

Jopam Nominees Pty Ltd v Owners Corporation No 1 PS4474926 (Owners Corporations) - [2016] VCAT 851

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC3076/2015

CATCHWORDS

Licence – assignment of licence – deed of licence by owners corporation to owners of five lots to use part of common property for signage purposes – qualified prohibition on assignment without consent of owners corporation unless to a person who was proprietor of all five lots – purported assignments without consent to persons who became successive proprietors of four lots only – assignments effective against assignors but not against owners corporation.

Waiver – whether owners corporation's conduct amounted to waiver by election or to misleading or deceptive conduct – owners corporation certificates disclosed the licence but not the first assignment – [Owners Corporations Act 2006 s 151](#); [Owners Corporations Regulations 2007](#), regs 10, 10A, 11; [Fair Trading Act 1999 s 9\(1\)](#).

Injunction – whether injunctive relief available to enforce a licence or to restrain a breach of a licence.

APPLICANT: Jopam Nominees Pty Ltd (ACN: 005 261 905)

RESPONDENT: Owners Corporation No. 1 PS4474926

WHERE HELD: VCAT 55 King St, Melbourne

BEFORE: Senior Member A. Vassie

HEARING TYPE: Hearing

DATE OF HEARING: 22 March 2016

DATE OF ORDER: 27 May 2016

DATE OF REASONS: 27 May 2016

CITATION: Jopam Nominees Pty Ltd v Owners Corporation No 1 PS4474926 (Owners Corporations) [2016] VCAT 851

ORDER

The proceeding is dismissed.

SENIOR MEMBER A VASSIE

APPEARANCES:

For Applicant Mr M Campbell of Counsel

For Respondent M X McLaurin, solicitor

REASONS FOR DECISION

1. The applicant Jopam Nominees Pty Ltd ('Jopam') owns five lots which are shown on plan of subdivision 447492G: commercial premises in Blackburn Road, Mount Waverley. It purchased four of the lots – Lots 3, 4, 5 and 7 ('the first four lots') – in 2011 and the fifth, lot 15, in 2012.
2. The respondent owners corporation is the legal owner of the common property shown on the plan of subdivision. Until the [Owners Corporations Act 2006](#) came into force on 31 December 2007 and changed its name, although not its legal identity, the owners corporation was called Body Corporate Registered Plan No PS447492G. I refer to it as 'the body corporate' when describing things it did and other events before 31 December 2007 and as 'the owners corporation' when describing things it did and other events after that date.
3. In 2002, by a deed executed under its common seal, the body corporate granted to the then owners of the five lots a licence to use part of the common property, a plinth wall, for signage. The licence was for a term of 99 years and was granted in return for a nominal licence fee of \$1.00 per year.
4. The dispute between Jopam and the owners corporation is whether Jopam has a right, as assignee of the licensee's rights under the licence, to use the signage space by permitting its tenant to display advertising on the wall. The owners corporation maintains that there has been no effective assignment, and further that the licence no longer exists.
5. At the time that Jopam had purchased the first four lots in 2011, there had been a tenant in possession of them under a lease. In 2008 the tenant had begun to display its trading name on a sign placed on the wall. The tenant has remained in possession. In 2015 the owners corporation caused the sign to be removed.
6. Jopam has brought this proceeding to ask for a declaration that the licence has been assigned to it, and to ask for an injunction requiring the owners corporation to reinstate the sign and restraining it from removing the sign again.

The Hearing

7. I heard the proceeding on 22 March 2016. Jopam's solicitors had prepared a Tribunal Book which contained most of the relevant documents, including the deed granting the licence. By agreement I received the Tribunal Book as an exhibit.
8. Four witnesses gave evidence. Jopam's director, John Morarty, was its only witness. For the owners corporation there were Madeleine Thewlis from Ross-Hunt Real Estate, its manager at all material times until 2011; George Grigoriou from Gough Partners, the current manager; and Sam Kandil, its chairman. On the whole, the documentary evidence was more important than the oral evidence.
9. At the end of the evidence Mr Campbell of Counsel for Jopam presented and spoke to a written submission, and Mr McLaurin, solicitor for the owners corporation, made an oral submission. Neither of those submissions dealt with an issue I raised during the hearing: whether the law permitted the grant of an injunction to enforce a licence or to restrain a breach of a licence. I reserved my decision and set a time table for further written submissions. Each party filed a further submission.

The Licence and the Subsequent Sales

10. The licence was dated 30 September 2002. The parties to it were the body corporate and the then owners of the five lots, Mesdames Burton, Layton and Walsh, called 'the owner' in the deed. The recitals to and operative parts of the deed were:

WHEREAS:

1. The Body Corporate is the Body Corporate created to operate in respect of the Plan of Subdivision of the property at 241-243 Blackburn Road, Mount Waverley (hereinafter called "the said subdivision").
2. The owner is registered or entitled to be registered as the proprietor of all that piece of land being Lots 3, 4, 5, 7 & 15 on the said subdivision (hereinafter called "the said Lots").
3. The owner is desirous of taking signage rights over that part of the common property being the external surface area of wall marked on the attached Plan (hereinafter called "the said area") and the owner has requested that the Body Corporate formalise these arrangements by granting to the owner an exclusive licence of signage rights over the said area subject to the terms and conditions hereinafter contained.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The Body Corporate HEREBY GRANTS to the owner the right to display, affix or exhibit on or to the exterior of the said area signage approved in writing by the Body Corporate to the exclusion of all other persons until the 31st day of December 2101.

2. The owner shall on the signing hereof pay to the Body Corporate a licence fee of \$1.00 for the period from the date hereof until the 31st day of December, 2002 and shall on or before the 31st day of December in each succeeding year pay to the Body Corporate an annual licence fee of \$1.00 provided that this fee need not be paid unless requested in writing by the Body Corporate.

3. The owner HEREBY COVENANTS with the Body Corporate as follows:

(a) Not to do or permit or suffer to be done on the said area anything which may be a nuisance or annoyance to the other members of the Body Corporate; and

(b) Not to use the said area for any purposes other than signage.

(c) That the owner shall submit in writing to the Body Corporate for its approved details of all proposed material changes to such signs. Such approval may be granted by the Body Corporate Manager (if any) or by ordinary resolution of the Body Corporate, and shall not be unreasonably withheld.

(d) The owner shall comply with all applicable laws, regulations and requirements of Council and other relevant Authorities and shall obtain all relevant approvals from Council or any other required Authorities and shall bear and be responsible for all costs or damages incurred by the Body Corporate at any times arising out of or relating to the said signage.

4. The owner may assign the right created by this licence with respect to the said area without seeking the approval or consent of the Body Corporate providing however that any such assignment or transfer must be to a person or entity who is, or is entitled to become the proprietor of all the said Lots.

5. In this licence where the context so admits or requires words importing the singular shall include the plural and words importing masculine gender shall include the feminine or neuter.

There was an 'attached Plan' which showed the area on the plinth wall where in 2008 the tenant eventually placed its sign. There is no dispute about the location of the area which was the subject of the licence.

11. In May 2006 the three original owners of the five lots sold the first four lots to Notee Finance Pty Ltd ('Notee'). They did not sell lot 15 to Notee. By a deed made on or about the date of the contract the three original owners purported to transfer or assign the licence to Notee. The deed named the body corporate as a party to the deed and made provision for the body corporate to execute it, but the body corporate did not execute it or otherwise approve of or consent to the purported transfer or assignment.

12. In April 2011 Notee on-sold the four lots to Jopam. By a deed dated 11 August 2011 Notee purported to assign the licence to Jopam. The owners corporation was not made a party to the deed. Notee and Jopam did not seek or obtain the owners corporation's approval of and consent to the purported assignment. Jopam did not then own lot 15.

The Issues

13. Within the terms of paragraph 4 of the licence, neither Notee nor Jopam was 'a person or entity who is or is entitled to become the proprietor of all the said Lots' at the time of the purported assignment to it. Neither then owned lot 15.
14. Before the proceeding came on for hearing before me on 22 March 2016, the stance that the owners corporation took, as reflected in its Points of Defence, was that the purported assignment to Notee (and hence the further purported assignment by Notee to Jopam) was ineffective because:
 - (a) the licence could not be assigned at all; or
 - (b) if it could be assigned at all, the licence could not be assigned if the assignee was not, or was not entitled to become, the proprietor of all five lots at the time of the purported assignment; and
 - (c) the purported assignment to a person who was not, or was not entitled to become, the proprietor of all five lots was a breach of a fundamental term of the licence and terminated the licence.
15. During the hearing the owners corporation abandoned the third of those contentions. Mr McLaurin stated that it was no longer contending that the purported assignment of the licence had terminated the licence because it had been a breach of a 'fundamental term'. In the owners corporation's further written submission, however, filed by leave after the hearing, it made a new contention which was not greatly different from the abandoned one. The new contention was that upon the sale of the first four lots by the three original owners to Notee, without there having been any sale of lot 15, 'the licence ceased ... and was not capable of being assigned'.
16. The answers that Jopam had made, in Points of Reply, to the Points of Defence were based upon conduct of the body corporate, then of the owners corporation, that had occurred after the sale to Notee. That conduct was that the body corporate had permitted the tenant's sign to remain in place on the wall after the sale, and that the owners corporation had supplied owners corporation certificates dated 11 November 2010, for the purpose of Notee's proposed sale of the first four lots, which stated that the signage licence affected the common property.
17. Those answers were: first, that by that conduct the owners corporation had waived any non-compliance with the terms of the notice or irregularity in the assignment by the original owners to Notee, so that there had been no termination of the licence and there has been an effective assignment to Notee in 2006 and then to Jopam in 2011; alternatively, that the conduct had been misleading or deceptive, in contravention of consumer protection legislation, so that Jopam was entitled to relief under that legislation, including the injunction that it was seeking.
18. If either of those answers were to be a good answer to the contentions made in the Points of Defence, it would also be a good answer to the new contention made in the owners corporation's written submission.

Purported Assignments and Other Events

19. I need to set out in more detail the events and documents, subsequent to the creation of the deed of licence itself, that affect a resolution of the issues raised in this proceeding.
20. On 8 March 2006 the three original owners, Mesdames Burton, Layton and Walsh, contracted to sell the first four lots (but not lot 15) to Notee. The fact and the date of the sale appeared in the document to which I refer in the next paragraph.
21. The Tribunal Book contained a document headed 'Notice of Partial Surrender of Rights under Signage Licence Agreement'. It took the form of a deed poll made by the three original owners, who executed it and were described in it as 'The Owner'. Before their attestation clauses and signatures were the words: 'Dated the [blank] day of May 2006'. The recitals and operative parts of the 'notice' were:

1. Whereas the Owner entered into a Signage Licence Agreement regarding Lots 3, 4, 5, 7 and 15 at 241-243 Blackburn Road Mount Waverley on or about the 20th day of September 2002.
2. The Owner has sold Lots 3, 4, 5, 7 and Storage Unit U1 under Contract of Sale dated the 8th day of March 2006.
3. The Owner remains registered or entitled to be registered as the Proprietor of Lot 15, 241-243 Blackburn Road Mount Waverley and wishes to surrender all rights of the Owner of Lot 15 in respect to the Signage Licence Agreement.

TAKE NOTICE as follows:

1. The Owner hereby surrenders all rights under the Signage Licence Agreement as owner of Lot 15 while reserving all rights under the Signage Licence to itself as owner of Lots 3, 4, 5 and 7.
2. The Owner undertakes to execute any further document and to do any act matter or thing to give effect to its intention.
3. The Owner gives notice that it intends to assign the rights created by the Signage Licence Agreement to Notee Finance Pty Ltd of 16 Monash Crescent Clontarf in the State of New South Wales 2093.

The notice was addressed to the body corporate. There was no evidence that it was ever given to or received by the body corporate at any material time, or that Jopam was made aware of it at any material time.

22. Neither party made any submission about the effect, if any, of the notice. Mr Campbell did not submit that it enabled the three original owners to assign the licence. Mr McLaurin did not submit that it did or did not amount to the surrender of anything. I have inferred that Jopam included it in the Tribunal Book so that the Tribunal was not misled about anything. At all events, I make no finding about it and proceed to consider matters as if the document had never existed.
23. At a time which I infer was after that notice document had been executed but was in 2006 at or about the time that the contract of sale of the first four lots to Notee was completed at settlement, the three original owners and Notee executed a document headed 'Transfer of Signage Licence'. The document described the body corporate as 'the licensor', the three original owners as 'the old

licensee', and Notee as 'the new licensee'. It referred to a signage licence dated 30 September 2002. The document itself was not dated. Although there was an execution and attestation clause for the body corporate, that clause was left blank; the body corporate did not execute the document. Paragraphs 1, 2 and 3 of the document were:

1. TRANSFER

The old licensee transfers the licence to the new licensee with all options. The new licensee will hold the licence from the transfer date.

2. VALIDITY OF LICENCE

The old licensee promises that on the transfer date the licence is valid and no changes have been made to it.

3. NEW LICENSEE ACCEPTS OBLIGATIONS

The new licensee must pay the licence fee and do everything else required by the licence for the remainder of the licence and during any period it stays in possession of Lots 3, 4, 5 7 & U1 on the plan of subdivision 447492G.

The document did not identify a transfer date, but no doubt the parties to it (the three original owners and Notee) intended that the transfer date should be the settlement date.

24. The body corporate did not consent to the proposed assignment to Notee. Ms Thewlis gave evidence that the solicitors for the original owners had submitted the document headed 'Transfer of Signage Licence' to her for execution by the body corporate, but the body corporate committee had refused to execute it. She gave that evidence in chief in response to a question from Mr McLaurin when he asked her to look at the copy of the document in the Tribunal Book and say whether, and if so how and when, she had seen it before. The copy in the Tribunal Book was a copy of a document which had been executed by the three original owners and by Notee. So I infer from her evidence, and find, that the document that the solicitors had submitted to her was one which the three original owners and Notee had already executed.
25. By a lease dated 1 September 2008 Notee leased to Australia Wide Pty Ltd the first four lots (and Storage Unit U1). The lease described Australia Wide Pty Ltd as 'the Tenant'. Clause 13.2 of the lease provided:

13.2 The Tenant must observe and comply with the Body Corporate Rules (now Owners Corporation) and the Signage Licence Agreement between the Landlord and Body Corporate Registered Plan No PS447492G as annexed hereto and marked "Annexure C", with respect to the signage at all times.

A copy of the deed dated 30 September 2002 was annexed to the lease and marked 'Annexure C'.

26. At some time between 1 September 2008 and 18 December 2008 the tenant, Australia Wide Pty Ltd, placed its sign on the plinth wall advertising its trading name.
27. On 18 December 2008, at an annual general meeting of members of the owners corporation, the members resolved to instruct the manager to write to the tenant asking it to remove the sign and resolved to instruct the manager to obtain a solicitor's opinion about the legality of 'the recent

transfer'. I infer that before that date the owners corporation had somehow become aware of the purported assignment of the licence to Notee.

28. On 11 November 2010 the owners corporation, by its manager Ross-Hunt Real Estate Pty Ltd, gave owners corporations certificates, under s 151 of the Owners Corporations Act 2006, for each of the first four lots. Notee had requested the certificates. Each certificate included the following:
 - (j) details of any current contracts, leases, licences or agreements affecting the common property;

Signage Licence for Lots 3, 4, 5, 7 & 15
29. On 2 December 2010 Notee signed a vendor's statement, under s 32 of the Sale of Land Act 1962, about the first four lots (and about 'Accessory Unit U1 Storage'). The many annexures to the vendor's statement included copies of:
 - (a) the signage licence dated 30 September 2002;
 - (b) the four owners corporation certificates; and
 - (c) the lease to Australia Wide Pty Ltd with the annexures to the lease.
30. Paragraph 9 of the vendor's statement stated: 'Title: Attached are copies of relevant documents: ... Transfer of Signage Licence'. But the vendor's statement did not have attached to it a copy of the purported assignment of licence from the three original owners to Notee. Copies of the licence itself were attached, twice: once as a distinct document, and once as 'Annexure C' to the lease, but there was no attachment of any 'transfer' of the licence.
31. By a contract of sale dated 19 April 2011 Jopam purchased the first four lots and the accessory unit U1. A copy of the vendor's statement was attached to the contract. Mr Morarty of Jopam gave evidence that he had perused the vendor's statement before signing the contract and had noticed the reference to there being a signage licence; he was aware of the tenant's sign on the plinth wall; the existence of a licence for the sign added to the land's lettable value, he had considered, and influenced his decision for Jopam to purchase the land.
32. By a deed entitled 'Deed of Assignment of Signage Licence' dated 11 August 2011 between Notee and Jopam, Notee purported to assign its rights under the licence to Jopam. The recitals to the deed and paragraph 1 of the deed were as follows (Notee being 'the Assignor' and Jopam being 'the Assignee'):
 - A. The Assignee as Licensee and Body Corporate Registered Plan No. PS447492G as Licensor (the Owners Corporation) are parties to a Signage Licence (entered into between the Owners Corporations as Licensor and a predecessor of the Assignor as Licensee) commencing 30 September 2002, comprised by a Signage Licence dated 30 September 2002 between the Owners Corporation and Joanne Catherine Burton, Elizabeth Nicole Layton and Jane Scott Walsh (the Licence) pursuant to which the Assignor enjoys signage rights over certain common property more particularly described in the Licence and situated at 242-243 Blackburn Road, Mount Waverley (the Property).

B. The Assignor was registered as proprietor of Lots 3, 4, 5, 7 and Storage Unit U1 at the Property, and sold these lots to the Assignee with settlement of those sales occurring on 25 May 2011.

C. The Assignor agrees to assign to the Assignee and the Assignee agrees to take an assignment of all its right, title and interest in or arising out of the License as and from 25 May 2011 (the Assignment Date) on the terms and conditions set out in this Deed.

D. Clause 4 of the License provides that the Assignor may make this assignment without seeking the approval or consent of the Owners Corporation in the circumstances.

NOW THIS DEED WITNESSETH AS FOLLOWS:

I. Assignment

In consideration of the covenants contained in this Deed the Assignor as beneficial owner hereby assigns to the Assignee with effect from the Assignment Date all of its right, title and interest in or arising out of the Licence to hold the same unto the Assignee for the residue unexpired of the term created by the License subject to the performance and observance by the Assignee of the Licensee's covenants, agreements and conditions in the License reserved and contained.

33. The hearing proceeded on the footing that the owners corporation had not consented to any assignment to Jopam of the licence. The deed did not name the owners corporation as a party or make any provision for the owners corporation to execute it.
34. As the deed had recited, the sale of the first four lots and of the storage unit U1 had been settled on 25 May 2011. Jopam became the registered proprietor of those lots.
35. In late 2011, according to Mr Morarty's evidence, he became aware that the owners corporation had asked the tenant to remove the advertising sign, without success. Although he did not say so, he must also have become aware at about that time that the owners corporation was maintaining that the rights under the licence had not passed to Jopam. At the 2012 annual general meeting of the owners corporation, held on 1 August 2012, which Mr Morarty attended on Jopam's behalf, the members resolved to allow Mr Morarty time to investigate and obtain legal advice about whether Jopam had rights under the licence.
36. By a further contract dated 25 September 2012 Jopam purchased lot 15 from the then owner, Nuda Rudda Pty Ltd, which (I have assumed) had purchased it in the meantime from the three original owners. The sale was completed. So Jopam is now the registered proprietor of the first four lots and lot 15.
37. The Tribunal Book included a further 'Deed of Assignment of Licence' document, this time expressed to be between the three original owners as assignors and Jopam as assignee. The deed was dated 28 September 2012. It was in the same terms as the earlier deed of 11 August 2011, except that the recitals to it were as follows:
 - A. The Assignors as 'Owner' of the first part and Body Corporate Registered Plan No. PS447492G as licensor (the Owner Corporation) of the second part are parties to a signage licence dated 30 September 2002 between the Assignors and the Owners Corporation (the Licence) pursuant to which the Assignors were granted signage rights over part of the common property

in Plan of Sub-division No. PS447492G more particularly described in the Licence and situated at 241-243 Blackburn Road, Mount Waverley (the Property), until 31 December 2101.

B. At the time of entry into the Licence, the Assignors were the proprietors or entitled to be the proprietors of Lots 3, 4, 5, 7 and 15 at the Property ('the said lots'). The Assignors subsequently sold the said lots to third parties (being predecessors in title to the Assignee), in or about 2006.

C. The provisions of the Licence entitle the Assignors to assign the rights created by the Licence without seeking the approval or consent of the Owners Corporation, provided that any such assignment or transfer must be to a person or entity who is or is entitled to become the proprietor of all the said lots.

D. The Assignee is, or is entitled to become, the proprietor of all the said lots.

E. The Assignors agree to assign to the Assignee and the Assignee agrees to take an assignment of all the Assignors' right, title and interest in or arising out of the Licence as and from the date of this Deed (the Assignment Date) on the terms and conditions set out in this Deed.

38. In its Points of Claim, and in Mr Campbell's opening address, Jopam had placed reliance upon that 2012 deed. In the written submission to which he spoke when making his final address however, Mr Campbell placed no reliance on it, and when addressing me orally he said that he placed no reliance upon it. So, in the end, Jopam did not contend that the 2012 deed had validly effected an assignment of the benefit of the licence if the earlier 2011 deed had not. Jopam's case was that the assignment by the original owners to Notee, and then by Notee to Jopam, had been effective, or if they had not been effective in accordance with the licence's terms then the owners corporation's conduct had made them effective.
39. On 11 November 2014, at the owners corporation's annual general meeting for that year, the members resolved to demand in writing that Jopam have the sign removed from the wall within 28 days, and if it did not comply with the demand the owners corporation would remove the sign.
40. The sign has been removed. The owners corporation's chairman Mr Kandil gave evidence that the owners corporation caused the sign to be removed in 2015. Then Jopam began this proceeding.

Assignability of a Licence: The Law

41. The benefit of a licence is assignable unless the contrary appears from its nature or from some provision in it.^[1] The burden of a licence, however, is not assignable.^[2]

^[1] Megarry's Manual of the Law of Real Property, 8th edition (2002) p 480.

^[2] *Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd* [1994] 1 AC 85 at 103.

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42. A licence which is personal to the licensee is, from its nature, not capable of being assigned.^[3]
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[3] [Bruce v Tyley](#) (1916) 21 CLR 277.

43. A licence is not personal to the licensee, and hence the benefit of the licence is capable of being assigned, if:
- (a) there is a provision in the licence that permits assignment, for that very provision shows that the licence is not personal, or
 - (b) on the proper construction of the licence, it can make no difference to the licensor whether it is to the original licensor, or to a transferee or assignee, that the licensor discharges the obligations under the licence. [4].
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[4] [Tolhurst v Associated Portland Cement Manufacturers \(1900\) Ltd](#) [1902] 2 KB 660 at 668, approved in [Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd](#) (2005) 149 FCR 395 at 405.

44. By its terms a licence may contain an absolute prohibition upon assignment, or a qualified prohibition upon assignment by providing that it cannot be assigned without the consent of the licensor.
45. A licence that contains an absolute prohibition upon assignment cannot be assigned; [5] but a purported assignment with the consent of the licensor can take effect as a novation. [6].
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[5] [Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd](#) (2000) 202 CLR 588 at 601.

[6] [Devefi Pty Ltd v Mateffy Pearl Naqu Pty Ltd](#) (1993) 113 ALR 225 at 235-6, approved in [Pacific Brands & Leisure Pty Ltd v Underworks Pty Ltd](#) (2006) 149 FCR 395 at 405.

46. A licence that expresses the qualified prohibition may be assigned with the consent of the licensor. The assignment is effective for the assignee against the licensor and the assignor; the assignee obtains the benefit of the licence, and may enforce it against both the licensor and the assignor.
47. When a licence either provides that it may be assigned with the consent of the licensor, or contains the qualified prohibition upon assignment without the consent of the licensor, a purported assignment without the consent of the licensor
- (a) is effective as between the assignor and the assignee, so that the assignee's entitlement to the benefit of the licence is better than the assignor's; [7].

- (b) but is not effective against the licensor; the assignee cannot compel the licensor to allow the assignee to have the benefit of the licence. [\[8\]](#).

[\[7\]](#) [Devefi Pty Ltd v Mateffy Pearl Naqy Pty Ltd](#) (1993) 113 ALR 225 at [236](#).

[\[8\]](#) [Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd](#) [1994] 1 AC 85; [New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd](#) [2003] 3 NZLR 1.

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48. While the burden of a licence is not assignable, a purported assignment of the burden, if it occurs with the consent of the licensor, may take effect as a novation. [\[9\]](#).

Construction of the Licence and of the Assignments

[\[9\]](#) [Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd](#) [1994] 1 AC 85 at [103](#).

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49. The licence, being a contract between the body corporate and the three original owners, should be construed in accordance with the principles applicable to construction of contracts generally: [\[10\]](#).

... The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. [\[11\]](#).

[\[10\]](#) [Avranik Pty Ltd v Lloyd & anor](#) [2012] VSC 306. An appeal from the decision was dismissed: [Avranik Pty Ltd v Lloyd & ors](#) [2013] VSCA 244.

[\[11\]](#) [Toll \(FGCT\) Pty Ltd v Alphapharm Pty Ltd](#) (2004) 219 CLR 165 at [\[40\]](#).

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50. The two documents which purported to have been assignments to Notee, and then from Notee to Jopam, should be construed in accordance with the same principles.
51. Although the licence did not define 'the owner' (the licensees) as including the successors of, or transferees of registered proprietorship from, the three original owners, I consider that on its proper construction the licence was not a personal licence which was incapable of assignment. The reasons are:

- (a) Paragraph 4 of the licence specifically provided for one possibility of assignment, even if for no others: the possibility of assignment to a person who was, or was entitled to become, the proprietor of all five lots.
- (b) As the parties to the licence must have known, the premises where the five lots were situated were commercial premises. The licence was expressed to grant a right to place signage on common property within those premises. The licence's evident purpose was to enable a business carried on within the premises to advertise itself. It was a commercial licence, not a licence for any personal purpose.
- (c) In that commercial context, it would make no difference to the licensor which person paid the licence fee or performed the other obligations of the licensee, so long as they were performed. What might make a difference was whether that person was, or was entitled to become, the proprietor of all five lots.

52. There are two possible constructions of paragraph 4 of the licence. For convenience of reference I set it out again:

- 4. The owner may assign the right created by this licence with respect to the said area without seeking the approval or consent of the Body Corporate providing however that any such assignment or transfer must be to a person or entity who is, or is entitled to become the proprietor of all the said Lots.

The first possible construction is that it imposed an absolute prohibition upon assignment to a person who was not, or was not entitled to become, the proprietor of all five lots, so that the body corporate had no power to approve or consent to an assignment to such a person. The second possible construction is that paragraph 4 imposed a qualified prohibition on assignment to such a person, the qualification being that the body corporate's consent had to be obtained, but also provided that an assignment to a person who was, or was entitled to become, the proprietor of all five lots would be effective even if there was no approval or consent from the body corporate.

53. In my view the second of those two possible constructions is preferable. A reasonable person who read the licence would understand that the purpose of paragraph 4 was as a safeguard against possible conflict between proprietors of the five lots from time to time about who was or was not entitled to use the designated area for signage. That purpose was achieved by requiring the original owners to obtain consent to any assignment to a person who was not, or was not entitled to become, the proprietor of all five lots; once asked to consent, the body corporate could assess whether such a conflict was likely to occur. There would be no need to make that assessment when a proposed assignment was to be a person who was, or was entitled to become, the proprietor of all five lots, for there could be no such conflict; thus, such an assignment could occur without the body corporate's consent.
54. When the document that purported to effect an assignment from the original owners to Notee was entitled 'Transfer of Signage Licence', and when paragraph 1 of that document provided that 'the old licensee transfers the licence to the new licensee ...', the wording used was inaccurate. It was not possible to transfer 'the licence', that is to say, both the benefit and the burden of the licence. There is a similar inaccuracy in the use of a phrase 'assign this contract'; however, 'lawyers frequently use those words inaccurately to describe the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned'. [\[12\]](#) A reasonable person would

understand it to have been intended to assign the benefit of the licence to Notee. So in my opinion on its proper construction the document was a purported assignment of the benefit of the licence to Notee.

[12] [*Linden Gardens Trust Ltd v Lenestra Sludge Disposals Pty Ltd*](#) [1994] 1 AC 85 at 103.

55. A similar inaccuracy was reflected in the title, 'Deed of Assignment of Signage Licence', of the deed between Notee and Jopam dated 11 August 2011, but not in the operative parts of the deed. Paragraph 1 of the deed, expressing an assignment of all of Notee's 'right, title and interest in or arising out of the Licence', was an express purported assignment to Jopam of the benefit of the licence.

The Effect of the Licence's Terms Upon the Purported Assignments

56. The owners corporation's first submission was that the licence could not be assigned at all because it was a licence personal to the three original owners. I reject the submission. For reasons given above I have concluded that the licence was not a personal licence and that the benefit of it was capable of being assigned.
57. Another submission was that the purported assignments were ineffective because they purported to assign both the benefit and the burden of the licence. I reject that submission also. For reasons given above I have concluded that each purported assignment – from the three original owners to Notee, and from Notee to Jopam – was of the benefit of the licence only.
58. Another submission still was that, upon the sale by the three original owners to Notee of the first four lots but not of lot 15, the licence ceased to exist. The licence itself did not express such a consequence. The owners corporation did not cite any authority for what seems to me to be an illogical proposition. I reject it.
59. If that submission was a reintroduction by the back door, so to speak, of the contention which the owners corporation had abandoned during the hearing – that a purported assignment to a person who was not, or was not entitled to become, the proprietor of all five lots terminated the licence because such a purported assignment was a 'fundamental breach' of the licence – I would reject it also. Again, the owners corporation did not cite any authority for the proposition, and again it seems illogical. As an assignment of the benefit of a licence, made contrary to a qualified prohibition upon an assignment without the licensor's consent – a 'breach' of the terms of the licence – is effective as between assignor and assignee),^[13] it follows that that 'breach' has not brought about a termination of the licence. There is no reason to conclude that a 'breach' of a slightly different kind of qualified prohibition in this particular licence would bring about a termination of the licence.

[13] See paragraph 47, and footnotes 7 and 8, above.

60. There remains the submission that the licence could not be assigned to a person who was not, or was not entitled to become, the proprietor of all five lots. The submission assumed that the licence contained a prohibition that was absolute. I have decided otherwise: there was a qualified prohibition upon assignment to such a person without the consent of the body corporate.
61. Both the purported assignment by the three original owners to Notee in 2006 and the purported assignment by Notee to Jopam in 2010 flouted the qualified prohibition. There was no consent by the body corporate to the first and no consent by the owners corporation to the second, it being in each case a purported assignment to a person who was not then the proprietor, or entitled to become the proprietor, of all five lots. In accordance with the legal principles set out above I would conclude that each purported assignment, although effective as between assignor and assignee, was not effective against the licensor, and that Jopam cannot succeed in this proceeding, unless there is some other reason (as Jopam argued that there is) for there being a legal result that each assignment has been effective against the licensor and can be enforced now against it.
62. To this point this case has resembled one which Mr McLaurin cited [\[14\]](#) and which can be called the Melburnian case because it involved the Melburnian apartments in St Kilda Road, Melbourne. In that case, two owners corporations affected those apartments and common property. Each owners corporation granted to one of its members a licence to use part of common property. A clause in each licence provided that the member might assign 'its rights and obligations' under the licence upon notice to the licensor owners corporation and if the assignee executed an instrument agreeing with the owners corporation that the assignee would be bound as if the assignee had been the original licensee. Such a contemplated assignment, unlike the purported assignments in the present case, was of both the benefit ('rights') and burden ('obligations') of the licence, so could not have been effective as contemplated; but that is by the way. As things happened, the licensee member entered into deeds of assignment to the respondent as assignee, but the relevant owners corporation was never made a party to either deed. The Tribunal held that neither purported assignment was effective against the relevant owners corporation because neither had complied with the conditions under which the licence could be assigned.

[\[14\]](#) *Owners Corporation I Plan No PS422669H & anor v United Property Fund Melburnian Project Pty Ltd & anor (Civil Claims)* [\[2010\] VCAT 2084](#).

63. I proceed to deal with Jopam's argument that because of the owners corporation's conduct the legal result in the present case is different.

The Effect of the Alleged Conduct

64. When considering conduct which occurred before Jopam purchased the first four lots from Notee, one needs to distinguish between conduct that was Notee's and conduct that was the owners corporation's. As an advertising brochure that I received in evidence showed, Notee had advertised the first four lots for sale by displaying a photograph in which the sign on the plinth

wall was prominent. In the vendor's statement given under s 32 of the [Sale of Land Act 1962](#) in respect of the first four lots the words 'Transfer of signage licence' were used to describe a document that was said to have been attached to the statement, even though it had not been attached. A document that was attached to the statement was a copy of the lease to the tenant requiring the tenant to comply with the terms of the signage licence, implying that Notee had the benefit of a signage licence and wanted to preserve the benefit by making sure that the tenant promised to comply with its terms. All of that conduct might be relevant to a claim against Notee if the fact is that Notee did not have a benefit that it could enforce against the licensor, but is not relevant to Jopam's case against the owners corporation.

65. The conduct of the owners corporation that is relevant to Jopam's case is:

- (a) Although its members had resolved to ask the tenant to remove the sign from the plinth wall, the owners corporation had taken no action to remove it before Jopam purchased the first four lots.
- (b) It gave owners corporation certificates which identified the signage licence as one that affected common property, but did not disclose that it was challenging the legality of the purported assignment to Notee or that it had asked the tenant to remove the sign.
- (c) The certificate did not disclose another agreement that affected common property: the purported assignment from the three original owners to Notee.

66. Under the provisions of the [Owners Corporations Act 2006](#) and the [Owners Corporations Regulations 2007](#), an owners corporation must issue an owners corporation certificate to an applicant if the prescribed fee for the certificate is paid.^[15] The certificate must contain information which includes details of any current contracts, licences and agreements affecting the common property.^[16] The owners corporation had partly complied with those provisions by including in each of the four certificates details of the signage licence. The purported assignment from the three original owners to Notee of the benefit of the licence was a contract or agreement that affected the common property – it gave Notee rights to the use of the common property which Notee could enforce against the assignors, but not against the owners corporation – and so to comply with the statutory requirements the owners corporation ought to have included details of it in the certificates, in my opinion. It did not.

^[15] [Owners Corporations Act 2006](#) s 151(1), (2), (3); [Owners Corporations Regulations 2007](#) regs 10 and 10A prescribe maximum fees to accompany an application for a certificate.

^[16] Section [151\(4\)\(a\)\(viii\)](#), reg 11 (j).

67. Jopam has argued that by its conduct the owners corporation waived any right that it had to deny the effectiveness of the successive assignments. It made its waiver argument primarily as an answer to the owners corporation's original contention that the licence had been terminated by breach, the unauthorised assignment to Notee having been a breach of a fundamental term of the

licence. I have decided that the unauthorised assignment did not have the effect of terminating the licence. I propose to consider, however, whether the conduct amounted to a waiver of a right to deny the full effectiveness of the successive assignments,

68. Waiver by election may occur when a party, by words or conduct, elects to choose one right and to give up another. The issue of waiver by election focuses upon the words and conduct of that party, rather than (as in the case of waiver by estoppel) the other party's reliance upon that conduct or suffering of detriment as a result of the reliance. For waiver by election to occur, the words or conduct must clearly and unequivocally amount to an election. [\[17\]](#).

[\[17\]](#) Halsbury's Laws of Australia, vol 16, paragraphs [110-905] – [110-915]; [Sargent v ASL Developments Ltd](#) (1974) 131 CLR 634.

69. The owners corporation's conduct to which I have referred did not, in my opinion, amount to any waiver of a right to deny the full effectiveness of the successive assignments of the signage licence. The conduct said or implied nothing about the existence or effectiveness of any assignment to Notee. Of its nature, the non-disclosure of the agreement between the three original owners and Notee could not have been clear and unequivocal conduct that implied that the agreement existed and was fully effective; if anything, it implied that no such agreement existed.
70. Jopam's alternative argument was that the owners corporation's conduct was misleading or deceptive conduct in contravention of consumer protection legislation, that that conduct caused loss or damage to Jopam, and that the appropriate remedies were the declarations and injunction sought.
71. Although Jopam did not purchase the first four lots until 19 April 2011, the relevant conduct of the owners corporation occurred on or before 11 October 2010, the date of the owners corporation certificates. At that time the consumer protection legislation which was in force was the [Fair Trading Act 1999](#). Section 9(1) of that Act provided that a person must not, 'in trade or commerce', engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 159 enabled a person who suffered loss or damage because of a contravention of a provision of the Act to bring proceedings in the Tribunal to recover the amount of the loss or damage from the contravening person. Section 158(3) empowered the Tribunal, in the case of such a contravention, to make various other orders against the contravening person, including any order it considers fair.
72. The *Australian Consumer Law (Victoria)* has, since 1 January 2011, replaced those provisions with other provisions that re-enacted them word for word. [\[18\]](#) The [Fair Trading Act 1999](#) has been repealed, [\[19\]](#) but the Tribunal despite the repeal continues to have jurisdiction in relation to conduct that took place while the Act was still in force. [\[20\]](#) In the Commonwealth Act, then called the [Trade Practices Act 1974](#), there were as at 11 October 2010 provisions [\[21\]](#) similar to those in the [Fair Trading Act 1999](#) that I have mentioned, and Mr Campbell sought to rely upon them; but the Tribunal has never had jurisdiction to grant remedies under the Commonwealth Act. [\[22\]](#).

[18] *Australian Consumer Law (Victoria)* ss 18(1), 236, 237, 243. The Tribunal has jurisdiction to hear and determine a cause of action arising under those provisions: [Australian Consumer Law and Fair Trading Act 2012 s 224](#).

[19] [Australian Consumer Law and Fair Trading Act 2012 s 233](#).

[20] *Fair Trading Amendment (Australian Consumer Law) Act 2010* s 47, which introduced clause 19B into Schedule 3 of the *Fair Trading Act*.

[21] Upon the re-naming of the Act as the *Competition and Consumer Act 2010* (Commonwealth), those provisions were repealed (Act 103 of 2010, s 3) and the [Australian Consumer Law](#) was introduced.

[22] The reason is that the Tribunal is not a 'court' within the meaning of the Commonwealth Act which can exercise the jurisdiction that the Act confers: see [Maltall Pty Ltd v Bevendale Pty Ltd](#) (1998) 14 VAR 368.

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73. There is no contravention of the relevant section unless a person engages 'in trade or commerce' in the conduct which allegedly is misleading or deceptive or is likely to mislead or deceive. No argument was put to me as to whether the owners corporation had been, or had not been, engaged 'in trade or commerce' at any material time. In favour of the proposition that an owners corporation engages in trade or commerce when issuing an owners corporation certificate is the circumstance that it receives a fee which the applicant for the certificate is required to pay. Against the proposition is that the owners corporation has a statutory obligation to provide the certificate once the fee is paid; it does not contract to provide it. I do not decide the issue. I propose to assume, in Jopam's favour, that the owners corporation engaged in trade or commerce when it issued the four certificates.
74. In those certificates the owners corporation stated that there was a signage licence and gave details of it, but did not disclose the existence of the agreement which was the purported assignment to Notee or give details of it. Non-disclosure of a fact may amount to misleading or deceptive conduct if there was a reasonable expectation that a party would disclose the fact. [23]. Because the owners corporation was obliged by law, in my opinion, to have disclosed in the certificates the purported assignment, the non-disclosure was capable of being misleading or deceptive conduct in contravention of s 9(1) of the *Fair Trading Act*. A person would have a reasonable expectation that an owners corporation would disclose in a certificate something that it was required by statute or regulation to disclose.

[23] [Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited](#) (2010) 241 CLR 357 at 368-371, [14]-[23], approving [Demagogue Pty Ltd v Ramensky](#) (1992) 39 FCR 31.

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75. Neither the giving of details of the signage licence in the certificates nor the non-disclosure in the certificates of the purported assignment to Notee was, in my opinion, a contravention of s 9(1). If in truth there was no licence in existence, they could have misled a reader of the certificates to believe that there was. Jopam's case, however, has to be that the certificates deceptively implied

that the licence had been assigned to Notee in a way that made the licence enforceable against the owners corporation. In my opinion they did not imply that at all. Paragraph 69 above gives the reason.

76. The owners corporation did not disclose in the certificates that it was challenging the legality of the purported assignment to Notee or that it had asked the tenant to remove the sign. There was no obligation imposed on the owners corporation by statute or regulation to disclose those matters in an owners corporation certificate. In my opinion, a person would not have a reasonable expectation that an owners corporation certificate would disclose those matters. Their non-disclosure was not conduct that was misleading or deceptive or likely to mislead or deceive.
77. Having concluded that the owners corporation did not engage in any conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 9(1), I do not need to go on to consider what relief, if any, would have been available to Jopam if my conclusion had been different.
78. Nothing, therefore, that the owners corporation did or failed to do alters the legal consequence of the purported assignments not being enforceable against the owners corporation because they flouted the qualified prohibition on assignment, without the consent of the owners corporation, to a person who was not, or was not entitled to become, the proprietor of all five lots at the time that the assignment occurred. Jopam is not entitled to the declaration it seeks. The proceeding must be dismissed.

Injunctive Relief

79. Often it is not possible for a licensee to obtain an injunction to restrain the licensor from breaching or terminating the licence. The reason is that, unless it creates or is coupled with a proprietary interest, a licence is revocable at will by the licensor, even if the revocation is a breach of contract. So, in the leading Australian case, [\[24\]](#) a person who purchased a ticket for a race meeting and thereby obtained a licence to enter the racecourse was refused an injunction when the owner ejected him from the racecourse, thereby revoking the licence.

[\[24\]](#) [Cowell v Rosehill Racecourse Ltd](#) (1937) 56 CLR 506.

80. It was for that reason that I invited the parties to make further written submissions after the hearing on the issue of whether it was open to me to grant Jopam the injunction it sought if it was otherwise successful in the proceeding. The parties had not addressed that issue during the hearing.
81. As Jopam has not been successful, it is not necessary for me to decide the issue, but because I put the parties to the trouble of making submissions about it if they wished I shall express my conclusions about it.
82. Where a licence is a personal licence, creates no proprietary interest for the licensee, and is to enter land rather than to occupy it or use it (like the licence to enter the racecourse and observe a

spectacle), it is commonplace for the courts to refuse to grant an injunction against an actual or threatened breach of the licence.

83. Where a licence is contractual and involves a right to occupy or use land, it is open to a court to grant an injunction in an appropriate case. The rationale for the availability of an injunction is that ‘in every contractual licence there is an implied negative stipulation by the licensor not wrongfully to revoke the licence, not to treat the licensee as a trespasser until the licence has been validly determined’. [25]. An example of a case where an injunction was granted to restrain the termination of a licence because there was such an implied negative stipulation in the licence was where a franchisor attempted to terminate the franchisee’s licence to occupy a convenience store, [26]. That does not mean, however, that in every case where there is the implied negative stipulation the court will grant an injunction. The usual considerations, of whether damages would be an adequate remedy [27] and where the balance of convenience lies, [28], apply and may lead to the refusal of an injunction.

[25] *Sigma Constructions (Vic) Pty Ltd v Maryvell Investments Pty Ltd* (2004) 22 VAR 279 at 290, [30].

[26] *Bingham & anor v 7-Eleven Stores Pty Ltd* [2002] QSC 209. An appeal was dismissed: [2003] QCA 402.

[27] E.g., *Voskuilen v Morisset Meqa-Market Pty Ltd* [2002] NSWSC 63.

[28] E.g., *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93.

84. The industry of Mr Campbell, displayed in Jopam’s further written submissions, has brought to my attention an unreported case in 1988 [29] which bears a resemblance to the present case, because it was about an exclusive licence to use an exterior wall for advertising for a term of three years with an option to renew. The licensor, alleging that the licensee had not validly exercised the option to renew, purported to grant a licence to another person to use the wall for advertising. There did not seem to have been any dispute that there was a serious question to be tried as to whether the plaintiff licensee had exercised the option to renew. For two reasons the presiding Judge held that there was no impediment to the grant of an injunction. The first reason was that the particular terms of the licence conferred a proprietary interest on the licensee. The second reason was the existence of the implied negative stipulation. The balance of convenience favoured the plaintiff, and the injunction was granted.

[29] *Australian Posters Pty Ltd v N Atie* (BC8801697), 27 July 1988 (Brownie J, Supreme Court of New South Wales).

85. As the presiding Judge stated in that case, the mere granting of a right to erect an advertising sign on a wall does not create a right in the nature of a proprietary interest. I doubt that the terms of the licence in the present case created any proprietary interest for the three original owners. But, particularly because the expressed duration of the licence was 99 years, I conclude that it

contained the implied negative stipulation and that, if all other things had been equal, I would have granted an injunction.

86. All other things are not equal, however. Jopam has not made out its case that it has an enforceable right against the owners corporation which an injunction could protect.

Conclusion

87. I have determined that the proceeding should be dismissed. There will be an order accordingly.

88. In the course of reaching that determination, I have decided that the purported assignments from the three original owners to Notee and from Notee to Jopam were not effective as against the owners corporation and are not enforceable by Jopam against it; I have also decided that the acts of purported assignment did not terminate the licence, and that the purported assignments were effective as between assignor and assignee, although not as against the licensor owners corporation. I have had no need to decide, and have not decided, anything else about the licence. In particular, I have had no need to decide, and have not decided, whether the licence remains on foot or, if it does, whether it is capable of being assigned now.

SENIOR MEMBER A VASSIE