

## update

3 November 2008

## Retail Alert: Landlords' obligation to notify

*The recent Victorian Supreme Court decision (handed down on 13 October 2008) of Xiao v Perpetual Trustee Company Limited Anor [2008] VSC 412 (Xiao) has serious consequences for landlords of retail premises.*

Whilst Xiao canvassed various issues, the most important issue was Vickery J's interpretation of the obligation of a landlord to "notify" a tenant under section 28 of the *Retail Leases Act 2003 (Vic)* (the **RLA**).

Section 28(1) of the RLA provides that where a retail premises lease contains an option 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, and such notification must occur at least 6 months and no more than 12 months before that date. If the landlord fails to notify the tenant in accordance with the section, the date by which the option must be exercised is extended to 6 months after the landlord gives the requisite notice. Thus, importantly, time does not begin to run against the tenant until a notice complying with the section is given.

Xiao concerned a retail premises lease between the Tenant (Mr Xiao) and the Landlord at Queens Road, Melbourne which was due to expire on 30 September 2008 but which contained an option to renew.

Under the provisions of the lease, the last day for the Tenant to exercise his option to renew was 31 March 2008, being 6 months prior to the expiry of the term. As set out in section 28(1), the Landlord was required to notify the Tenant at least 6 months prior to that date, that is, by 30 September 2007. No notice was given within this time frame and thus time did not begin to run against the Tenant until a requisite notice was given.

On 4 December 2007, a letter was sent on behalf of the Landlord by registered post to the Tenant's residential address which

stated that the Tenant could not exercise the option to renew after 3 June 2008.

It was accepted by Vickery J that the Tenant did not actually receive this letter until 31 December 2007 when he collected it from the post office. The Tenant did not inform the Landlord of his desire to exercise his option to renew the lease until 19 June 2008. The Landlord argued that by reason of the sending of the 4 December letter, the option was not exercised within the 6 month time frame and it had therefore lapsed.

The Landlord contended that the obligation to "notify" under section 28(1) simply requires the landlord to comply with the notice provisions in the RLA, which allow for service by post. It was submitted that the Tenant should be "deemed" to be notified "at the time which the letter would ordinarily be delivered", whether or not the Tenant actually received the letter. As such, the Tenant should be deemed to have been notified two days after the 4 December letter was posted, namely 6 December 2007, when it was recorded as having arrived at the post office. It was irrelevant that it was not until 31 December 2007 that the Tenant actually collected (and presumably read) the letter.

Vickery J rejected the Landlord's submission, holding that the word "notify" does not equate to mere "formal service" or "delivery", and instead entails the notion of "communicating." That is, "notify" involves an "actual communication of the relevant subject matter to the recipient in the sense of making the information known to him or her". To "notify" involves the "physical supply" of

the written document such that it is "actually provided to and received by the tenant".

It was held that the Tenant should have "personally received" the 4 December letter before it could be said that the Landlord had fulfilled its obligation. This did not occur until 31 December 2007 and thus the 6 months did not begin to run until this date. Accordingly, the Tenant had until 30 June 2008 to exercise his option meaning that his exercise of the option on 19 June 2008 was within time.

Importantly, however, Vickery J noted that even if he had incorrectly interpreted the concept of notification, the 4 December letter, in referring to 3 June 2008, did not correctly specify the date after which the option could not be exercised as required by section 28(1). Whether notification occurred on 6 December 2007 (as submitted by the Landlord) or 31 December 2007, 6 months from either of these dates was not 3 June 2008.

It thus followed, according to Vickery J, that no notice as required by the section had ever been provided to the Tenant. Until such requisite notice was given, time would not run against the Tenant and the lease would continue on the same terms and conditions as previously. In any event, Vickery J held that the Tenant had lawfully exercised his option to renew the lease on 19 June 2008.

Realistically, in order to comply with Vickery J's strict interpretation of the obligation to "notify", a tenant would need to be personally handed the requisite notice. Delivery by post would not suffice for it would be far too risky. Personal delivery

would be the only means of determining the exact date on which the tenant was appropriately notified and thus the only means of ensuring that the notice stated the correct date after which the option was no longer exercisable.

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