138. Vexatiously conducting a proceeding therefore relates to the way in which the proceeding is conducted.

139. The respondents rely on the above failures to comply with the terms of the First Undertaking and Second Undertaking, together with commencing the proceeding in the face of clause 3(b) of the Terms, as supporting an argument that the applicant "vexatiously conducted the proceeding" within the meaning of section 78(1)(f) of the Act.

140. I am not satisfied, for the reasons that I have outlined above, that the circumstances amount to vexatious conduct within the meaning of section 78(1)(f) of the Act, in the sense described in *State of Victoria v Bradto Pty Ltd.*

141. In the Tribunal's retail leases' jurisdiction, there is authority to the effect that pursuing a claim in circumstances that it was bound to fail amounts to "the party having conducted the proceeding in a vexatious way" within the meaning of section 92(2) of the *Retail Leases Act 2003*.[59] I am not sufficiently persuaded that the meaning of "vexatiously conducting" in section 78(1)(f) of the Act should necessarily be construed in the same manner. Section 75 of the Act expressly provides an additional specific procedural remedy where there exists a proceeding that is bound to fail so as to amount to a vexatious proceeding.

142. In this respect, I am also not satisfied that a "bar from suit" clause of the type represented by clause 3(b) of the Terms, and relied on by the respondents, prevents a proceeding subsequently being brought, where it is alleged that the very agreement containing the clause was entered into in

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58 [2015] VSCA 216

59 see Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VCAT 596 per Judge Jenkins, subsequently approved on appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216.

reliance on alleged misleading and deceptive conduct of the counterparty. I do not accept that the bringing of the proceeding in the face of the "bar from suit" clause amounts to vexatiously conducting the proceeding.

143. I am not satisfied on the evidence that in respect of any of the conduct complained of the respondents are unnecessarily disadvantaged.

144. For the reasons I have outlined, the further application by the respondents that the proceeding be dismissed or struck out pursuant to section 78(2) of the Act is dismissed.

145. In the circumstances, the applicant has no right to remain in possession of the premises under any agreement and the second respondent has not consented to any period of overholding.

146. There is no basis, therefore, upon which the applicant may be granted an injunction, because the applicant does not have a specifically enforceable contract granting it any rights to remain in the premises or any other proprietary right in the premises to protect.[60] There is in my view no legal basis for its claim for an injunction, or any arguable basis on which it may seek to extend the period of the licence.

147. I make the accompanying orders, and I shall reserve costs.

A T Kincaid
Member

[60] See, eg, *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18,085; [2000] NSWSC 459 *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; 217 CLR 315, [37]-[62] (Gleeson CJ).