



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Mega & Co Pty Ltd t/as Oporto Clarence Street v Elanor Funds Management Ltd as Trustee for 193 Clarence Hotel Syndicate [2016] NSWCATCD 60
Hearing dates:	5 May 2016
Decision date:	20 July 2016
Jurisdiction:	Consumer and Commercial Division
Before:	D Patten, Principal Member
Decision:	<p>1 Declare that the lessee Mega and Company Pty Ltd on or about 15 September 2015 validly exercised the option to renew registered lease AE778223K in respect of property Part 1/55298 being Ground Floor Shop 193 Clarence St Sydney for a term of five years commencing 1 February 2016 and terminating 31 January 2021 in accordance with cl 2.08 of variation to the said lease AG354012P.</p> <p>2 Order that the lessor Elanor Funds Management Ltd pay the lessees costs on the ordinary basis as agreed or assessed.</p>
Catchwords:	Disputed exercise of option for renewal of lease – findings that valid notice given and received within option period.
Legislation Cited:	Retail Leases Act Civil and Administrative Tribunal Act Interpretation Act Conveyancing Act
Cases Cited:	Bressan v Squires (1974) 2 NSWLR 460; Comdox v Robins [2009] NSWSC 367; Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd (1994) 63 SASR 235; Holwell Securities Ltd v Hughes [1974] 1 WLR 155; Levitt v Illawarra Seafood Pty Ltd (No 2); Kearney J 29 April 1983; Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd Young J 1 July 1998; McGregor v Henry [2006] NSWSC 368; Ring v RW & CD Investments Pty Ltd Barrett J 11

November 2004;
Wallville Pty Ltd v Liristis Holdings Pty Ltd Bryson J 16
October 2001;
Parras v FAI General Insurance Company;
Santow J 23 November 2001; and
FAI General Insurance Company Ltd v Parras 55 NSWLR
498.

Category: Principal judgment

Parties: Mega & Co Pty Ltd t/as Oporto Clarence Street (Applicant)
Elanor Funds Management Ltd as Trustee for 193
Clarence Hotel Syndicate (Respondent)

Representation: Counsel: Mr K Morrissey for the applicant
Ms J P Muir for the respondent
Solicitors: Baker & McKenzie

File Number(s): COM 16/02024

Publication restriction: Nil

REASONS FOR DECISION

- 1 This matter concerns the lease of premises at 193-195 Clarence Street Sydney for use as a "Take Away and Restaurant". It constituted a retail shop lease or lease within S 3 of the Retail Leases Act (the Act). The lease from City Motel Enterprise Pty Ltd to Mega and Company Pty Ltd (the lessee) registered AE778223K originally terminated on 23 April 2013. However by an undated variation of lease registered AG354012P this term was extended to 31 January 2016 and two options for renewal were provided potentially extending the term of the lease to 31 January 2026. The provision for exercise of the first option was:

2.08 First Option For Renewal And Option Rent. If the Lessee desires to have a Lease of the lease premises granted to it for the further term of five **(5) years plus a final option of five (5) years** as specified in Item 7 of the Summary of Lease Particulars to commence immediately after the expiration of the term of this Lease, the Lessee must give written notice of its exercise of the option to the Lessor and such notice must be provided to the Lessor by no earlier than 01 September 2015 and by no later than 01 November 2015, then provided that at the date of giving of the notice of exercise of option there has not been any breach of the lease and if the Lessor waives the breach and there is no subsisting breach of this Lease by the Lessee as at the expiry of this Lease, the Lessor shall grant the Lessee a Lease of the lease premises for the said further term of **five (5) years plus a option of five (5) years** on the date of expiration of the term of this Lease at an annual rent determined in accordance with clause 2.09 and otherwise upon and subject to like covenants terms and conditions and restrictions as are contained in this Lease except this Clause which shall be replaced by the provision in clause 2.08A, and deleting clause 2.08A; and the renewed lease including the Summary of Lease Particulars will be amended accordingly.

- 2 Sometime after the Variation of Lease the reversion of the freehold was acquired by Elanor Funds Management Ltd (the lessor).
- 3 On or about 25 November 2015 the lessee received a letter from Baker & McKenzie

Solicitors for the lessor addressed to its employee Amit Shah:

Dear Amit,

End of Lease AE778223 ("Lease")

Lessor: Elanor Funds Management Limited

Lessee: Mega & Company Pty Ltd

Premises: 193-195 Clarence Street, Sydney NSW 2000

We refer to the Lease of the Premises from the Lessor to the Lessee. We act for the Lessor.

We confirm that the term of the Lease will expire on **31 January 2016 (Expiry Date)**. We note that the Lessor has not received any notice from the Lessee between 1 September 2015 to 1 November 2015 to exercise the Lessee's option for a further term in accordance with clause 2.08 of the Lease.

In accordance with clause 8 of the Lease, prior to the Expiry Date the Lessee is required to:

remove all of the Lessee's fixtures and fittings (including removal of the Lessor's works, if any);

repair and make good the Premises having regard to the condition of the Premises at the commencement of the Lease, excepting any fair wear and tear and repairs of a structural nature (unless the damage to the structure is caused or contributed by the Lessee or its employees or visitors);

replace any fixtures of installations belonging to the Premises that are missing, worn out or destroyed;

paint (or stain and varnish if applicable) all the internal brickwork, masonry, wood, enamel, metal, ironwork and ceilings of the Premises and all additions and fixtures that usually require painting, with at least two coats of good oil paint or other suitable material of the best quality in a proper and workmanlike manner*;

wash down all tiles, facings, glazed bricks and similar surfaces;

pay the cost for professional steam cleaning of any fixed floor coverings and where stains are not removable, pay the cost of replacement of the fixed floor coverings (if any required by the Lessor)*; and

yield up the Premises,

(together, the **Make Good Obligations**)

Please note that in accordance with clause 8.05 of the Lease, the Lessee is liable to continue to pay pro rata rent, a GST and outgoings until the Make Good Obligations have been complied with to the reasonable satisfaction of the Lessor (including until removal and re-instatement by the Lessor where the Lessee has failed to attend to the Make Good Obligations).

With respect to items 4 and 6 above (marked with a "*"), the Lessor is prepared to waive the requirements set out therein on the conditions that by the Expiry Date the Lessee (i) satisfies its other Make Good Obligations, (ii) pays all amounts due under the Lease up to and including the Expiry Date; and (iii) vacates the Premises in accordance with the Lessee's obligations under the Lease. The Lessor otherwise reserves its rights under the Lease.

If you have any queries please do not hesitate to contact us.

Thank you for your assistance.

Yours sincerely,

David Jones Rahul Parrab

Partner Special Counsel

4 There was an email response to this letter by Linda Vij on 27 November 2015 at 2.52

pm:

Dear David

Thank you for your letter of 25 November.

Punkaj (Percy)Vij, Director of Mega and Company has (sic) accountant Amit Shah and myself at Centrum Printing (a second business he owns) handle sundry administration for Mega and Company (trading as Oporto Clarence St at 193 Clarence St long term).

Percy mailed a notice of his wish to continue at 193 Clarence St to your client (lessor) on 15 September (office copy attached). If you have any further query, please ring Percy on 1300 663 860 or 0412 178 410 in first instance.

Linda Vij

- 5 Attached to the email was a copy document:

Mega & Company Pty Ltd

ACN: 143 576 185

193-195 Clarence Street, Sydney, NSW 2000

Phone (02) 9262 1315

To The Lessor

Eleanor Funds Management Ltd

Level 38/259 George St

Dear Lessor

Notice of Request For Renewal of Lease AE7788223 to Mega and Company Pty Ltd At 193-195 Clarence St Sydney

Please be advised we wish to exercise our options for renewal of the lease.

Kind Regards

Punkaj (Percy) Vij

Director

Mega and Company

15 September 2015

Office Copy

- 6 Baker McKenzie replied, again to Mr Shah, on 29 December 2015:

Dear Amit,

End of Lease AE778223 ("Lease")

Lessor: Elanor Funds Management Limited

Lessee: Mega & Company Pty Ltd

Premises: 193-195 Clarence Street, Sydney NSW 2000

We are informed that you are the Lessee's representative and to direct relevant correspondence to you in relation to the Lessee.

We refer to our letter to the Lessee dated 25 November 2015, confirming expiry of the Lease on 31 January 2016 and the Lessee's make good obligations (a copy of our letter is **attached** as Annexure A to this letter). Subsequent to the Lessee's receipt of that letter, we received a telephone call from your office on 27 November 2015. We were informed that the Lessee claimed that a notice to the Lessor was sent in September 2015 which purports to exercise the option for a further term of the Lease.

We requested a copy of that notice and were subsequently provided with an electronic copy of a letter which we now **attach** as Annexure B (**Letter**).

The Lessor does not accept that the Letter is a valid notice issued in accordance with

clause 2.08 of the Lease, and we comment further on the Letter and the surrounding circumstances as below.

We are instructed that the Lessor did not in fact receive the Letter, nor did it receive any other form of notice from the Lessee between 1 September 2015 and 1 November 2015 exercising the Lessee's option for a further term. Our client has further confirmed that there was no discussion or communication between the parties of any nature, regarding the possibility of entering into a new lease for the further term.

The Lessor's name on the Letter, "Eleanor Funds Management Ltd" is not correct.

No suburb, postcode, state or country is included in the Lessor's address in the Letter. It is unclear where the Letter is purported to have been sent as there are a number of 'George Street's in Australia. As indicated above, we are instructed that the Letter was not delivered to or received by the Lessor.

Though the words, "Office Copy" are written on the Letter, the words appear to have been written on the original document as it still displays colour letterhead.

There is no evidence on the face of the Letter that indicates that it was sent or that it was delivered to the Lessor.

During our telephone call with you as the Lessee's representative on 23 November 2015, you asked if there was still an opportunity to exercise the option for a further term and the conversation was otherwise conducted on the basis that the option had not been exercised. This is clearly inconsistent with the Lessee now claiming that the option was previously exercised.

The Lessor does not consider that the Lessee's option for a further term was validly exercised and we confirm that the term of the Lease will expire on 31 January 2016. The Lessor requires the Lessee to comply with the Make Good Obligations as set out in our letter of 25 November 2015.

Thank you for your assistance.

Yours sincerely,

David Jones Rahul Parrab
Partner Special Counsel

- 7 Further written and oral communications ensued between the parties which it is unnecessary to detail. The result was that the lessor maintained its position that the option had not been exercised and that the lease came to an end on 31 January 2016. That remained the position and was the issue between the parties when these proceedings came before me for hearing on 5 May. Mr K Morrissey of counsel appeared for the lessee and Ms J P Muir of counsel for the lessor, the proceedings being an application by the lessee for a declaration that the option had been validly exercised and for consequential relief.
- 8 Ms Vij was the first witness for the lessee. She said in an affidavit sworn 14 January 2016 that she has been a Director of Centrum Printing Pty Ltd since January 2000 that it operates from 2/43 Riverside Rd Chipping Norton and that she sometimes assists her husband Punkaj (Percy) Vij a director of the lessee in the administration of his business at 193 Clarence St Sydney. Her affidavit continued:

Oporto Lease

5 I am aware that the lease of Oporto Clarence Street has been renewed and varied several times in the past as I was responsible for sending notices or having notices sent to the previous lessors; Frank Shorter and City Hotel Enterprise Pty Ltd.

6 The usual practice I follow is to send a brief letter or notice of intention about a lease renewal by standard mail. I use standard mail for most matters I handle for Centrum Printing and Oporto, which in the past has also included Statements of Claim.

A new landlord for Oporto

7 In early 2015 I became aware that the respondent had become the owner of 193 Clarence Street.

The notice exercising the option to renew

8 In the first week of September 2015 Percy said to me:

“Can you do me a notice to the landlord about the lease renewal for Oporto?”

9 I typed a notice by pulling up the Oporto template on my computer and typing directly onto the template. I use an electronic letterhead for Oporto Clarence Street as I typically use less than half a dozen-letterhead pages in hard copy for that business per year.

10 I was confused about what was the best address to send the notice for renewal of the lease because the respondent had two addresses, 193 Clarence Street and 259 George Street. Both addresses were in the Sydney CBD and both addresses appeared on their tax invoices. (Attached and marked ANNEXURE A is a copy of a tax invoice.)

11 I knew the respondent had an address and a hotel at 193 Clarence Street however I also knew that I hadn't been able to contact the respondent at that address previously. I believe a group called Breakfree runs their hotel in Clarence Street.

9 Ms Vij said that she consulted Mr Shah who later told her that the George Street address was the correct one to use. Ms Vij related what she did next:

14 I noted the George Street address in the letter of notice I had typed on 15 September 2015 in case I needed to correspond with the landlord again.

15 I printed copies of the notice on the printer in our main office at 2/43 Riverside Road Chipping Norton. The printer is a large colour printer.

16 I put the copies on Percy's desk for him to sign them. He came back to my office some time later (I estimate approximately half hour) to give me the signed copies. Percy said to me:

“Can you post to the landlord?”

17 I placed one of the copies into an envelope. The other copy I wrote “office copy” on it and filed it with our business documents. (Attached and marked ANNEXURE B is a copy of the office copy of the notice dated 15 September 2015.)

17 I had to use a plain envelope as I had no express envelopes left in a small size (we only had them in 3 kg lots at the time). I wrote the full address of Level 38, 259 George St, Sydney NSW 2000 on the envelope.

18 There isn't a post office in Chipping Norton but I keep stamps on site. I posted the letter to the landlord on the same day (15 September 2015) as that was the date Percy signed and gave the notices back to me.

19. I posted the letter at the mailbox I routinely use on Henry Lawson Drive, Milperra that is near Chipping Norton. The mailbox is located just before I enter the M5 to go home to Mascot.

10 The “Office Copy” Notice referred to by Ms Vij in her evidence was a copy of the document reproduced in paragraph 5 above.

11 In evidence in chief Ms Vij told Mr Morrissey that she wrote her return address on the envelope and I infer although it was not expressly stated that the envelope was not returned to her in the mail. She was cross examined with some vigour by Ms Muir. Although she stoutly maintained her version of events under cross examination she was not a particularly impressive witness. Her answers to questions were often unresponsive and suggested to me an overzealous attempt to reinforce her evidence by repetition. Possibly she was sensitive to any suggestion that the casual manner in which she went about the exercise of an option so vital to the very existence of the

company's business was not the expected conduct of an experienced business woman. More likely I think her approach was conditioned by the informal relationship the lessee had with its previous landlord.

- 12 Moreover there was support for Ms Viji's evidence from both her husband and Mr Shah. Mr Punkaj (Percy) Vij said in his affidavit sworn 14 January 2016 that in early September 2015 he asked her to prepare a notice exercising the option and later signed 2 copies of the document dated 15 September 2015 which is in evidence. He said he noted his diary for 1 December 2015 to check on the arrival of the new lease.
- 13 Mr Vij also deposed to some background matters which certainly point to the unlikelihood of him not wanting to exercise the option:

4 The applicant trades under the business name "Oporto Clarence Street". The lease of 193 Clarence Street is in the applicant's name. The building at 193-195 Clarence Street is a multi level building predominantly used for hotel accommodation. The applicant leases the ground floor of the building aside from an area that provides access to the hotel accommodation. The then owner, City Hotel Enterprise Pty Ltd, negotiated with the applicant in 2011 to surrender the area required for the hotel foyer in return for extended lease options.

5 The applicant operates an Oporto Franchise at the lease location. The franchise agreement with Oporto is in the name of Mega and Company Ltd T/A Oporto Clarence Street.

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The lease of 193 Clarence Street

7 For approximately 13 years Oporto Clarence Street has traded from a shopfront located at 193 Clarence Street, Sydney. For the same period, the applicant has held a retail lease over those premises.

8 The site at which the shopfront is located has changed owners three times during that period. The first two owners were Frank Shorter and City Hotel Enterprise Pty Ltd. The last change of owners occurred in October 2014 when the respondent purchased it. I was informed of the change of ownership by letter dated 10 October 2014.

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The Variation to lease dated 14 July 2011

10 City Hotel Enterprise Pty Ltd altered the building to accommodate a hotel. To make an entrance for the hotel the applicant gave up floor space and negotiated a new lease that included two further options of five years.

11 I sacrificed floor space and I put up with business interruptions during the building phase without compensation. Because of the alterations the landlord made Oporto Clarence Street had to bear some direct costs for refurbishments to fit the new shape of the leased area.

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The history of the Oporto Clarence Street Store

16 Oporto Clarence Street is one of the oldest franchises of the Oporto chain. Oporto has a number of stores in Australia and has now entered the international market.

17 I obtained Oporto Clarence Street through the original owner of Oporto, Anthony Cerqueira. I set the shop up from scratch on the site and take considerable pride in it. I designed the original look, including the logo for the upcoming franchise adopted by the early stores.

18 Oporto Clarence Street also has special meaning to me because it was the source of personal development for my son, Alexander Pavan Viji, now aged 19. Alexander worked for four years in the store, front and back, and during that time he gained his Retail Certificate III. He currently assists on a part time basis with matter such as

marketing and settling rosters.

Expenditure on Refurbishments

19 When I first leased the premises it was an open space as it was previously a furniture warehouse. I made it into an Oporto at a cost of around \$350,000.

20 In the last few years, I have spent approximately \$100,000 on refurbishments. In June 2015 I had a larger grease trap installed. I did this with the knowledge that the lease contained two further options to renew until 31 January 2026.

21 The respondent knew about the installation of a new grease trap. Caleb Furner, Business Customer Representative of Business Customer Services, Sydney Water (Daceyville NSW) sent a notice to the respondent on 5 May 2015 after he had revised the Trade Waste Agreement on discussion with Linda.

- 14 Mr Shah in his affidavit of 14 January 2016 said that he is a qualified accountant and that "I run the accounts department for Punkaj (Percy) and Linda Vij who are directors at Centrum Printing Pty Ltd in Chipping Norton. I also oversee accounts payable for Mega and Co Pty Ltd T/A Oporto Clarence St Sydney of which Percy is the sole director. I have been employed by Percy Vij since October 2011". As to his relationship with the lessor he said "I pay the rent on time in response to their tax invoices but otherwise have very little to do with them".
- 15 Mr Shah went on to recount that in early September 2015 Ms Viji asked him to check with the lessor as to the address to which a notice of renewal of lease should be sent. He spoke by telephone to a male person at the office of the lessor and then told Ms Viji to address the notice to Level 38, 259 George Street, Sydney which as was common ground was the correct address of the lessor.
- 16 It is of course curious that the address printed on the notice was incomplete in that it did not state the city of the addressee. Ms Vij gave an explanation for this in paragraph 14 of her affidavit reproduced above upon which she was cross examined. As to this it seems to me inherently unlikely that an experienced businesswoman addressing an envelope by hand would write such an incomplete address.
- 17 In the result despite my misgivings about the evidence of Ms Vij I am satisfied that she was an honest witness doing her best to assist the Tribunal and find on the balance of probabilities that on or about 15 September 2015 she enclosed the duly signed notice dated 15 September 2015 a copy of which is in evidence in an envelope, correctly addressed to the lessor at the address stated above and posted it by ordinary mail.
- 18 The respondent in its case adduced evidence by affidavit from Mr Rahul Parrab, Mr Michael Sheridan, Ms Amy Tester, Ms Aleta Harper, Ms Emma Panhuber and Ms Marianne Ossovani. Of these witnesses only Mr Parrab, Mr Sheridan and Ms Tester were required for cross examination.
- 19 Mr Parrab a lawyer and Special Counsel with Baker & McKenzie testified as to a conversation he had with Mr Ramit Shah on 23 November 2015:

Rahul: Hi Amit, my name is Rahul Parrab from Baker & McKenzie. I act for Elanor Investors Group in relation to their property matters including their leasing matter. I am calling regarding the Oporto lease at 193-195 Clarence Street. I understand you are the tenant's representative and I should be speaking with you.

Amit: Hi Rahul. Yes, I am the person to speak to regarding the tenancy.

Rahul: As you know the lease expires on 31 January 2016, and I have called to confirm the make good arrangements and the expiry date with you on behalf of Elanor. What I normally do is touch base quickly and send you a follow up letter setting out each party's responsibilities in relation to the end date to make sure you can vacate on time.

Amit: I understand what you're saying about the Oporto lease and I'll have to speak to the directors and get back to you.

Rahul: Thank you, my letter will follow soon.

Amit: Is there still the opportunity to exercise the renewal?

Rahul: I believe the option period has already passed and the option can no longer be exercised. The lessor is wishing to take back possession of the premises.

Amit: I'll have to speak to the directors.

- 20 Mr Parrab was challenged in cross examination upon this conversation as Mr Shah subsequently swore an affidavit to the effect that he could not recall it and in which he said "I have never used that type of language to Mr Rahul Parrab or to anyone on behalf of the Respondent".
- 21 Mr Parrab's evidence as to the conversation is however largely supported by a contemporaneous file note and I have no doubt that it took place at about 10am Vietnam time, as Mr Parrab was working there, on 23 November 2015. The lessor relies on the conversation as indicating that by 23 November the lessee was aware that the option had not been exercised. However I accept Mr Shah's evidence that his role was in the accounting side of the business and that while he was the man for the lessor to contact regarding such matters as the payment of rent he may well have been unaware of the time for exercising an option for renewal of a lease or whether it was intended to exercise such an option. As the evidence of Mr and Mrs Vij makes clear he had no role in the events of 15 September 2015 except to ascertain the correct address of the lessor. I do not regard the statement "Is there still the opportunity to exercise the renewal" as constituting an admission against the interests of the lessee.
- 22 Mr Sheridan in his affidavit sworn 13 April 2016 said that he has been the Regional General Manager of Elanor Investors Group which includes the lessor since 23 December 2014. Describing the lessor as Elanor he said:

Overview of Elanor's structure and my role at Elanor

6. Elanor runs an investment and funds management business, with its office in Sydney. The businesses owned and run by Elanor are located in the Australian Capital Territory, New South Wales, Tasmania, Victoria and Western Australia.

7. Elanor's Sydney office is located at Level 38, 259 George Street, Sydney New South Wales. Elanor has approximately 30 employees based in the Sydney office. All work on level 38. The office is open plan.

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9. I work within the Hotel, Tourism and Leisure division of Elanor, which includes eleven hotels and one zoo. I oversee all aspects of the hotel, tourism and leisure assets that Elanor owns, and from around mid-February 2016, I have done this in conjunction with Mr Campbell Shepherd, who is the Director of Asset Performance. Mr Shepherd joined Elanor in or around mid-February 2016 and is based in Elanor's Sydney office.

.....

10. I report to Ms Marianne Ossovani who is the Chief Investment Officer and Head of Hotels, Tourism and Leisure for Elanor, and based in Sydney office.

.....

11. I analyse the financial and operational performance of the assets. My role includes reviewing the assets' financial results, reviewing the assets' day to day operations, identifying measures that I believe would assist the group to operate more efficiently and cost efficiently, and ensuring assets are meeting to their financial targets.

The way mail was distributed at Elanor

12. I estimate that about 95% of the mail that I receive is either addressed on the envelope to an Elanor company or it refers to an Elanor property. I estimate that the other 5%, is addressed to me by name.

13. During the period 1 September to 1 November 2015, I spent some of my time working in Elanor's Sydney office and some of my time working from Elanor's property in Melbourne, Bell City. When I was not working at either Elanor's Sydney office or Bell City, I was travelling to other Elanor properties as required.

14. During the times I was present in the Sydney office during September to November 2015, I observed that it was the practice of Ms Amy Tester, Elanor's Receptionist, to deliver to me any documents that arrive in the mail (including notices), that

(a) referred to me by name;

(b) referred to the business or operating name of a specific asset; or

(c) referred to the name of a corporate entity that owns one of the assets.

15. When I was away from the Sydney office, from time to time, it was the practice of Ms Harper to contact me to let me know that a piece of mail had been received that was either addressed to me, or relevant to the part of the business that I manage. If I wanted to see the document, I asked Ms Harper to email it to me.

16. I did not have an in-tray on my desk in the Sydney office. Each time that I returned to the Sydney office, I saw that some mail was left on my desk for me, and it had usually been opened.

23 In relation to the building of which the subject premises forms part Mr Sheridan testified:

The property at 193-195 Clarence Street, Sydney (Clarence Street Property)

19. Elanor owns the Clarence Street Property.

20. The BreakFree on Clarence hotel and the applicant's Oporto shop are located at the Clarence Street Property. The Oporto Shop is located on the ground floor of the Clarence Street, Property.

24 In August 2015 Mr Sheridan said that he was told to speak to Mr Shah in relation to issues arising in respect of the premises. He said that he had a telephone conversation with Mr Shah on or about 10 August 2015. After discussing outstanding rent he said there was the following exchange:

Michael: "Are there any other issues you are aware of?"

Amit: "No there aren't, that I am aware."

Michael: "Who is the best person to contact moving forward for any issues to do with Oporto?"

Amit: "I am the best point of contact for the owners of Oporto. I am not based at the restaurant, for day to day operations there is a manager on site."

25 Mr Sheridan said that subsequently in September 2015 he had a telephone conversation with Mr Shah and an exchange of emails regarding a gas connection upgrade. In neither conversation nor the emails was exercise of the option mentioned.

26 In late November or early December 2015 according to his affidavit Mr Sheridan was

told by Ms Ossovani that the option had not been exercised. He said that he first saw the document relied upon by the lessee as an exercise of the option in March 2016. If he had seen it earlier he would have reported that fact to Ms Ossovani.

27 Cross examined by Mr Morrissey, Mr Sheridan said that in September 2015 he was living in Melbourne but attending the George Street premises 3 – 4 days a week. The George Street address became the registered office of the lessor at the beginning of September. He denied that September 2015 was a confusing time in the affairs of the lessor.

28 Ms Amy Tester testified in an affidavit affirmed 15 April 2016 that she was employed as a receptionist by the Elanor Group of companies from 14 September 2015 until 19 February 2016 when she was promoted to the position of Executive Assistant to the Chief Executive Officer of Elanor's Investors Group. Her affidavit continued:

My role at Elanor

7 While I worked as the Receptionist, I reported to Ms Aleta Harper, the Executive Assistant to the Chief Investment Officer and Head of Hotels, Tourism and Leisure at Elanor. I also received assistance from Lara Wilson, the Business Manager of Elanor, who had managed the previous Receptionist.

8 My role as the Receptionist included manning the Reception area on Level 38 of 259 George Street, Sydney, collecting mail that had arrived for Elanor, and distributing it to Elanor' staff.

9 During the first week in my job, Ms Harper and Ms Wilson trained me in my role. I asked either Ms Harper or Ms Wilson the questions I had about procedures in the office.

10 Over my first two days at Elanor, I read through the hard copy version of the Elanor Administration Handbook (the **Handbook**) in between performing tasks, or being trained by Ms Harper. After that I used the Handbook as a reference guide. Pages 5 and 19 of the Handbook refer to the procedures regarding mail.

11 Page 5 of the Handbook states: "Check the mailbox after midday 2-3 times per week (LG1, south). Ours is box #18. (if we are capital raising, please check every day)".

12 Page 19 of the Handbook states: "Mail addressed to our street location is delivered to LG1 (basement) mail boxes. The box is on the south side of the building, next to the carpark lift. Ours is Box #18."

13 It was my practice at all times to follow the practices and procedures set out in the Handbook, and any directions that Ms Harper or Ms Wilson gave me.

Delivery of Elanor's mail to its office

14 Since 14 September 2015, I have observed that:

14.1 mail addressed to Elanor's GPO box was delivered to Elanor's Reception on Mondays, Thursdays and Fridays each week by an office services business called Mailplus. They leave the mail on Elanor's Reception desk on those mornings; and

14.2 mail addressed to Elanor's street address was received at the mailbox located on the lower ground level of the car park of the building at 259 George Street, Sydney. The mailboxes are located next to a boom gate, through which cars exit the car park. The Elanor mailbox is marked with a sticker that says "Elanor Investors Group." It has the number 18 marked on it.

15 As the Receptionist it was my responsibility to collect the mail from the mailbox.

16 I held a key to the mailbox which I kept in the top drawer of the Reception desk. While I was the Receptionist, I did not see anyone else access the mailbox.

17 From either my first or second day of work at Elanor, it became my usual practice to check the mailbox either before or after my lunch break, every day or every second

day. When Elanor was capital raising, I checked the mailbox every day.

The way I distributed mail as Elanor's Receptionist

18 While I was the Receptionist, I had a practice for dealing with mail. I started this practice within my first week of work at Elanor. My practice is set out below.

19 If the item was addressed to a particular person at Elanor, I delivered it to that person without opening the envelope.

20 If the item was addressed only to an Elanor company, including Elanor's investment properties and managed funds, with no specific person identified, I opened it and looked at the document(s) inside.

21 When I looked at the document(s) inside, I took one or more of the following steps, as required:

21.1 if I recognised either the name of an Elanor company, an address or a property referred to, then, depending on the type of document and based on my knowledge of the employees responsible for different areas of the business, I decided who I would give the document(s) to;

21.2 if I saw that the contents referred to an address, and I did not recognise the address, I did a google search of the street address. If the search results indicated that the property was a hotel, and the name was listed on the website, then I cross referenced against either the Elanor website, or a flow chart that was kept at the Reception desk that shows the properties Elanor manages. If the property was shown on one of these documents, I was satisfied that the document(s) related to an Elanor property; or

21.3 if I did not recognise the name of the company or property referred to, I took the steps outlined in paragraphs 28 and 29 below.

22 Depending on the type of document contained in an envelope addressed only to an Elanor company or property, and based on my knowledge of the employees responsible for different areas of the business, I then decided who I would give the contents to.

23 I distributed mail to those recipients as promptly as I could.

24 If recipients had an in tray, I put the email into their in trays. If they did not have an in tray I would put mail on their keyboard, or next to it if there was space. I would not put mail on top of documents that were already on their desk.

25 In my second week working at Elanor, I had a conversation with Ms Wilson, in which she showed me the Elanor Investors Group corporate structure diagram (**Structure Diagram**), and explained which people in the business undertook which roles. Our conversation included the following exchange:

Ms Wilson: Over here are some of the hotels we own,

[I recall that Ms Wilson pointed to the names Cradle Mountain Lodge, Wollongong Hotel, Eaglehawk Hotel, Albany Hotel, and then 193 Clarence Hotel and Bell City in the Managed Funds]

..... the go to person for hotels is Michael Sheridan.

27 In my first week Elanor I had created a spreadsheet in which I set out the different areas of business, and entered information that I thought would be useful for me in my role. After my conversation with Ms Wilson, I entered in the appropriate contact person to whom to direct mail and go to for queries in the different areas of the business. I added to the spreadsheet over the next month and did not modify it later.

28 After my conversation with Ms Wilson, if any mail came in that was addressed only to a company and I did not recognise the company name, I checked the Structure Diagram. If I found an asset or company on the diagram that corresponded to the mail, I asked the individuals who worked in the relevant area if it was for them.

29 If it was unclear to me which area of the business it related to, or the individual who worked in the relevant area of the business was not there, I spoke to Ms Harper or Ms Wilson to ask to whom the email should be directed.

30 At some time within my first few weeks working for Elanor, I gave Mr Sheridan a piece of mail. He said "These should go to someone else instead because I am not

here all the time. I am based in the Melbourne office.”

31 After that conversation with Mr Sheridan, any mail that came in that I saw related to one of Elanor’s assets and was not of a financial nature (such as invoices or bank statements), I gave to Ms Marianne Ossovani, the Chief Investment Officer and Head of Hotels, Tourism and Leisure, as she was the head of the division that includes the operational management of hotel assets. It was my practice to leave mail that I decided should go to Ms Ossovani on her desk, as it was normally clear of any other papers.

29 Ms Tester testified that to the best of her belief she did not see before March 2016 a copy of the document relied upon by the lessee as constituting the exercise of its option.

30 In cross examination Ms Tester agreed that 259 George Street is a large building comprising 42 floors and that hundreds of people occupy it. She also agreed that the tenant directory on the ground floor did not contain a reference to the Elanor Group of Companies.

31 Ms Marianne Ossovani in an affidavit sworn 16 April 2016 said that she is Chief Investment Officer and Head of Hotels Tourism and Leisure for the Elanor Investment Group and works out of level 38, 259 George Street, Sydney.

32 After stating that while working out of Elanor’s Sydney office she had never experienced difficulty with mail delivery she referred to her involvement with the subject premises.

Option to renew the applicant’s lease for the ground floor of 193 – 195 Clarence Street, Sydney

13 I prepared the deal for Elanor to purchase the property at 193 – 195 Clarence Street, Sydney (**Clarence Street Property**), so I was aware that there was a lease for the ground floor of the Clarence Street Property from which an Oporto was operating. I was aware that the lease for the ground floor space included an option to renew the lease for five years, and that the period for exercising the option was from 1 September 2015 to 1 November 2015. I was looking out for the notice in the mail during that period.

14 I understood from my view of the lease documents that if the option was exercised, then the rent would be reviewed to market rent. Based on the due diligence undertaken in preparation for the acquisition of the Clarence Street Property and my knowledge of the market, I believed the market rent review would result in a significant increase in rent for the lessee, possibly in the order of a 50% increase. I therefore was not surprised when the two month option notice period ended and I had not received a notice from the applicant that it intended to exercise the option to renew its lease.

33 Ms Ossovani denied receiving during September 2015 a notice purporting to exercise the option and said she did not see what purported to be a copy of it until she read an attachment to Mr Parrab’s email of 9 December 2015.

34 Ms Aleta Harper the Executive Assistant to Ms Ossovani testified that she had no recollection of having seen the purported exercise of option before being shown a copy by the lessors solicitors in April 2016. She said that if she had received the notice she would have given it to Ms Ossovani.

35 There was evidence in the lessors case as to how Australia Post dealt with insufficiently addressed mail. Having regard to my finding that the notice of exercise of option relied upon by the lessee was correctly addressed by Ms Vij that evidence seems to me to be irrelevant.

36 Having regard to the evidence of Mr Sheridan Ms Tester, Ms Ossovani and Ms Harper I

am satisfied on the balance of probabilities that for whatever reason the notice of exercise of option posted on 15 September 2015 did not come to the attention of Ms Ossovani or Mr Sheridan. As it seems to me however there was as demonstrated by evidence in the respondents case ample scope for the notice posted by Ms Vij to go astray in the lessors office in the sense of not coming to the attention of either Ms Ossovani or Mr Sheridan. The notice itself was a very unprepossessing document bearing an incomplete address for the lessor the name of which it misspelled and it was not accompanied by a covering letter. In the lessors office the responsibility for mail collection and distribution was primarily that of a woman whose employment commenced the very week the notice was posted and the man (Mr Sheridan) to whose attention the notice should have come shared his time between a Melbourne office and a Sydney office. Moreover the letter was not returned to the sender, there was no mail book in which incoming letters were recorded and there was no evidence of any search of files in the lessors office. In all those circumstances I think it more probable than not that the notice was received into the lessors office and misplaced there without coming to the attention of an employee responsible for dealing with it.

- 37 The question remains whether the option was duly exercised for the purposes of the lease. The lessee asserts it was and the lessor that it was not. Unsurprisingly there is much judicial authority on the subject and there are two potentially relevant statutory provisions viz section 76 of the *Interpretation Act* 1987 and section 170 of the *Conveyancing Act* 1919. Those sections are in the following terms:

Interpretation Act

76 Service by post

(1) If an Act or instrument authorises or requires any document to be served by post (whether the word “serve”, “give” or “send” or any other word is used), service of the document:

(a) may be effected by properly addressing, prepaying and posting a letter containing the document, and

(b) in Australia or in an external Territory—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and

(c) in another place—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post.

(2) In this section:

working day means a day that is not:

- (a) a Saturday or Sunday, or
- (b) a public holiday or a bank holiday in the place to which the letter was addressed.

Conveyancing Act

170 Regulations respecting notices

(1) Any notice required or authorised by this Act to be served shall be in writing, and shall be sufficiently served:

- (a) if delivered personally,
- (b) if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served,
 - (b1) in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease,
 - (b2) in the case of a mining lease, if left at or sent by post to the office of the mine,
- (c) if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member, or
- (d) in such manner as the Court may direct.

(1A) In the case of service by delivery to the facilities of a document exchange, the notice is, unless the contrary is proved, to be taken to have been served on the second business day following the day of delivery of the notice to those facilities.

(2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall, if served otherwise than by post, be sufficient although addressed to the lessee or mortgagor by that designation only, without the name of the lessee or mortgagor, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(2A) The provisions of this section extend to notices required to be served by any instrument affecting property (including any dealing under the *Real Property Act 1900*) executed, made or coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930*, unless a contrary intention appears in the instrument or dealing or in the *Real Property Act 1900*.

(3) This section does not apply to notices served in proceedings in any court.

(4) This section applies only if and so far as a contrary intention is not expressed in any instrument, and shall have effect subject to the provisions of such instrument.

(5) In this section, **business day** means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State.

38 As to service of the notice of exercise of option cl 14.2 of lease AE778223K provided:

CLAUSE 14 EXCLUSIONS, NOTICES AND SPECIAL CLAUSES

14.2 A document under or relating to this lease is –

14.2.1 served if it is served in any manner provided in section 170 of the *Conveyancing Act 1919*; and

14.2.2 served on the lessee if it is left at the property.

39 However as earlier indicated lease AE778223K was varied by instrument AG354012P and that instrument deleted that part of the lease containing cl 14.2 without replacing it with a comparable clause although somewhat curiously cl 16.01 in the variation deals with the service of notices but only by the lessor upon the lessee:

16.01 Registered office of Lessee. The Lessee must keep the Lessor advised in writing of any change of home address and in the case of a body corporate any change in the registered office of the Lessee and any document including any notices or court process sent by prepaid post or delivered to the registered address or address (as the case may be) of the Lessee as noted in the lease or the new address as notified by the Lessee will be deemed, under all circumstances to be duly served on the third day after posting unless the Lessee acknowledges receipt earlier than the aforesaid third day, and without limiting in any way any other mode of service open or available to the Lessor as provided for in the Lease or in law.

40 It was not contended by the lessor that the document reproduced in paragraph 5 was not in form sufficient to constitute an effective exercise of the option and I agree that this concession was properly made. The incomplete address for the lessor was irrelevant as in my view was the minor error in spelling the lessors name. In terms in my view the document made it abundantly plain that the lessee was exercising the option for renewal. Nor was it contended that something more than service by ordinary mail as contemplated by section 170 of the *Conveyancing Act* was required. Indeed as no contrary intention appears in the lease it was entirely appropriate to effect service in accordance with s 170(b). Even without the provisions of s 76(1)(b) of the *Interpretation Act* I would take judicial notice of the fact that an envelope correctly stamped posted at a Sydney suburb on 15 September 2015 and addressed to an office in George St Sydney would be delivered well before 1 November 2015.

41 During submissions both counsel referred to a number of cases including *Bressan v Squires* (1974) 2 NSWLR 460; *Comdox v Robins* [2009] NSWSC 367; *Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd* (1994) 63 SASR 235; *Holwell Securities Ltd v Hughes*

[1974] 1 WLR 155; *Levitt v Illawarra Seafood Pty Ltd* (No 2); Kearney J 29 April 1983; *Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd* Young J 1 July 1998; *McGregor v Henry* [2006] NSWSC 368; *Ring v RW & CD Investments Pty Ltd* Barrett J 11 November 2004; *Wallville Pty Ltd v Liristis Holdings Pty Ltd* Bryson J 16 October 2001; *Parras v FAI General Insurance Company*; *Santow J* 23 November 2001; and *FAI General Insurance Company Ltd v Parras* 55 NSWLR 498. The cases were very helpful in my consideration of the principles applicable to disputed exercise of options. The facts I have found in my opinion enable this case to be determined according to uncontentious principles. That is a notice valid in form enclosed in a correctly addressed and pre stamped envelope posted in a timely manner and actually received into the office of the addressee well within the option period seems to me undoubtedly on the authorities a valid exercise of an option for renewal of a lease.

- 42 In the result the lessee has established an entitlement to the relief it seeks. As to costs which are governed by Section 60 of the Civil and Administrative Tribunal Act I find there are special circumstances constituted by the fact, as I infer, that very much more than \$30,000 is in issue in the proceedings. Costs should follow the event.

Declaration and orders

- (1) Declare that the lessee Mega and Company Pty Ltd on or about 15 September 2015 validly exercised the option to renew registered lease AE778223K in respect of property Part 1/55298 being Ground Floor Shop 193 Clarence St Sydney for a term of five years commencing 1 February 2016 and terminating 31 January 2021 in accordance with cl 2.08 of variation to the said lease AG354012P.
- (2) Order that the lessor Elanor Funds Management Ltd pay the lessees costs on the ordinary basis as agreed or assessed

D Patten

Principal Member

Civil and Administrative Tribunal of New South Wales

20 July 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 28 September 2016