VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP693/2015

CATCHWORDS

Commercial tenancy – written form of lease – some matters to be agreed upon missing from document – conflict between provisions – no indication as to which meaning intended – no prior oral agreement as to matters in doubt - whether purported lease void for uncertainty –words used must evince a definite meaning – impossible to find agreement as to essential matters – purported agreement void – amendment of part of document – whether deficiencies cured - purported renewal of void lease – possession of premises and payment of rent monthly – periodic tenancy – notice to quit by landlord - damages as mesne profits payable by tenant for occupation of land following termination of tenancy

APPLICANT	Melbourne Gourmet Foods Pty Ltd (ACN 124 797 673)
RESPONDENT	Steven Lawther (as Trustee of the Estate of Lieu-Yen Chau)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20 - 22 January 2016
DATE OF ORDER	11 February 2016
CITATION	Melbourne Gourmet Foods Pty Ltd v Lawther (Building and Property) [2016] VCAT 160

Order

1. The application is dismissed;
2. Order that, as from 5 pm on 19 February 2016, the Applicant by itself, its servants or agents or otherwise howsoever, be restrained from:
   (a) occupying or continuing to occupy the premises situated at and known as 167 to 169 Kensington Road, Kensington, being the land comprised in Certificate of Title Volume 08050 Folio 001;
   (b) entering upon the said premises without the written consent of the respondent;
   (c) preventing the respondent from taking possession of the said premises or interfering with his position thereof.

3. Order the Applicant to pay to the Respondent mesne profits assessed at $15,600.00;

4. Order the Applicant to pay to the Respondent interest on the said sum of $15,600.00, at calculated at $511.60.

5. Liberty to the Respondent to apply to a judicial member of the Tribunal for an order for possession if it should be necessary or expedient to do so.

6. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES*:*

For the Applicant:	Ms J. Croxford of counsel
For the Respondent:	Mr D. Gibson of counsel

REASONS FOR DECISION

Background

1. The Respondent is the executor of the will of his deceased partner, Lieu-Yen Chau ("Miss Chau"). As executor he is registered as the proprietor of an estate in fee simple in the land and improvements situated at and known as 167 to 169 Kensington Road Kensington ("the Warehouse") being the land comprised in Certificate of Title Volume 08050 Folio 001.

2. The Applicant occupies the Warehouse and has done so since about October 2009. It carries on business in the Warehouse as a seller and distributor of foodstuffs.

3. The Applicant claims to be entitled to a lease of the Warehouse for a period of five years, commencing on 1 August 2014. It also claims to be entitled to the benefit of a number of options for further terms with respect to the Warehouse. The entitlements are said to arise from the purported exercise of an option that the Applicant claims to have effected by a letter from its solicitor, Mr Naughton, on 23 April 2014. It is said that this letter was effective to renew an earlier lease of the Warehouse. The Respondent denies that the Applicant has any such entitlement and says that the Applicant was at all relevant times a monthly tenant of the Warehouse and that the tenancy was determined by a notice of termination dated 1 May 2015 which required the Applicant to deliver up possession of the Warehouse by 5 June 2015.

4. Following the service of the purported notice of termination, the Applicant commenced these proceedings and sought and obtained an order from this tribunal on 3 June 2015 restraining the Respondent from entering into possession

of the Warehouse. The order was granted upon the Applicant giving the usual undertaking as to damages.

Orders sought

5. The Applicant seeks declaratory relief to the effect that it has the entitlement that it claims to a lease together with a number of options to renew. It seeks various other orders of a declaratory nature and an order for rectification of the lease document to the effect that the original term of the alleged lease was three years and not two years as stated in its schedule.

6. The Respondent seeks an order for possession of the Warehouse and payment of the difference between the money the Applicant has paid as rental since 5 June 2015 and what is found to be the rental value of the Warehouse for the same period together with interest. It is unclear from the counterclaim whether this is claimed as mesne profits or as damages suffered by reason of the order made on 3 June 2015 which restrained re-entry by the Respondent. By its undertaking to the Tribunal, the Applicant has undertaken to pay any such damages if the tribunal should find that they ought to be paid by the Applicant.

The hearing

7. The matter came before me for hearing on 20 January 2016 with three days allocated. Miss J Croxford of counsel appeared for the Applicant and Mr D Gibson of counsel appeared for the Respondent.

8. For the Applicant I heard evidence from its director, Mr Melhem. For the Respondents I heard evidence from the Respondent, from a Mr Moroney, and from a valuer, Mr Courtney. Evidence concluded on the morning of the second day and the proceeding was then adjourned part heard until the morning of the third day for submissions, following which I informed the parties that I would provide a written decision.

History

9. Prior to its occupancy by the Applicant the Warehouse had been occupied by members of Miss Chau's family who manufactured noodles there. There is no evidence that Miss Chau herself was involved in this business. According to the Respondent she was a dental nurse. During at least part of the period in which the Warehouse was used by Miss Chau's family, Mr Melhem was managing a food distribution business elsewhere, and in the course of that business he purchased noodles from her brother.

10. Noodle manufacturing in the Warehouse ceased when the building caught fire and the family then moved its activities to other premises. By that time Mr Melhem had started his own business. In 2007 he was informed by Miss Chau's brother that the Warehouse, which had then been repaired, might be available for lease but Mr Melhem was not willing to pay the rental of $32,000 per annum that Miss Chau wanted.

11. Further discussions occurred in 2009 and Miss Chau eventually agreed to lease the Warehouse to the Applicant at a rental, including GST, of $27,500. It was

agreed that Mr Melhem would arrange to have a lease to that effect prepared by a solicitor.

The First Document

12. There is a document ("the First Document") tendered on behalf of the Applicant which is said by Mr Melhem to be this first lease. My copy is undated but it purports to be for a period of two years starting on 1 August 2009. It provides for a fixed rental for the first two years of $27,500, and then for a fixed rental for the following three years if the Applicant should exercise an option for that period. There are two further option periods of five years each, the first at a fixed rental and the second at a rental to be negotiated. All outgoings excluding building insurance are to be paid by the Applicant.

13. The copy of the First Document that has been tendered bears no signature on behalf of the Applicant but appears to have been signed by Miss Chau.

14. The permitted use of the Warehouse is said in the First Document to be "Food Factory Warehouse". There is no mention of retailing and the provision made in the lease form that was designed to be used by the parties to indicate whether or not the *Retail Leases Act* 2003 applies was not completed by deleting whichever of the two alternatives was inapplicable.

15. The period of this lease expired on 1 August 2011. Mr Melhem said that, in the meantime, he contacted Miss Chau in November 2010 about wanting to extend the manufacturing area. He said that he told her that he proposed to spend a great deal of money setting up a manufacturing plant and would need two further option periods of five years. He said that she said that was fine and that he should prepare everything and send the documents to her. He said that he told her that the lease would be the same as before, the only alteration being the further options for renewal. He did not specifically say in the course of his evidence that he had exercised the option granted in the first document to renew the term. Mr Melhem acknowledged during the hearing that he has not set up any manufacturing plant although over four years have now passed and that was the justification for the additional option periods.

16. Although this conversation was said to have occurred in November 2010, the next document was not signed until August 2012, which is well after the term created by the first document expired. Mr Melhem sought to explain that delay by saying that he lost touch with Miss Chau and did not have her address or telephone number. He said that he subsequently obtained it from her brother. Rental continued to be paid into her account and I think that if he had really wanted to contact her he could have done so. In any event, a second form of lease document was signed ("the Second Document"), albeit a year after the first term had expired.

The Second Document

17. The Second Document, which has been tendered on behalf of the Applicant, is dated 16 August 2012. It is this document which forms the basis of the Applicant's claim. It bears the signature of Miss Chau which has been witnessed

by the Respondent and is also signed on behalf of the Applicant by Mr Melhem. According to Mr Melhem, the Second Document was prepared by his solicitor on the exact same conditions as the First Document. His solicitor was a Mr Naughton

18. I am satisfied from the evidence of the Respondent, who spoke to Mr Naughton by telephone, and Mr Moroney, who listened in on the conversation, that Mr Naughton did not in fact prepare the Second Document. In that telephone conversation Mr Naughton told the Respondent and Mr Moroney that he had prepared a draft and sent it to Mr Melhem for completion but never received it back from him. He said that he never saw the final document. The account of this conversation given by the Respondent and Mr Moroney was detailed in the Respondent's material which was served upon the Applicant. Mr Naughton was not called to give evidence to contradict it. I am satisfied that the conversation occurred as described.

19. A comparison of the two documents shows that although they are both for a period of two years, they are not "on the exact same conditions" as Mr Melhem had agreed. Building outgoings have been limited to Council rates, South East water rates and power, phone and gas. The Applicant is now required to take out public risk insurance and the security deposit is quantified. There is an additional provision entitling the Applicant to "take partners in the business" without a new lease. There is no evidence that any of these matters were discussed with Miss Chau before the Second Document was prepared.

20. The period stated in the Second Document is two years. By the design of the standard form document that was used, the provision for rental is intended to be inserted in Item 6 of the Schedule. As it has been completed by Mr Melhem, it reads as follows:

> "(a) $30,000.00 per calendar month inclusive of GST or $2,500.00 per calendar month, for the first term of three years;
>
> (b) The Second term of five (5) years is $32,500.00 PA GST inclusive for five (5) years.
>
> (c) The Third term of lease rent will be $35,000.00 PA GST inclusive fixed for five (5) years.
>
> (d) The Fourth term of lease rent will be $37,500.00 PA GST inclusive fixed for five (5) years.
>
> (e) The Fifth term to be negotiated and fixed increase should not exceed 10% of the current rent at the time of the option renewal and the term is five (5) year." (sic.)

21. There is no amount specified as being the rent for the two-year period expressed to be created by the Second Document. Moreover, the option periods specified in Item 18 of the Schedule are one period of three years and three periods of five years yet Item 6 of the schedule provides for rental for each of those periods plus an additional five year term for which no entitlement is conferred by Item 18.

22. Mr Melhem acknowledged that Miss Chau trusted him to have the lease prepared by a solicitor and he has not suggested that she had any input into what the Second Document contained. He does not provide the detail of the execution of the Second Document in his witness statement. In his oral evidence he said that she came to the Warehouse to sign the lease on 10 August 2012 and was there for about one and a half hours. Since Mr Melhem claims that the document was drawn by Mr Naughton I am unable to find that it was drawn up in Miss Chau's presence. Neither Mr Melhem nor the Respondent, who was also present, suggested that it was, and neither of them gave any evidence as to what was said on that occasion. The Second Document, in the form in which it was signed, was unaltered, suggesting that no alterations were made to it between the time of its preparation and Miss Chau's arrival. It was not suggested that she had seen it beforehand.

Subsequent events

23. In December 2012 Miss Chau gave birth to her daughter. On 27 February 2013 she suffered a cardiogenic shock and on 14 March 2013 she had a ventricular assist device inserted. According to the Respondent, this involved cables emerging from her stomach which were connected to a computer which kept her heart operating. Thereafter, her health deteriorated. She walked with the aid of a walking frame and according to the Respondent she was in considerable pain and was frail and depressed. She was unable to carry the weight of the computer that operated the device that kept her alive and he had to accompany her everywhere.

24. In about July 2013 Miss Chau consulted her solicitor, Mr Caldwell, together with the Respondent in order to make a will and to seek advice concerning the Second Document. According to the Respondent, Mr Caldwell advised her during the consultation that the two-year period of the lease had expired and that as far as he could see a new lease should either be drawn up or the Applicant should vacate the Warehouse. Miss Chau arranged for an estate agent to visit the Warehouse for the purpose of making a valuation for the purpose of its sale. In about early August 2013 she arranged a meeting with Mr Melhem at the Warehouse to discuss the Second Document.

The August meeting

25. Neither the Respondent nor Mr Melhem was able to tell me the precise date of this meeting. The date is not recorded for it but according to the evidence it was after Miss Chau made her will and before she received a heart transplant in September 2013, which means that it occurred sometime in August or possibly even early September. The accounts given of this meeting by Mr Melhem and by the Respondent differ somewhat.

26. I find that Miss Chau arranged the meeting because she was concerned about advice that she had received that the alleged lease purported to tie the Warehouse up for so long and at such a reduced rental, that its value would be seriously diminished as a consequence and that she would not get a fair price for it. She was concerned to secure the financial future of her daughter and the Respondent.

I find that she told Mr Melhem that she proposed to sell the Warehouse and I think that Mr Melhem's evidence to the contrary is unlikely to be true.

27. It is clear from Mr Melhem's evidence that his concern at this meeting was to correct what he alleged was an error in the Second Document that he himself had prepared, to the effect that the term of the lease was two years and not three which, he claimed, had been his intention.

Miss Chau's condition at the meeting

28. Pedestrian entry to the Warehouse is gained through a door from a driveway at the rear. Inside that door, there are a number of steps up to the floor level of the Warehouse but Miss Chau was unable to climb them and so a chair was brought down for her to sit on at the foot of the stairs. Mr Melhem agreed that she was frail at the time. I also accept the Respondent's evidence that she was upset, tired and very sick.

29. The Respondent said that Mr Melhem dominated the conversation and would not let Miss Chau "get a word in". Mr Melhem's concern was to amend the period of the lease from two to three years in order, he said, to correct a mistake. In exchange for her agreement to that, he offered to abandon the last five year option period and reduce the third option period from five years to three years if Miss Chau were to sell the Warehouse.

30. The Respondent said that any alteration to the Second Document should be made by a solicitor, whereupon Mr Melhem said to him in an aggressive manner and tone words to the effect that: "We don't need a solicitor, these amendments will fix it". The Respondent said that he replied with words to the effect: "This is wrong to make her do this while she is so sick and I will not be a witness to anything here" whereupon Melhem said to him: "You do not need to say anything as it has nothing to do with you and we do not need you to witness anything anyway". I accept that words to the foregoing effect were said and I accept the Respondent's evidence as to Mr Melhem's manner towards Miss Chau.

31. Mr Melhem then put the pen into Miss Chau's hand for her to initial the handwritten amendments that he had made and she did so. He did not give her a copy of the altered document.

32. The Respondent did not suggest that Mr Melhem was rude or offensive in his behaviour towards Miss Chau or that he physically forced her to initial the amendments. Rather, he said that Mr Melhem was overbearing and dominated the conversation and that she felt pressured to make the amendments. He acknowledged that he was not present for the whole time in that, for a few minutes, he left the area in order to change the baby's nappy. However he said that, during the meeting, Mr Melhem was made aware that Miss Chau had recently suffered a heart attack and had been in hospital with severe illness through much of 2013.

The amendments made to the Second Document

33. The amendments were simply to Item 6 of the Schedule where Item 6(e) was deleted and Item 6(d) was reduced to three years, subject in each case to Miss Chau selling the Warehouse. The other amendment was to change the two year period of the lease in Item 8 to three years. Otherwise the amended document is simply the Second Document.

34. Miss Croxford submitted that, although the Second Document provided for an initial two year term, the parties recognised and agreed that the initial term of the lease was in error and that it should have been for three years. That is not established on the evidence. Although Miss Chau initialled the amendments I am not satisfied that it is demonstrated that she acknowledged that there was such an error. Mr Melhem claimed that it was an error but he was the one who prepared this document and how such a fundamental error came to be made was never satisfactorily explained.

Subsequent developments

35. On 25 September 2013 Miss Chau received a heart transplant but suffered from complications and never emerged from hospital. She died on 20 December 2013. The Respondent informed Mr Melhem of her death and he attended the funeral.

36. On 28 April 2014 Mr Naughton wrote to the Respondent on the Applicant's behalf, purporting to exercise the option. When the Respondent denied that there was a lease in force these proceedings were brought.

The Retail Leases Act 2003

37. Miss Croxford submitted that the *Retail Leases Act* 2003 applied to the tenancy claimed to have been created by the Second Document. Assuming for the moment that a tenancy was created by it, for the Act to apply the tenancy alleged would have to fall within the description to be found in s.4(1) of the Act, which, where relevant, is as follows:

> "(1) In this Act, retail premises means premises, not including any area intended for as use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—
>
> (a) the sale or hire of goods by retail or the retail provision of services;"

38. Although Miss Croxford acknowledged that this definition requires that the use must be "under the terms of the lease", she submitted that the use actually made of the premises will often inform the enquiry into whether the relevant use is subject to the Act. I am uncertain what that means. I think I should focus on the wording of the Second Document and the words of the section.

39. Item 15 of the Schedule to the Second Document provides that the Act does not apply. The parties cannot agree to exempt the Act if it would otherwise apply (see s.94(1)) but they can agree upon the permitted uses to be made of the premises. The permitted use in the present case is described in Item 15 as "Food Factory Warehouse". There is no mention of any retail activities. By Clause

2.2.1 of the document, the Applicant must not use the Warehouse for any purpose except for the permitted use.

40. Mr Melhem's present contention that the Act applies sits uneasily with the state of the documents. Although he had undertaken the responsibility of having the necessary lease documents prepared, he had no documents prepared that were designed to comply with the requirements of the Act. No disclosure statement was prepared and the wording of the Second Document, which included the acknowledgement that the Act did not apply, was at least partly his own. In it, he said that the Act did not apply.

41. The single photograph of the Warehouse that I have, on page 4 of Mr Courtney's valuation, shows that it has a frontage to the street but no signage and no door allowing passenger access from the street. There is a roller door at the front to allow truck access to a loading bay but this loading bay is at ground level and there are no steps from the loading bay up to the internal floor level of the Warehouse. According to the evidence of Mr Melhem, a pedestrian seeking access to the Warehouse must walk down the driveway to a door which has no signage other than the name of the Applicant. In order to gain entry it is necessary to ring a bell to attract the attention of the occupants. Upon being admitted to the building it is then necessary to walk up stairs to the floor level of the Warehouse. There is no counter and no display of stock for sale and no cash register. It is not possible to pay for anything by credit card. Rather, payment must be in cash or by cheque.

42. In these circumstances it is quite clear that the Applicant's business would attract no passing trade. The only retail customers who would visit the Warehouse to purchase anything would be persons with prior knowledge that goods were there for sale and that, although they were retail customers, they would be able to purchase them. There is no evidence of any advertising directed to retail customers or other measures taken to bring these matters to the attention of the public and attract people to the warehouse.

43. In his witness statement dated 11 December 2015, Mr Melhem said that he operated "a wholesale and food outlet" but that the public can come to purchase food as well. However in his earlier supplementary affidavit dated 3 June 2015, he described the Applicant's use of the Warehouse in the following terms:

> "The Applicant company operates a food distribution business from the premises. It sells frozen and chilled food and pre-packaged meals such as pasta meals, poultry meals and pieces and pizzas and pastry products to cafes, small takeaway food businesses, supermarkets and delis on a daily basis. Those businesses then use the food that the company sells to cook and prepare food for sale to the public. The Applicant company also uses a small part of the premises as an office."

44. That is not a description of a retail business. In his oral evidence at the hearing Mr Melhem said that approximately 5% of his business was to retail customers. He acknowledged that he had no permit from the council to conduct a shop in the Warehouse

45. As to what needs to be shown in order to establish that premises are retail premises within the meaning of the Act, Miss Croxford referred me to a number of authorities upon which she relied.

46. In the case of *Wellington v. Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333, Nathan J said (at p.336):

> "The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so."

In that case the relevant service, which was provided from the premises, was that of a patent attorney who would sometimes provide advice to solicitors who would then pass the advice on to their own clients. Although the advice was to be used for commercial purposes it was nevertheless rendered to the final consumer. I think the important thing to note about this case is that the advice rendered to the end user was provided from the premises.

47. Miss Croxford also referred me to the case of *Fitzroy Dental Pty Ltd v. Metropole Management Pty Ltd & anor* [2013] VSC 344. In that case the permitted use was "Conference centre, cafe/restaurant area and associated office storage space". The provision of food and drink as well as entertainment to the end consumer in the course of carrying out this use amounted to the retail provision of goods and services. Again, the food, drink and entertainment were provided at the premises. In that case, as in the previous case, the key question was the use to which the premises were put and in each case the premises were used in order to supply the goods and services to the end user.

48. Miss Croxford submitted that the provision by the Applicant of food to retail food outlets which then supplied the public amounted to a retail use, in that the goods were supplied to the end consumer in a condition unchanged from their condition when they left the Warehouse. That is not sufficient to bring the Warehouse within the Act. The supply of the goods to the end user takes place at the retail premises of the Applicant's customer, not at the Warehouse. Moreover, if this argument were correct it would apply to virtually every Warehouse or distribution centre. The flaw in the argument is that, although the supply to the ultimate consumer is a retail transaction, that supply does not take place in the Warehouse.

49. In these circumstances I find it impossible to see how the Warehouse could be said to be used, under the terms of the Second Document, wholly or predominantly for the sale or hire of goods by retail or for the retail provision of services.

The rental

50. Evidence concerning the rental value of the Warehouse was given by Mr Courtney. He gave evidence that he was a certified practising valuer and had been a valuer since August 1961. No other valuation evidence was called.

51. Mr Courtney inspected the Warehouse on 30 September 2015. He said that, by the term "market value", he meant the value for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion.

52. He said that "market rental value" of premises was:

> "The rent obtainable at the time of assessment in a free and open market between a willing landlord and willing tenant in an arms-length transaction having regard to these matters:
>
> the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same or a substantially similar, use to which the premises may be put under the lease;
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> the landlord's outgoings to the extent to which the tenant is liable to contribute to these outgoings;
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> wherein the parties had each acted knowledgeably, prudently and without compulsion."

53. After considering the accommodation afforded by the Warehouse and rentals commanded by other properties in the area, Mr Courtney concluded that the net rental value of the Warehouse as at 1 August 2011 was $42,225, excluding GST, and the net market rental value as at 4 June 2015, excluding GST, was $44,900.

Net rental and gross rental

54. Mr Courtney said that the net rental was the rent to the owner free of all outgoings. Accordingly, in order to arrive at a gross rental value there must be added to these figures the outgoings paid by the landlord. According to the Respondent's evidence, at the present time, he pays land tax on the Warehouse of $5,055 per annum and the cost of insuring it is $2,639.50 per annum. In August 2011 land tax was only $895. Although the building insurance in 2012 was $2,889.45 I have no evidence as to what was in 2011.

55. According to Mr Courtney's evidence, these amounts of land tax and insurance need to be added in order to arrive at the gross rental value of premises where land tax and building insurance are to be paid by the landlord. On that basis the gross market rental value of the Warehouse at 1 August 2011 was $43,120 plus whatever the insurance was, which appears likely to have been at least another $2,000. The gross market rental value of the Warehouse as at 4 June 2015 on the other hand was $52,594.50.

56. There was no agreement by the Applicant to pay market rental value. However it is apparent from these findings that the rentals fixed under both the First Document and Second Document are well below the gross market rental value of the Warehouse. Moreover, since the rentals for the renewal periods described are all tied to the initial rental, the documents Mr Melhem prepared were designed to tie Miss Chau to substantially reduced rentals for over 20 years. It is hardly

surprising that she was advised that that would seriously reduce the price for which the Warehouse could be sold.

What to make of the Second Document?

57. There are a number of inconsistencies and apparent omissions from the Schedule to the Second Document.

58. In Item 8, the term of the lease is expressed to be two years, starting on 1 August 2011, and yet there is no provision in Item 6 that fixes the rent for this period. Item 19 provides that the last date upon which the first option for renewal conferred by Item 18 May be exercised is 1st May 2014, yet by that date, the period of the lease would have expired.

59. Mr Gibson urged me to find that the term of the lease, which is clearly stated to be two years, is correct and that the renewal date was a typographical error and should have read 1 May 2013. He said that this was the simplest explanation for the inconsistencies in the Schedule. However that still leaves unresolved the rental payable for the two-year period as to which no provision has been made..

60. Miss Croxford said that the date for the exercise of the option is correct and that the mistake was in the period of the lease which should have been three years and not two. However Mr Melhem had told Miss Chau over the telephone that the document would be identical to the previous lease apart from the additional option periods. The previous lease was for two years. Further, if paragraph (a) of Item 6 is intended to be the rental for the period of the lease, that is, three years, then that is inconsistent, not only with Item 8 of the Schedule but also with Item 18, which says that the renewal periods are one further term of three years followed by three periods of five years. There is a further inconsistency between Item 6 and Item 18 in that the former suggests that there are four five year option periods whereas Item 18 provides that there are only three. In addition, Miss Croxford's interpretation would mean that Item 6 does not provide for a rental for the first renewal period of three years.

61. When I put these matters to Miss Croxford she suggested that I should find that the period of three years referred to in Item 18 is the period of the lease and that I should ignore the words and figures "Three (3)" on the second line of Item 18. She also invited me to insert the number "four" in substitution. I do not believe that I can simply ignore words in a document or alter them to other words when that document is the only repository of the agreement that the parties are claimed to have had. In support of her submission, Miss Croxford said that the number of option periods was indicated in Item 6. That is not the item that the text of the lease document refers to in regard to options to renew. Further, the term of three years in Item 18 is clearly described as being a further term, not the original term of the lease.

Uncertainty

62. Mr Gibson submitted that the Second Document was void for uncertainty. Before determining that a document is so uncertain as to be void, some attempt

must be made to render it certain by a process of interpretation. Id certum est quod certum reddi potest – something is certain if it can be made certain.

63. One should not find that a document is void for uncertainty too readily. In this regard, Lord Wright said in *G. Scammell and Nephew v Ouston* [1941] AC 251:

> "The object of course is to do justice between the parties, and the Court will do its best, if satisfied there is an ascertainable and determinative intention to the contract, to give effect to that intention, looking at the substance and not the mere form. It will not be deterred by mere difficulties if interpretation. Difficulty is not synonymous with ambiguity as long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically, and with due regard to all such implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract. Such a position is not often found."

64. Mr Gibson referred me to the case of *Thorby v Goldberg* [1964] HCA 41 where Menzies J said (at para 2 of the judgment):

> "It will therefore be necessary to examine the agreement as a whole but, before I do so, I would say that I do not think the law to be applied is in any doubt and I agree with and will apply the following statement of that law from the dissenting judgment of Sugerman J. He said: -
>
> > "It is a first principle of the law of contracts that there can be no binding and enforceable obligation unless the terms of the bargain, or at least its essential or critical terms, have been agreed upon. So, there is no concluded contract where an essential or critical term is expressly left to be settled by future agreement of the parties. Again, there is no binding contract where the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention". (at p607)."

65. He also referred me to the following passage in the judgement of Graham J in *Ku v Song* [2007] FCA 1189, where the learned judge said (at para. 51)

> "The primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or

unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate'…"

66. The real problem with the Second Document is not so much ambiguity but rather, it says conflicting things and it is impossible to tell from its face what it means. Even if resort could be had to the discussions between the parties it appears that there were none, apart from the telephone call Mr Melhem said that he had with Miss Chau where, he said, it was agreed that there would be two additional five year option periods and that it would otherwise be on the same terms as the First Document.

67. That telephone conversation and the Second Document itself when signed indicate that it was the intention of the parties to enter into a two year term, yet Mr Melhem now says that that was a mistake and that his intention was always to enter into a three-year term. Both the telephone conversation and the wording of the Second Document on the one hand, and what Mr Melhem says was his own intention on the other, point in different directions but they are extrinsic to the document. Keeping only to the Second Document, it clearly states that the term granted is a period of two years but the date by which the option to renew must be exercised and Item 6 in the schedule, which omits any provision for rent for a two-year period, are inconsistent with that. The document is undoubtedly deficient and it is impossible to ascertain from its terms what the intention of the parties was.

68. It is impossible to render all of the provisions of this document harmonious one with another and I have no power to remake or amend the document. It is not possible to ascertain any particular meaning through a process of construction. The Second Document is incapable of being given any definite meaning upon which I can safely act and so it is void for uncertainty.

Severance

69. Mr Gibson raised the issue of severance. As to whether any of the items in the schedule can be severed, he referred me to the joint judgement of Taylor, Menzies and Owen JJ in *Whitlock v Brew* [1968] HCA 71 where the learned judges referred (in para 6 of the judgment) with approval to the following earlier statement of principle by Knox CJ in the case of *Life Insurance Company of Australia Ltd v Phillips* [1925] HCA 18 where said:

"When a contract contains a number of stipulations one of which is void for uncertainty, the question whether the whole contract is void depends on the intention of the parties to be gathered from the instrument as a whole. If the contract be divisible, the part which is void may be separated from the rest and does not affect its validity."

70. After referring to this passage the learner judges continued (at paragraph 6 of the judgement):

"Observations in the same case make it clear that in seeking to ascertain the intention of the parties to a written contract extrinsic evidence may not be resorted to except

where such evidence may be called in aid in the interpretation of the written instrument. Clearly enough, it seems to us, it is not to the point to make an independent examination of extrinsic facts, even if they were within the knowledge of both parties, and upon such evidence to conclude that a particular provision was or was not of importance to them or to either of them; the question for determination is the intention of the parties as disclosed by the contract into which they have entered."

71. The problem with severance in the present case is to determine what parts of the Schedule you would sever in order to render the remainder of the document certain. Severing some parts of the document might give it one meaning whereas severing other parts might give it an entirely different meaning. I have no way of ascertaining which parts, if any, should be severed. Further, the main conflict lies in the granting of the option periods and, when viewed objectively, a provision granting an option cannot be said to be so insignificant that it would be severable. Indeed, it is to establish its alleged rights under the option periods that the Applicant has brought this proceeding.

Capacity

72. Some medical evidence concerning Miss Chau was tendered in the form of a medical report and an autopsy report. In addition, her condition and appearance at the meeting where the Second Document was altered by Mr Melhem has been described above. Mr Gibson submitted that there was sufficient evidence for me to conclude that Miss Chau was feeling tired and may not have considered all the matters in the lease. That seems likely. He also submitted that Mr Melhem acknowledged that Miss Chau had trusted him and had relied on him to do the right thing in preparing the lease documentation. That was admitted by Mr Melhem.

73. The Respondent said that Miss Chau was kind and not dominating. According to Mr Moroney, Mr Naughton told the Respondent, in the telephone conversation that he overheard, that Mr Melhem had told him that Miss Chau was very relaxed and seemed easy to deal with. Mr Melhem did not deny that he said that to Mr Naughton.

74. Mr Gibson submitted that, in the circumstances, after seeing her condition at the meeting at which the alterations to the Second Document were made, Mr Melhem should have insisted that she obtain legal advice before proceeding with the amendments and that his actions amounted to unconscionable conduct in taking advantage of her position by insisting on the amendments at a time when she was not in a fit state to consider the matter and by pressuring her in the way that he did.

75. I think the evidence goes a little further than that. When the Respondent attempted to intervene and suggested that Miss Chau obtain legal advice he was informed by Mr Melhem that the matter did not concern him and that a solicitor was not required.

76. The Respondent said that, at the meeting, every time Miss Chau opened her mouth to speak Mr Melhem would speak over her. I do not understand why, if he

thought Miss Chau was being overborne by Mr Melhem, the Respondent did not try harder to intervene, since Miss Chau was dependent on him for support. However, from his demeanour in the witness box he did not appear to be a forceful person either, and he said that he did not have much knowledge of finances.

77. The equitable jurisdiction to set aside a transaction on the ground of unconscionable conduct is well-established (see *Commercial Bank of Australia Ltd v Amadio Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14). It applies where one party to a transaction, who suffers detriment by reason of the transaction, is suffering from some special disability or is placed in some special situation of disadvantage at the time of the transaction and the other party unconscientiously takes advantage of the opportunity presented by that situation.

78. Although I have no evidence from Miss Chau, since she is now deceased, that her will was overborne, I am certainly not satisfied that she brought a considered judgement to these alterations. I think it would be unconscionable for Mr Melhem, in all the circumstances, to rely upon the alterations that he made. He believed that she was easy to deal with, he knew that she was very frail and seriously ill yet he did not allow her to talk, he adopted a forceful and overbearing manner and, most significantly, deprived or attempted to deprive her of the support of the Respondent, upon whom she relied. Mr Melhem had undertaken the responsibility of properly documenting the leasing of the Warehouse. He acknowledged that she had trusted him and yet he was seeking to lock her into an unrealistically low rental for over 20 years.

79. However even if these alterations to the Second Document are not set aside, they do not save the situation as far as the Applicant is concerned. It is still impossible to say what the Second Document means and it is still void for uncertainty.

Rectification

80. The Applicant seeks in the alternative, an order that Item 8 of the Schedule to the Second Document be rectified so that it provides for a term of three years starting on 1 August 2011. Power to grant rectification is conferred by s. 91(1)(c) of the *Retail Leases Act* 2003, but since the alleged lease does not fall within that act that power is unavailable. The tribunal has no general equitable jurisdiction but s.184(2)(f) of the *Australian Consumer Law and Fair Trading Act* 2012 confers power upon the tribunal to order rectification of a contract in the course of determining a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services (see s.182 of that act). Those are the provisions which confer jurisdiction to decide the present dispute.

81. As to the principles upon which an order for rectification may be made, I was referred to the case of *Re Butlin's Settlement Trusts* [1976] Ch. 251. That case

and other authorities were recently discussed by the Court of Appeal in *The Club Schanck Resort Company Limited v Cape Country Club Pty Ltd* [2001] VSCA 2.

82. The principles are well-established, but in order to be able to make an order for rectification I would need to be satisfied that there was a prior oral agreement that the term of the proposed lease was to be three years and not two. There is no evidence that a three year term was discussed with Miss Chau before the document was prepared. The only discussion in evidence is the telephone conversation in which Mr Melhem informed Miss Chau that the proposed lease document would be upon the same terms as the First Document, which provided for a two-year term. There is no evidence of any other agreement by Miss Chau as to the term of the proposed lease apart from the Second Document itself which is the sole repository of any agreement that the parties had.

Mesne profits

83. I am satisfied that, on the date upon which the Applicant received the notice to vacate, it had only a monthly tenancy of the Warehouse and consequently the Respondent was entitled to serve the notice.

84. The effect of the notice was that the monthly tenancy was determined as at 5 June 2015. Consequently the continued occupation of the Warehouse by the Applicant was a trespass for which mesne profits are payable.

85. The circumstances in which a claim for Mesne profits can be made are succinctly put in *Halsbury's Laws of England* 4th Ed. Vol. 27 para. 255 as follows:

> "The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendants trespass, landlord may recover as mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, and only be recovered in respect of the defendants continued occupation after the expiry of his legal right to occupy the premises."

86. In the present case, the open market value of the Warehouse for the period between 5 June 2015 and the date of judgement is $52,594.50. The damages suffered by the Respondent through being out of possession of the Warehouse is therefore the difference between that figure and what he has received, which is $30,000 per annum, is $22,594.50. From 5 June 2015 until 11 February 2016, which is 249 days, the difference in rental is $15,600.00.

The claim for interest

87. In his prayer for relief, the Respondent seeks interest on the amount awarded for mesne profits.

88. By s.184(2)(b)(ii) of the *Australian Consumer Law and Fair Trading Act* 2012, the Tribunal may order the payment of damages in the nature of interest on that sum. By s.184(4) interest may be awarded at the rate fixed from time to time under s.2 of the *Penalty Interest Rates Act* 1983 or at any lesser rate it thinks appropriate.

89. An award of interest is designed to compensate the party in whose favour it is made for the loss of use of the money for the period in question. In the present case, the Respondent ought to have received rental at the appropriate rate between the date upon which the Applicant should have moved out and the date of this order. Instead he received a lesser rate because the Applicant did not move out but wrongfully remained in possession of the Warehouse. Since the Respondent has been wrongfully deprived of the use of the additional money which has been assessed as mesne profits it is appropriate that an order for interest be made. The rate will be as fixed by the *Penalty Interests Rates Act* 1983 since I cannot see any reason for adopting a lesser rate. The calculation will be one half of the amount calculated on the principal sum with respect to the whole period, in order to take account of the fact that the obligation for mesne profits accrued incrementally over that period.

The claim for possession

90. In the case of a lease to which the *Retail Leases Act* 2003 applies, the tribunal is empowered by s.91(1)(d) to make an order for possession. Where the lease does not fall within that act, the relevant power is found in s.184(2)(j) of the *Australian Consumer Law and Fair Trading Act* 2012 but, by s.184(3), the power is only exercisable by a judicial member of the Tribunal.

91. Since I am not a judicial member I cannot make such an order. However since I was listed to hear and determine this proceeding and have made all relevant findings of fact, I must make such orders as I can in order to give effect to the rights of the parties as I have found them to be, even though that might indirectly achieve what I cannot directly order.

92. I will therefore make injunctive orders designed to enforce the undoubted right of the Respondent to recover possession of the Warehouse and bring to an end the wrongful occupation of it by the Applicant. Because of the nature of such orders and the consequences of disobedience, they will come into effect a week after the date of this order, in order to give the Applicant time to move out of the Warehouse.

Orders to be made

93. The following orders will be made:

    (a) The application is dismissed;

    (b) Order that, as from 5 pm on 19 February 2016, the Applicant by itself, its servants or agents or otherwise howsoever, be restrained from:

(i) occupying or continuing to occupy the premises situated at and known as 167 to 169 Kensington Road, Kensington, being the land comprised in Certificate of Title Volume 08050 Folio 001;

(ii) entering upon the said premises without the written consent of the respondent;

(iii) preventing the respondent from taking possession of the said premises or interfering with his position thereof.

(c) Order the Applicant to pay to the Respondent mesne profits assessed at $15,600.00;

(d) Order the Applicant to pay to the Respondent interest on the said sum of $15,600.00, at calculated at $511.60;

(e) Liberty to the Respondent to apply to a judicial member of the Tribunal for an order for possession if it should be necessary or expedient to do so.

82. The costs of the proceeding will be reserved for further argument.

SENIOR MEMBER R. WALKER