

CITATION: *City of Darwin v Carolyn Reynolds* [2020] NTLC 005

PARTIES: DARWIN CITY COUNCIL

V

CAROLYN REYNOLDS

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO: 21934192

DELIVERED ON: 26 AUGUST 2020

DELIVERED AT: DARWIN

HEARING DATE: 5 MARCH 2020

DECISION OF: JUDGE ALAN WOODCOCK

CATCHWORDS:

Notice to accept offer of renewal of lease. Application pursuant to Division 13 of The Business Tenancies (Fair Dealing) Act. Whether lease is a business lease. Presumption that persons of full age have the capacity to manage their own affairs, is presumption, rebutted, should litigation guardian have been appointed.

REPRESENTATION:

Counsel:

Applicant: Sarah Pringle

Respondent: Respondent in person

Solicitors:

Applicant: Minter Ellison

Respondent: Respondent in person

Decision category classification: B
Decision ID number: 005
Number of paragraphs: 49

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21934192

BETWEEN

Darwin City Council

Applicant

AND

Carolyn Reynolds

Respondent

REASONS FOR JUDGMENT

(Delivered on the 26 August 2020)

JUDGE ALAN WOODCOCK

1. This is an application, filed on 11 September 2019, by the City of Darwin (the Applicant) for vacant possession of 20 Doctors Gully Road (lot 5245) Larrakeyah (the Premises), Darwin Pursuant to s131 of the Business Tenancies (fair Dealing) Act (The Act).
2. There are no pleadings.
3. On 30 August 1994 The Applicant entered into a lease agreement (the Lease) with Tekserv International Pty Ltd (Tekesrv) to lease lot 5245 for a term of 25 years from 1 July 1994, expiring midnight 30 June 2019.
4. On 8 August 2001 Tekserv entered into a Deed of Consent to Assignment of the Lease with Carolyn Reynolds (the Respondent) transferring its interest in The Lease to The Respondent, with the consent of the Applicant. On the same day the Applicant and Respondent executed an Amendment of a Lease.
5. Since that time the Respondent has undertaken a rock climbing business at the premises (The Rock Centre), subsequently she has also commenced a child minding centre at the premises (Help NT). At all relevant times these were ongoing

concerns operating at the premises under the ownership of the Respondent as registered business names. At some time during 2013 Gemma Reynolds, the daughter of Respondent was appointed as Manager of The Rock Centre, she continues in that role and undertakes the day to day business of the same.

6. Miss Pringle, solicitor for the Applicant, in her affidavit of the 10 September 2019, gives evidence as follows, setting the basis of the application:

"I am informed by the Applicant and verily believe that between 1 January and April 2019, the Respondent did not serve notice on the Applicant to exercise the option to renew.

On the 2nd of May 2019, Minter Ellison Lawyers personally served a letter on the Respondent requesting vacant possession of the premises at the expiry of the Lease at midnight on the 30th of June 2019...

I am informed by the Applicant and verily believe that the Respondent did not provide vacant possession of the premises at midnight on the 30th of June 2019 and has not vacated the premises to date...

On the 17th of July 2019 a letter enclosing the Notice to Quit and Vacate premises was hand delivered to Willoughby and Associates for service on the Respondent.

7. The letter of 2 of May, addressed to the Respondent, was hand delivered to Gemma Reynolds at the demised premises. The essence of the letter, is as follows;

"...As you are aware, the Lease is due to expire on 30 June 2019(expiry date)...under... the Lease...the premises must be returned by you in good and tenantable repair...any fixtures by you may be removed....Accordingly please note that COD will require the premises to be vacated by midnight on the expiry Date.."

8. Clause 10 and 12 of part C of The Lease (mutual covenants) are as follows:

10. RENEWAL

- (1) *The Lessor offers the Lessee a renewal of this lease for a term of Twenty Five (25) years commencing on the day after the date of expiry of the Term hereof and subject hereto containing identical covenants to the covenants of this lease (excepting this clause). The initial rent for the renewed term shall be calculated in accordance with the rent review provisions hereof as though the first day of the renewed term were a review date.*

(2) *The Lessee may only accept this offer if the rent shall have been duly and punctually paid and the covenants contained in this lease have been complied with throughout the Term hereof and the Lessee shall have served on the Lessor notice that he accepts this offer of a renewed term during a period commencing six (6) months and ending three (3) months before the date of expiry of the Term hereof.*

12. NOTICES

Any notice consent requirement or other communication or legal process to be given to the Lessee or served hereunder shall be deemed to have been duly given or served if handed to the Lessee personally or left at or sent in a pre-paid letter addressed to the Lessee care of the Demised Premises or at the usual or last known address or place of business of the Lessee. A notice or legal process sent by post shall be deemed to have been given or served on the second day after posting. Where the Lessee shall comprise more than one person or company service on any one of them shall be deemed to be service on them all.

9. Clause 12 would appear to relate to service of notice on the Lessee only. However Clause 10 (2) sets out that notice of acceptance of an offer for a new term is effected when “*the Lessee shall have served on the Lessor notice that he accepts*”. The plain English meaning of these words in the mutual covenants of the Lease require written notice by the Respondent to confirm acceptance of the offer to renew.

10. The Notice to quit and vacate was served on the Respondent in person on 27 July as follows:

NOTICE TO QUIT AND VACATE PREMISES

To: Carolyn Jane Reynolds
Address: C/- Help NT
20 Doctors Gully Road (Lot 5245) Larrakeyah NT 0820
From: City of Darwin (**Lessor**)

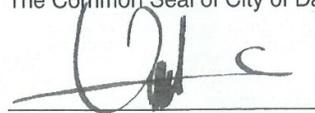
TAKE NOTICE that you are required to quit the Demised Premises (as defined in the Lease) known as 20 Doctors Gully Road (Lot 5245), Larrakeyah which you occupy pursuant to the Lease which commenced on 1 July 1994 and which expired on 30 June 2019.

TAKE FURTHER NOTICE that the period of this Notice to Quit will expire upon the expiration of 14 days following service upon you of this Notice to Quit, by which time you are required to have completely vacated the Demised Premises and to have removed from the Demised Premises all chattels, plant and equipment owned by you.

If you fail to quit the Demised Premises, the Lessor may apply to the Local Court for a warrant of possession pursuant to section 131 of the *Business Tenancies (Fair Dealings Act (NT))* to eject you from the Demised Premises.

DATED 17 July 2019

The Common Seal of City of Darwin was affixed in the presence of:



Kon Vatskaljs – Lord Mayor



Scott Waters – Chief Executive Officer



11. s125 of the Act requires that the notice be in writing and signed by the landlord or the land lords agent. In this instance s130(2) (b) requires that the landlord specifies that the ground for giving the notice to quit was that the lease has expired. The notice is compliant.

12. s6 of the Act sets out that the Act does not apply, other than Part 13, to, inter alia business leases. In TTG Nominees Pty Ltd (CAN 163811345) v Aileron Pastoral Holdings Pty Ltd (ACN 605457 421) Mildren AJ considered the meaning of 'business lease' as defined in s5(1) of The Act. At paragraph 37

"this definition looks at the purpose for which the lease was granted, rather than what the premises may have actually been used for from time to time."

13. Clause 8 of the lease (lessee's covenants of the lease) sets out the permitted use of the property under the lease as follows:

"To keep the Demised premises open for carrying on the business of the Lessee during normal business hours and to use best endeavours to develop extend and improve the business and not do or suffer to be done anything to injure the connections or good will of the business."

14. The purpose of the lease is clear, it is a business lease. As such part 13 of the Act applies.

15. The Application is brought pursuant to s131 of Part 13 of the Act:

131 Application for warrant of ejectment

- (1) *Where a landlord has given to a tenant a notice to quit which complies with this Division, the landlord or an agent authorised in writing may, at any time within 60 days after the expiry of the term of the notice, apply to the Local Court for a warrant of possession.*
- (2) *The Court must specify the day on which an order for the issue of a warrant of possession takes effect.*

16. William Carroll is the Manager of Economic Development and Tourism, gave evidence in his affidavit of 11 October 2019 as follows:

“...I have been responsible for overseeing City of Darwin’s commercial leases since 2001.

...significant matters such as the renewal of leases or the issuing of new leases are referred to me to oversee.

...I oversee the lease between the city of Darwin and Carolyn Reynolds for 20 Doctor Gully Road (lot 5245)...

...I was aware that Carolyn Reynolds had to serve notice on the City of Darwin between 1 January 2019 and 1 April 2019 to exercise the option to renew the Lease for a further term of 25 years.

I did not have any conversations with or receive written correspondence from Carolyn Reynolds between 1 January 2019 and 1 April 2019 regarding the renewal of the Lease.

I was not informed of any attempts by Carolyn Reynolds to contact me or the City of Darwin between 1 January 2019 and 1 April 2019 regarding the renewal of the Lease and I was not asked to return any calls to Carolyn Reynolds during that time.

I have reviewed City of Darwin’s management system in respect of contact with Carolyn Reynolds between 1 January 2019 and 1 April 2019. There is no record of Carolyn Reynolds requesting to speak or meet with me during that period, and there is no record of Carolyn Reynolds giving verbal or written notice to City of Darwin between 1 January 2019 and 1 April 2019 to exercise the option to renew the lease...

The first time that I spoke to Carolyn Reynolds about the end of the lease was on 8 May 2019...

17. Mr Carroll gave the following evidence in cross examination. The Respondent suggested she had discussed renewal of the Lease with him in 2018 in the botanic gardens when her business had erected a climbing wall. Mr Carroll denied this and said the Respondent had expressed an interest in “the other tank”. The applicant put to him that she had asked for a meeting. Mr Carroll replied:

“...if you’d asked for a meeting, we would have had a meeting”

18. Mr Carroll was cross examined. He gave answers consistent with his evidence in chief. He gave truthful and consistent answers in the of face persistent cross examination. I accept his evidence as truthful.

19. Miss Suzanne Johnson-Herewini is a senior customer service officer employed by the Applicant and has been employed in the customer service team of the Applicant since 1999. She has known the Respondent since 2000. She recalls the Respondent attending the front counter in 29 January to make a payment of some sort. They had a brief conversation involving the Respondent's travel plans and her daughter living in Sydney. The witness does not recall the Respondent mentioning the Lease or requesting to see Liam Carroll. She cannot ever recall the Respondent discussing renewal of the Lease or requesting a meeting with Liam Carroll between 1 January 2019 and 1 April 2019. She reviewed her email inbox and confirms there is no record of such a discussion or request within that period.

20. Miss Johnson-Herewini was cross examined by the Respondent. She gave evidence that she was an experienced and competent person at taking multiple messages in any given day in a busy office and ensuring all messages were successfully passed on to the intended recipient. The Respondent put in cross examination that on the 29 of January 2019 she came in to the Applicant's office specifically to see Miss Herewini-Johnson and requested she organise a meeting with Mr Carroll. She was told by Miss Herewini- Johnson that Mr Carroll was away a message would be sent to him and a meeting organised. The witness responded as follows:

"..I am extremely anal about messages through people, and so if that was the case, I would have sent Liam an email, but I can't remember that far back, 12 months ago. To be specific, but if I was asked to do that, I would have done it because I am extremely good at sending messages and passing on messages."

21. The witness goes onto concede it is possible she called Mr Carroll on the 29 January 2019, but simply does not recall.

22. The following exchange took place in cross examination of Miss Johnson-Herewini:

"...Have you previously heard me say that I want to extend the lease of The Rock Climbing Centre?---No Carolyn I Can't recall anything about the lease of the Rock Climbing Centre. I don't know anything about leases."

"But did you hear me, in the conversation with you, talk about me taking the other tank as well, because rock climbing is now an Olympic sport?— No, I don't know anything about rock climbing, Olympic sports or other tank."

23. Miss Johnson-Herewini gave evidence consistent with this evidence in chief. She made appropriate concessions, I accept her account as truthful.

24. The Respondent commenced her evidence by calling two witnesses who had filed affidavits in accordance with trial directions. Over the objection I allowed their evidence. Both Miss Pfannkuchen and Mr Cousins were regular patrons of The Rock Wall, I do not regard their evidence as relevant to any of the legitimately contentious matters to be decided in this matter.
25. Gemma Reynolds was called in evidence by the Respondent. She is the manager of the Rock Centre and the Respondent's daughter. She had sat through the bulk of the proceedings at the bar table as support for her mother, the unrepresented Respondent. On the day of the hearing The Respondent sought to tender, out of time, an affidavit sworn by the witness on the day of the hearing. Over counsel's objection I allowed it into evidence.
26. The affidavit seeks to give insight into the mind of the Respondent during the notice period and corroborate her cognisance of the need for notice and efforts to give the same. In this regard I reject it, along with the related attempts to make the same out in answers to cross examination as a belated, untruthful reconstruction. The truth of the Respondent's state of mind and that of her daughter Gemma Reynolds in and about the relevant period was revealed in the subtext of some answers to cross examination as contemplating at some time in the future to meet the Applicant to negotiate a rent review, possibly transfer the lease over to the witness and possibly extend it to other tanks. The same would emerge in more strident fashion in answers in cross examination of the Respondent herself.
27. The Respondent gives evidence in chief in her Affidavit of the 7 of October 2019:

"I dispute the matter brought by the City of Darwin in its entirety... I have stated on numerous occasions throughout my lease that my intention has always been to renew the lease (316513) as a tenant for a further period of 25 years and to continue running the Rock Centre....and have expressed this at every opportunity and meeting.

City of Darwin were fully aware that I wished to renew the lease...via my phone calls and left messages between six and three months before the expiry date...City of Darwin failed to contact me to discuss renewal during this period...

28. The Respondent goes on to list eight phone calls during January 2019 from her to the Respondent, the last on 29 January 2019. She recalls the following:

"on 29 January 2019 after a meeting with Ms Susan Johnson-Herewini at the Civic Centre city of Darwin to pay rent for lot 5245 Town of Darwin, I asked her if she was able to request a meeting with Mr Carroll and Mr

Merrigan to discuss the lease extension as I had been unable to secure a meeting through my own efforts as at that time.

The following week, having not received any follow up...I made another call to the city of Darwin Council, yet again, requesting a meeting to discuss my planned lease renewal for The Rock Centre. “

29. In the Respondent's letter of 9 May 2019 addressed to Mr Scott Walker CEO (annexed to the affidavit of Miss Pringle 11 October 2019) the Applicant characterised her interaction with Miss Johnson-Herewini as follows:

“During the attendance on the 29th of January, I expressed our firm offer to continue the lease with Susan”

30. The Respondent was cross examined, primarily on the issue of notice. She was taken initially to her letter of 9 May:

“...this letter was sent following the notice period...to renew your lease for 20 Doctors Gully Road?---That's correct. I'd already verbally given my notice.

So that...notice period expired on 1 April 2019?---No. I'd verbally given notice in the extension period, in that period. I then was told they needed it in writing.

...I gave notice verbally...to Susan and to Chris Potter and to Liam Carroll.

...That's in my affidavit and it shows you where the phone calls are and the times that I gave them verbal notice...

This is the first written correspondence that you've provided to the city of Darwin in relation to the exercising your option to renew the lease? I didn't need to put any written notice in...

There have been other written correspondence on around about 30 March but I've been really unwell...This is the first...written notice that I have in front of me here. I know another one was done and was prepared, but I was unwell at the time. I don't know if it actually got to Darwin City Council...because...we haven't had any responses to the letters...that's been sent to The Darwin City Council...It was prepared by me...around 30 March when we couldn't get a meeting...I don't know what happened to it...

... the letter that was written around 30 March you haven't referred to it at all in your affidavit?---Well I didn't need to. We'd already given verbal notice and we didn't have to do written notice.

...you do not refer to that correspondence at any other time throughout the course of presenting your case to the court?---I don't know whether the letter got there or not. We never had a response to anything so I haven't referred to it because I don't know what happened because I wasn't well. But we'd already given verbal notice anyway and was still awaiting a meeting to discuss whether the lease stayed the same....I didn't know whether or not the option for the next 25 years just carried on with the same lease or whether there was a change or variation....there was an opportunity for the Darwin City Council to vary the lease with Gemma's name going on...I assumed it was just carrying on as exactly the same paperwork.

I didn't know I hadn't renewed it until 2 May. I had no idea. I assumed it was renewed and we were just carrying on with the same lease.

...I'd already provided notice that I was carrying on with the lease and that all my notices and all my attempts to then discuss the actual lease and whether it was the same lease as I've got and I was just carrying on with that one were not responded to.

...I have gone into the council and physically met on January with the council to say I want meetings so that I can extend the lease and that was my oral notice...

..I didn't know at the time whether I just continued with the same lease...It's 25 years with an option for another 25 years. So there's no rent renewal. The renewal comes with CPI...each year...I didn't know what the CPI was. I was sitting there wanting to talk with them because I wanted to take on the other tank as well. I wanted to see if we included that in the same lease or how it would work... I assumed we were just carrying on with this one. They knew Gemma was going to be taking this lease as well. So that my thoughts were we might continue with this lease for a year, a year and a half, and then reassign the lease like I had the lease assigned to me.

...we were expecting...them to organise a meeting with us to be able to sit down to discuss the final details with the additional opportunities with respect to the taking on the next tank. And also to re-discuss with them the extension plan..."

31. The Respondent, when pressed in cross examination about the absence of written notice claimed she had at or about 30 March drafted a written notice to the council and left it to be sent by her daughter the manager, and due to sudden ill health was unable to action it. This account was not in the Respondent's affidavit. At page three of her ten page letter to Scott Walters on 15 June she says she "intended to

formally submit a written request to council for a meeting to discuss this...clearly outlining the intention to renew the lease” but ill health intervened. Not going so far as to say it was drafted and left for the manager to action as she

said in cross examination. This account is contrary to the balance of her account and is a recent invention in cross examination in an attempt to show she was cognisant of the need for notice in the notice period. Indeed the witness says she did not have to give written notice as oral notice was sufficient.

32. The Respondent asserts she made appointments to see Mr Carroll about the lease and left messages concerning the same, she says Miss Herewini- Johnson assured her she would send an email to Mr Carroll to follow up. Miss Herewini- Johnson cannot remember the entirety of her conversation with the defendant. However it is common ground this witness is very efficient and experienced specifically at passing on messages, I do not accept she said this and failed to pass on the message.
33. The Respondent gave evidence she told Mr Carroll that she wished to have a meeting with him about the lease in 2018 in the Botanic Gardens. Mr Carroll says this did not happen and if it did he would have had a meeting with her. I accept Mr Carroll's account and reject the Respondent's in this regard.
34. I reject the account of the Respondent. She went beyond exaggeration and was self-serving and untruthful. She was unable to make basic concessions. The totality of the reliable evidence suggests she had overlooked the need to provide notice during the notice period. I do accept that she contemplated renegotiating the Lease with the Applicant as to the number of tanks, potential improvements, to negotiate CPI indexing or otherwise a lesser rent and potentially assigning the lease to Gemma or having it otherwise in her name. I reject as untruthful reconstruction the evidence of the Defendant relating to her conduct in and about the notice period.
35. It is uncontroversial that the Respondent did not serve written notice during the notice period. I have found that The Lease required such notice must be in writing. I have also found that the requirement to give notice was overlooked by the Respondent and accordingly that she did not give oral notice of an acceptance the offer to renew the lease as set out in clause 10. In the event I am wrong about the need for written notice I am satisfied no oral notice was given during the notice period.
36. I am satisfied that no employee of the Applicant made representations to the Respondent, performed an act or omitted to do the same, relating to the renewal of

The Lease giving rise to an equitable remedy. This includes the ongoing obligation for the Respondent to have a valid certificate of occupancy.

37. As set out above, part 13 of the Business Tenancy Act has application. In compliance with the Act a notice to quit was served on the Respondent on 27 July 2019. Since that time the Respondent has not given vacant possession of the premises to the Applicant.
38. In the lead up to the final hearing the behaviour of the Respondent was erratic and it was contemplated that a litigation guardian may need to be appointed for the Respondent. On 19 November the Respondent said she had a frontal lobe brain injury and as a consequence she could not help but be disrespectful.
39. The Local Court Rules set out the following in relation to appointing a litigation guardian:

“15.01 Definition

*In this Part, **person under a disability** means:*

(b) a person who is incapable because of age, injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to proceedings.

15.02 Litigation guardian

(1) Except where provided otherwise by or under an Act, a person under a disability may only commence or defend proceedings by his or her litigation guardian.

(3) Except where these Rules provide otherwise, anything that is required or permitted by these Rules to be done by a party who is a person under a disability is required or permitted to be done by the party's litigation guardian.

15.05 Appointment, &c., of litigation guardian by Court

(1) If a party to proceedings becomes a person under a disability after the proceedings are commenced, the Court must appoint a litigation guardian of that party.

(2) Before appointing a litigation guardian under subrule (1), the Court may review the conduct of the proceedings and make the orders it considers necessary to ensure that justice is done between the parties.”

40. In *Vishniakov v Lay* [2019] VSC 403 Derham AsJ set out a number of principles relating to the appointment of a litigation guardian. The starting point is that it is presumed everybody of full age has the mental capacity to manage their own affairs.

“30 The following principles have been established in authorities in Australia and the United Kingdom:

- (a) There is a presumption that everybody of full age has the mental capacity to manage their own affairs, including the commencement and defence of legal proceedings. The burden of proving to the contrary rests with those asserting incapacity.⁷*
- (b) The law requires that a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself.⁸*
- (c) The authority of a lawyer to represent a client depends on the client having the requisite mental capacity.⁹ A lawyer has a duty of care not to coerce their client into a settlement or to take or act on instructions from a client to settle a case when they know or should know the client lacked the mental capacity to give the instructions or could not be reasonably satisfied the client had that capacity.¹⁰*
- (d) The commencement of proceedings on behalf of a client implies the solicitor, as an officer of the court, is reasonably satisfied the client has that capacity.¹¹ It is therefore the solicitor’s responsibility to be reasonably satisfied that the client has the mental capacity to participate in the proceeding and to instruct.¹² If the issue cannot be resolved to the reasonable satisfaction of the solicitor, they must raise the issue with the court. It is the court which has the final responsibility to determine the issue.¹³*
- (e) A solicitor who persists with representing a client who has lost mental capacity is liable to have costs awarded against them on an indemnity basis even if there is no impropriety.¹⁴*
- (f) The authority of a court-appointed litigation guardian may be challenged, and a proceeding issued by them dismissed, where the party is shown to be capable of managing their affairs.¹⁵*
- (g) The appointment of a litigation guardian protects the person under a disability and the processes of the court as these apply to the parties generally.¹⁶*
- (h) Provisions of the kind established by O 15 are procedural and not substantive law designed to ensure that:*
 - (i) there is someone answerable to the Court on behalf of the litigant with a disability;*

- (ii) *crucial decisions affecting that litigant can be properly and responsibly made.*¹⁷
- (i) *An application for the appointment of a litigation guardian for a person is very serious because it deprives the person of their fundamental civil rights under the common law, most especially the 'right to sue or defend in [his or her] own name, and ... compromise in litigation without the approval of the court'.*¹⁸
- (j) *There is no universal test for determining whether a person is capable of managing his or her affairs.*¹⁹ *Lack of capacity is usually denoted by a person's inability to understand the nature of an event or transaction when it is explained.*²⁰
- (k) *The words 'in relation to the proceeding' in r 15.01 are important because they focus on the person's ability to bring or defend a particular proceeding rather than on whether the person is able to manage his or her affairs generally or in relation to some other transaction.*²¹
- (l) *The question of incapacity in relation to litigation must be examined against the facts and subject matter of the particular litigation, the number and complexity of the issues involved and the identity, number and interests of the other parties, particularly opposing parties.*²² *A person can have the requisite capacity for one proceeding and lack it for another.*²³
- (m) *A person will be incapable of managing their affairs in relation to the proceeding if they do not have the mental capacity to understand the nature of the acts or transactions in respect of which they need to give instructions to the lawyer.*²⁴
- (n) *Depending on the nature and circumstances of the particular case, there may be many factors relevant to the determination of whether a person lacks capacity in relation to a proceeding.*²⁵ *As a general rule, however, the following have been found to be relevant:*²⁶
- (i) *whether the person had the ability to understand that they required advice in respect of the relevant legal proceeding;*
 - (ii) *whether the person had the ability to communicate this requirement to someone who could arrange an appropriate advisor or, alternatively, whether he or she could arrange such an advisor of their own accord;*
 - (iii) *whether the person had the ability to instruct the advisor with sufficient clarity to enable that advisor to understand the situation and to advise the person appropriately; and*
 - (iv) *whether the person had the ability to make decisions and give instructions based upon, or otherwise give effect to, such advice as might be received.*

- (o) The level of mental capacity required by a litigant in person is greater than that required to instruct a lawyer, because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.²⁷
- (p) A person who does not have the mental capacity to represent themselves may have sufficient capacity to be able to give instructions to a lawyer to represent them.²⁸
- (q) The means by which the court will determine whether a guardian should be appointed varies from case to case. It is prudent, but not essential, that the decision whether a party lacks the relevant capacity be based on a medical assessment, or the assessment of another appropriately qualified expert.²⁹ However, the court is entitled to rely on its own observation to make an assessment about the capacity of a party or to rely on other evidence, including the assessments of legal practitioners.³⁰ This is so particularly where:
- (i) there is no medical evidence available or the party refuses to submit to an expert assessment; and
- (ii) the lack of capacity is so clear that medical evidence is not called for.³¹

7 *Murphy v Doman* (2003) 58 NSWLR 51, 58 [36] (**Murphy**); *L v HREOC* (2006) 233 ALR 432, 437-8 [20]; *Masterman-Lister v Brutton & Co [Nos 1 and 2]* [2003] 1 WLR 1511, 1520 [17] (**MastermanLister**); *City of Swan* [2010] WASC 204 [66]; *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 414-15 [66]-[68] (**Owners of Strata Plan No 23007**); *Slaveski v Victoria* [2009] VSC 596 [25]-[26] (**Slaveski**); *Goddard Elliott* [2012] VSC 87 [546].

8 *Masterman-Lister* [2003] 1 WLR 1511, 1533 [57] (**Chadwick LJ**); *Goddard Elliott* [2012] VSC 87 [547].

9 *Goddard Elliott* [2012] VSC 87 [548].

10 *Ibid* [541].

11 *Ibid*.

12 *Borchert v Terry* [2009] WASC 322 [69]; *Goddard Elliott* [2012] VSC 87 [549].

13 *Goddard Elliott* [2012] VSC 87 [568]; *Pistorino* [2012] VSC 438 [6].

14 *Yonge v Toynbee* [1910] 1 KB 215, 228; (**Buckley LJ**); *Goddard Elliott* [2012] VSC 87 [549].

15 *J (by her next friend) v J* [1953] P 186, 191; *Martin* (1973) 20 FLR 345, 348; *Goddard Elliott* [2012] VSC 87 [550].

16 *Masterman-Lister* [2003] 1 WLR 1511, 1525 [31] (**Kennedy LJ**), 1536 [65] (**Chadwick LJ**); *City of Swan* [2010] WASC 204 [63]-[65]; *Goddard Elliott* [2012] VSC 87 [552].

17 *State Rail Authority of New South Wales v Hammond* (1988) 15 NSWLR 395, 400-1 (**Kirby J**). *Kirby J* also stated that another purpose was to ensure that a person exists who can bear any costs ordered against the person under disability at the end of the litigation. That is no longer apt to the Victorian situation: *Dyke v Stephens* (1885) 30 Ch D 189; *Rhodes v Swithenbank* (1889) 22 QBD 577, 578-9. See also *R v Registrar of the County Court; Ex parte Farrington* [1927] VLR 406, 409-10 where *Cussen J* said it was an open question whether the purpose of a litigation guardian is to provide for the defendant's costs or to provide for the care of the infant's interests in connection with the action or suit.

18 *Masterman-Lister* [2003] 1 WLR 1511, 1520 [17] (**Kennedy LJ**); *Goddard Elliott* [2012] VSC 87 [553].

19 *Murphy* (2003) 58 NSWLR 51, 58 [33]; *Slaveski* [2009] VSC 596 [26].

20 *Gibbons v Wright* (1954) 91 CLR 423, 437 (**Dixon CJ**); *Masterman-Lister* [2003] 1 WLR 1511, 1521 [18] (**Kennedy LJ**), 1533 [58] (**Chadwick LJ**). See also *Goddard Elliott* [2012] VSC 87 [555].

21 *Slaveski* [2009] VSC 596 [27].

22 *Dalle-Molle v Manos* (2004) 88 SASR 193, 199 [23] (**Dalle-Molle**); *Slaveski* [2009] VSC 596 [28]; *Pistorino* [2012] VSC 438 [20]-[22].

23 *Slaveski* [2009] VSC 596 [28].

24 *Martin v Azzopardi* (1973) 20 FLR 345, 347-8; *Slaveski* [2009] VSC 596 [29].

25 See for example the list applicable to a self-represented litigant in *Slaveski* [2009] VSC 596 [32].

26 *Murphy* (2003) 58 NSWLR 51, 58 [35]; *Slaveski* [2009] VSC 596 [30].

27 *Slaveski* [2009] VSC 596 [31]; *Murphy* (2003) 58 NSWLR 51, 58 [35]; *Goddard Elliott* [2012] VSC 87 [557].

28 *Skrijel v Mengler* [2003] VSC 128 [5]; *Slaveski* [2009] VSC 596 [33]; *Goddard Elliott* [2012] VSC 87 [558].

29 *Masterman-Lister* [2003] 1 WLR 1511, 1520 [17] (**Kennedy LJ**); *Pistorino* [2012] VSC 438 [16]-[17].

30 *Slaveski* [2009] VSC 596; *Pistorino* [2012] VSC 438 [17].

31 *Pistorino* [2012] VSC 438 [17]."

41. The Respondent did not attend court on 13 December when appointment of a litigation Guardian was to be considered. No person was available to act in this

capacity and no evidence was made available regarding the Respondent's frontal lobe injury. No litigation Guardian was appointed.

42.

43.

44. Publication of paragraphs 42 and 43 is prohibited pursuant to s57(1) (ii) of the Evidence Act.

45. I accept the Respondent has seriously high blood pressure and was unwell at periods during these proceedings, and various adjournments were granted to accommodate her. Ultimately the hearing had to be attended to, it is a matter of short duration and the applicant was entitled to have it heard.

46. It was apparent, quite apart from being unwell, the Respondent was endeavouring to delay the proceedings and muddy the waters. This included exaggeration, untruths and red herrings of various types. On the evidence before me, I do not accept her assertion that she has a brain injury, was struck by lightning or has Post Traumatic Stress Disorder (PTSD) as she claims.

47. I am not satisfied on all the evidence that the Respondent is a person under a disability such that she is incapable of managing her affairs in relation to this proceeding. It would not have been appropriate to appoint a litigation guardian.

48. In accordance with s131 of the Act the Applicant has given the Respondent a Notice to Quit which complies with Division 13 of the Act. The Notice is given subsequent to a failure by the Respondent to provide notice, written or otherwise, of acceptance of an offer to renew the Lease within the renewal period. This application was brought subsequent to 60 days elapsing from the expiry of the term of the notice

period in accordance with s131(1) of the Act. I am therefore satisfied the Applicant is entitled to the relief sought.

49. A warrant of possession is to issue for the Premises with effect from 9am on 31 August 2020.

Dated this 26 day of August 2020

Alan Woodcock

LOCAL COURT JUDGE