

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP167/2022

CATCHWORDS

Landlord and Tenant, retail lease, whether tenant served with notice of last day to exercise option as required by s 28 of the *Retail Leases Act 2003* (Vic), tenant exercised option 5 years after term expired.

APPLICANT	Dylanbella Pty Ltd (ACN: 152 552 611)
RESPONDENT	Thanh Chi Loung
WHERE HELD	Melbourne
BEFORE	Senior Member L Forde
HEARING TYPE	Hearing
DATE OF HEARING	5 April 2022
DATE OF ORDER AND REASONS	13 April 2022
CITATION	Dylanbella Pty Ltd v Loung (Building and Property) [2022] VCAT 412

ORDER

1. I find and declare that the applicant validly exercised its option to extend the first term of the Lease for a period of 5 years from 14 November 2016.

L Forde
Senior Member

APPEARANCES:

For Applicant	Mr A Blair – of Counsel
For Respondent	In person



REASONS

- 1 The applicant (**Tenant**) leases premises situated in Yarraville, Victoria from the respondent (**Landlord**). The Tenant operates a mechanic workshop from the premises. The lease dated 22 November 2011 (**Lease**) is governed by the *Retail Leases Act 2003* (Vic) (**RLA**).
- 2 There is a dispute between the parties as to whether the Landlord gave the Tenant a last day to exercise option notice as required by s 28 of the RLA in 2016 at the end of the first term of the Lease.
- 3 The Tenant says it was not given a notice and consequently, it remained open to it to exercise the option, which it did on 20 December 2021.
- 4 The Landlord says the Tenant was given notice and did not exercise the option. It says the Tenant had been on a monthly tenancy since the end of the first term in 2016. To complicate matters the Landlord has sold the premises to a third party with vacant possession.

LEGISLATIVE REGIME

- 5 Section 28 of the RLA applies if a retail premises lease contains an option exercisable by a tenant to renew the lease for a further term.
- 6 The section was amended in 2020. In 2016 s 28 provided:

(1) If a retail premises lease contains an option exercisable by the Tenant to renew the lease for a further term, the Landlord must notify the Tenant in writing of the date after which the option is no longer exercisable—

- (a) at least 6 months; and
- (b) no more than 12 months—

before that date but is not required to do so if the Tenant exercises, or purports to exercise, the option before being notified of the date.

(2) If subsection (1) requires the Landlord to notify the Tenant but the Landlord fails to do so within the time specified by that subsection—

- (a) the retail premises lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the Landlord notifies the Tenant as required; and
- (b) if that date is after the term of the lease ends, the lease continues until that date (on the same terms and conditions as applied immediately before the lease term ends); and
- (c) the Tenant, whether or not the Landlord has by then notified the Tenant as required, may give written notice to the Landlord terminating the lease from a specified day that is—
 - (i) on or after the date on which the term of the lease ends; and
 - (ii) before the date until which the lease would otherwise have continued because of paragraph (b).



...

(4) If an option to renew is exercised because of subsection (2)(b) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease, disregarding for this purpose any period during which that lease continued because of that subsection.”

7 Presently, section 28(1A) of the RLA has a comparable obligation and provides:

(1A) The Landlord, at least 3 months before the last date that an option to renew the lease may be exercised, must give the Tenant written notice setting out—

- (a) the date by which the option to renew the lease may be exercised by the Tenant; and
- (b) the rent payable for the first 12 months under any renewed term of the lease; and
- (c) the availability of an early rent review under section 28A; and
- (d) the availability of a cooling off period under section 28B; and
- (e) any changes to the most recent disclosure statement provided to the Tenant, other than any changes in relation to rent.

THE FACTUAL DISPUTE

- 8 The Lease was for an initial term of five years and included two options to extend the term, each for a further 5 years. Consequently s 28 of the RLA as amended from time to time, applies to the Lease.
- 9 The Landlord was obliged to give the Tenant notice that its option to renew could be exercised in accordance with RLA s28(2) (as it then was) by no later than 14 May 2016. The first term of the Lease expired on about 14 November 2016.
- 10 The Landlord says it complied with s 28 of the RLA. It says a letter dated 7 January 2016 was issued by its managing agent to the Tenant with the subject line “Notice of date after which the option can no longer be exercised – 14/08/2016” (**option letter**).
- 11 Mr Mijatovic, the sole director of the Tenant says the Tenant did not receive the option letter. He said he knew this because if he had received it, he would have acted upon it.
- 12 The Tenant has remained in continuous occupation of the premises since the start of the Lease.
- 13 On 25 November 2021, the Tenant received a letter from the Landlord’s then solicitors, which stated that the term of the Lease had come to an end and that the Tenant was in possession on a month-to-month overholding basis. The letter also gave notice that the Lease would terminate on 1 February 2022.



- 14 In response to the letter, the Tenant's solicitors served a Notice of Exercise of Option. The Tenant says the Landlord failed to give the required notice under s 28 of the RLA of the last date to exercise the option and as such the time to exercise the option continued to run.
- 15 The Landlord says that at the time the first option came up for exercise, his managing agent was Dixon Kestles. He relied upon Dixon Kestles to do what was necessary under the Lease including sending out notices. He acknowledged that at no time did Dixon Kestles confirm to him in 2016 that the s 28 notice had been issued.
- 16 Ms Fergus, associate director of Dixon Kestles gave evidence on behalf of the Landlord. She is and was at the relevant time the head of the commercial premises department and supervised by Amy Stewart, a property manager responsible for managing the premises in 2016. Ms Stewart did not give evidence. She left Dixon Kestles three years ago. Ms Fergus was of the opinion based on her records that the option letter was posted to the Tenant.
- 17 Ms Fergus explained how the management system at Dixon Kestles operated. Once a lease was executed the lease went from the leasing department to the property management department where relevant details were entered into the database. The system automatically generated key dates such as option dates.
- 18 According to Ms Fergus on 7 January 2016 the option letter was generated by Ms Stewart. A copy of the option letter printed from Dixon Kestles' system was in evidence. It was addressed to the Tenant's care of a PO BOX in Kingsville. It is not disputed that the PO Box is the Tenant's business post office box.
- 19 The option letter included a request to the Tenant to acknowledge receipt of the notice and contained a section where the Tenant could give notice of the exercise of the option. It is not in dispute that the Tenant did not provide either of these responses.
- 20 Ms Fergus says that Dixon Kestles' records of which an extract was produced recorded in the section headed "Task Notes" the following:

TASK NOTES

Last date of exercise 14/08/16 Lease expiry 14/11/16

Tenant not leaving but doesn't exactly know what he wants to do.

Will call him back in another week or so.

- 07/01/2016 11:19 AM Amy Stewart - Document 1. Lease Expiry with Option - Tenant to acknowledge - Print - Dylanbella Pty Ltd - PO Box 180, KINGSVILLE, VIC, 3012
- 19/09/2016 11:24 AM Amy Stewart-



Left message for tnt as he has not exercised option. Will need to put up for lease

- 20/10/2016 01:11 PM Amy Stewart -
Spoke to Goran's accountant. Goran to call me back urgently or I will put up for lease.
- 02/12/2016 12:06 PM Amy Stewart - Task Completed"

- 21 Ms Fergus said that the “task notes” only recorded an option letter as having been printed when the letter had in fact been printed. The system generates the letter automatically and the property manager would have “tweaked” parts before printing. Letters were posted not emailed and no records of the posting were kept.
- 22 Ms Fergus gave evidence that she searched Dixon Kestles’ records including Ms Stewart’s email account and found no emails relevant to the option.
- 23 The Landlord terminated Dixon Kestles management of the premises on 23 November 2016. It appears that the Landlord self-managed the premises after this date.
- 24 Mr Mijatovic and Ms Mangos, the Tenant’s bookkeeper gave evidence that the option letter was not received by the Tenant. They spoke of the searches and enquiries they made to locate the option letter. They reside at the property which is the registered address of the Tenant. Mr Mijatovic said that all mail to his residence was automatically redirected to the PO Box used by the Tenant. He collected the mail each morning from the PO Box. Searches were undertaken at the premises, the PO Box and Australia Post. Both say no correspondence was taken from the premises to their residence.
- 25 Ms Fergus said Mr Mijatovic rang her on 16 February 2018 and said he needed the option letter. He was upset and said the Landlord wanted to get him out of the premises and he did not know what to do. She told him to refer to his lease. He said he had not been given one.
- 26 Mr Mijatovic said he rang Ms Fergus in February 2018 to ask for a copy of his lease as the Landlord had not given him one. He denied asking for a copy of the option letter.
- 27 On 16 February 2018 Ms Fergus sent the following three emails to Mr Mijatovic
 - a. email sent at 11.49 am which attached the Lease with the words “As requested, please see attached”;
 - b. email sent at 11.52 am which attached the option letter with the words “Hi – exercise of option letter”; and
 - c. email sent at 12.01 pm which attached the receipt history and Dixon Kestles Owner statement showing the transfer of the



security deposit with the words “Receipt History, Bond Transfer” followed by contact details for the body corporate.

- 28 In cross examination it was put to Ms Fergus that Mr Mijatovic did not ask for a copy of the option letter as he did not know one had been sent. She disagreed with the suggestion.
- 29 When it was put to Ms Fergus that Mr Mijatovic only asked her for a copy of the Lease she replied that she did not know why if that was the case she would have sent him the option letter if he had not asked for it.
- 30 Mr Mijatovic said he had never seen the option letter before a copy of it was sent to his solicitors by the Landlord’s solicitors in January 2022. He did not explain this statement in view of Ms Fergus’ email to him on 16 February 2018 enclosing the option letter.
- 31 Ms Mangos said she searched her emails in December 2021 and found the 16 February 2018 email enclosing the option letter. She said she did not see it in February 2018 as it was emailed to Mr Mijatovic and she did not always have access to his emails. Following a security breach of Mr Mijatovic’s email account in 2018 she now has access to his emails.
- 32 Ms Fergus agreed that no response to the option letter was received by Dixon Kestles from Mr Mijatovic.

DID THE LANDLORD COMPLY WITH S 28 OF THE RLA?

- 33 To comply with s 28 as it then was, the Landlord was required to “notify the Tenant in writing” of the last day to exercise the option.
- 34 Neither party made submissions about what is required to satisfy the obligation to notify under s 28 of the RLA.
- 35 The Tenant says I should not infer that the option letter was posted to it. In closing submission counsel for the Landlord referred me to Wright LJ in *Caswell v Powell Duffryn Associated Collieries Ltd*¹ where in considering the circumstances of a fatal accident he said:

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

- 36 I was also referred to the decision of *Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd* that requires that: “...inference must be based on evidence, it must be the product of logical deduction rather than speculation, and the party that seeks to establish the inference must

¹ [1940] AC 152.



demonstrate that the inference is the more probable conclusion to be drawn from the proven facts...”.

- 37 I find based on the evidence that:
- a. the option letter was printed by Dixon Kestles on 7 January 2016;
 - b. the process at Dixon Kestles was that an option letter was printed and then posted;
 - c. Ms Stewart made entries in the Task Notes on 19 September 2016 and 20 October 2016 consistent with the option letter having been posted;
 - d. On 16 February 2018 Mr Mijatovic requested a copy of the option letter from Ms Fergus and she emailed him a copy on that day.
- 38 Mr Mijatovic says the first time he saw the option letter was in 2022. I think this unlikely. Ms Mangos’ evidence is that the email from Ms Fergus attaching the option letter dated on 16 February 2018 was contained in Mr Mijatovic’s emails and located by her in December 2021. She works and resides with Mr Mijatovic. It is unlikely that Ms Mangos knowing the option letter was hotly contested did not inform Mr Mijatovic of her discovery of the 16 February 2018 email in December 2021.
- 39 I find that Mr Mijatovic was sent a copy of the option letter by email on 16 February 2018 after requesting a copy of it from Ms Fergus. I find that Mr Mijatovic knew of the option letter before 16 February 2018.
- 40 Where the evidence of Ms Fergus and Mr Mijatovic differed, I prefer the evidence of Ms Fergus. I found Ms Fergus to be credible and matter of fact. She gave details of the phone call on 16 February 2018 such as that Mr Mijatovic was upset which satisfied me that she accurately recalled the phone call notwithstanding the passage of time. Her version of the call is supported by the emails sent by her after the call sending a copy of the option letter to Mr Mijatovic. On the other hand we have the example of Mr Mijatovic having the option letter in his possession at least as at 16 February 2018 and denying he knew of the option letter until January 2022 when it was provided to him by his solicitors. I find Ms Fergus’ attention to detail and recall more reliable than that of Mr Mijatovic.
- 41 Ms Stewart was not called to give evidence. Ms Fergus explained that she ceased to be employed by Dixon Kestles some three years earlier. The Tenant submits that I may draw an inference that Ms Stewart’s evidence would not have assisted the Landlord’s case². That may be correct but that does not mean that Ms Stewart’s evidence would have been damaging to the Landlord.
- 42 The Task Notes lack detail for the critical entry_
Last date of exercise 14/08/16 Lease expiry 14/11/16

² Jones v Dunkel (1959) 101 CLR 298.



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- 43 The entry suggests Ms Stewart had a discussion with Mr Mijatovic relevant to exercising the option. The notes however are not clear. The date of any discussion is not recorded. The notes do not refer to the option letter. The notes are not proof that the Tenant received the option letter.
- 44 Based upon my findings I draw an inference that it was more likely than not that the option letter was posted to the Tenant on or about the date it was printed.
- 45 A finding that the option letter was posted is not the same as a finding that the Tenant was “notified” of the date after which the option could not be exercised within the meaning of s 28 of the RLA.
- 46 Vickery J in *Xiao v Perpetual Trustee Co Ltd and Anor (Xiao)*³ discussed the difference between delivering or serving something on a tenant and notifying a tenant of something by saying:-

The purpose of s.28 of the RLA is to provide a measure of protection to a retail Tenant who is vulnerable to the strictures of the law in the manner I have described. For this reason, s.28(1) makes provision for a timely reminder to be provided to a Tenant conducting business under a retail lease, which operates for more than a year and which contains an option to renew, as to the last date when the option to renew can be exercised. The timely reminder will not be provided and the purpose of the legislation will not be achieved in numbers of cases, if the word “notify” in s.28(1) is construed as merely “delivery” or “formal service” of the required notice. However, the beneficial purpose which I have described will have a more ample prospect of being achieved, if the word “notify” is given its ordinary and natural meaning in the context by ascribing to it the notion of “communicating” the statutory reminder to the Tenant. This is to be achieved by making the prescribed information available to the Tenant through physical supply of the written document containing the relevant information such that it is actually provided to and received by the Tenant. Until this occurs, it could not be said that the Landlord has fulfilled the obligation to “notify” the Tenant of the prescribed information as required by s.28(1) of the RLA.

- 47 It follows from this passage that the Landlord cannot rely upon mere posting of the option letter to satisfy the “notify” requirement of s 28 RLA.
- 48 The Landlord has not provided any proof that the option letter was delivered. No evidence was given on behalf of the landlord as to whether the option letter was returned to sender.

³ [2008] VSC 412 at [65].



- 49 The Tenant denies receiving the option letter during the critical time required by s28 of the RLA. The Tenant's evidence is that subsequent searches have failed to locate the option letter.
- 50 There is no evidence before me that during the time specified in the option letter to exercise the option that the option letter was actually provided to and received by the Tenant. As such there is no evidence that the Tenant was "notified" of the option information as required by s 28 of the RLA.
- 51 Accordingly, s 28(2)(a) of the RLA is enlivened, providing that the Lease is taken to provide that the date after which the Lease is no longer exercisable is instead six months or three months depending on the section in force at the time after the Landlord notifies the Tenant as required.
- 52 I have found that the option letter was delivered by email to Mr Mijatovic on 16 February 2018. This is notification. It does not however satisfy the notification requirements of s 28 of the RLA. The information contained in the option letter was by that time out of date. The option letter provided that the last date for exercising the option was 14 August 2016. The date had passed by 16 February 2018 and the option letter was out of date. It was not valid notification under s 28 of the RLA.
- 53 The consequence for the Landlord is that the Tenant was entitled to exercise the option in accordance with s 28(2)(a) of the RLA. The Tenant did exercise the option by its notice of exercise of option letter dated 22 December 2021.
- 54 The landlord produced no evidence of any unremedied default or persistent default by the Tenant which would prevent the Tenant from exercising the option. Section 27(2) of the RLA was not engaged.
- 55 Section 27(2) provides:
- (2) If a retail premises lease contains an option exercisable by the Tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if—
 - (a) the Tenant has not remedied any default under the lease about which the Landlord has given the Tenant written notice; or
 - (b) the Tenant has persistently defaulted under the lease throughout its term and the Landlord has given the Tenant written notice of the defaults.
- 56 The effect of the Tenant exercising the option on 22 December 2021 is that the Tenant was entitled to a further term which term commenced on the expiry of the previous Lease being 14 November 2016 by reason of s 28(4) of the RLA.
- 57 The Tenant is not on a monthly tenancy and the Landlord is not entitled to terminate the Lease as if the Tenant were on a monthly tenancy.
- 58 The outcome of this hearing aptly illustrates the importance of considering whether additional safeguards should be implemented by a landlord when giving the requisite notice under s 28 of the RLA. Additional safeguards may



be as simple as adopting a process whereby notices are sent by prepaid mail which requires a signature from the recipient at the time of delivery or which includes a tracking number which tracks delivery of the notice.

L Forde
Senior Member

