

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R148/2014

CATCHWORDS

RETAIL LEASE—section 149 *Victorian Civil and Administrative Act 1998*—stay application—claim by applicant for possession and mesne profits—counterclaim for damages to be heard separately—orders made for possession and payment of mesne profits—application for stay pending hearing and determination of counterclaim—no application made for leave to appeal from orders pursuant to section 148(2) *Victorian Civil and Administrative Act 1998*—applicant wrongly contends that no such application can be made until stay obtained from the Tribunal—held that balance of convenience does not favour granting a stay—factors considered—stay application dismissed.

APPLICANT	H Y Ting and Sons Pty Ltd (ACN 948 325 390)
RESPONDENT	Mark MacDonald
WHERE HELD	Melbourne
BEFORE	Member A. Kincaid
HEARING TYPE	Stay Application
DATE OF HEARING	2 March 2015
DATE OF ORDER	27 April 2015
CITATION	H Y Ting and Sons Pty Ltd v MacDonald (Building and Property) [2015] VCAT 532

ORDERS

1. The application by the respondent for a stay of the Orders 2 and 4 of the Order made 4 December 2014 is dismissed.
2. Order 1 is stayed until 4:00 p.m. on 8 May 2015.
3. The Respondent must provide to the Tribunal a copy of any application for leave to appeal from Orders 2 and 4 of the Order made 4 December 2014 that may be filed before 8 May 2015, and a copy of any application to the Supreme Court for a stay of those Orders.
4. **I direct the principal registrar to refer the Applicant's request for a certificate pursuant to section 122(1)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* to a judicial member for consideration after 8 May 2015.**
5. The Respondent must within 7 days of the date of this order reimburse the solicitors for the Applicant with \$194.65 hearing fee, paid by them on behalf of the Respondent.

Other Matters: On 2 March 2015 the Applicant paid \$194.65 being the Applicant's share of the hearing fee for 2 March 2015, in order that the hearing could continue.

A T Kincaid
Member

APPEARANCES:

For the Applicant	Mr Hopper of Counsel
For the Respondent	Mr MacDonald in person, by telephone.

REASONS

1. The respondent is the occupier of 108-130 Murray Valley Highway, Lake Boga, Victoria (“the **property**”). Lake Boga is about 325 kilometres northwest of Melbourne, near Swan Hill. The property has 36 guest rooms, intended for use as a motel.
2. The applicant is the registered proprietor of the property.
3. By this application, the respondent seeks an order staying the Tribunal’s orders dated 4 December 2014 requiring the respondent to leave the property by 18 December 2014, and to pay \$39,216.97 mesne profits to the applicant for the period from 1 November 2013.
4. The applicant is represented by solicitors, and the respondent is self-represented.

The claim

5. The respondent occupied the property pursuant to a lease granted by the applicant dated 10 July 2009 (the “**lease**”). The lease granted a 3 year term to the respondent to 9 July 2012, with four further options of three years each.
6. On 31 July 2009 Aussie Bush and Country Motels Pty Ltd (“**ABC**”), a company of which the respondent was a director, entered into a contract to buy the property (the “**contract of sale**”). A \$25,000 deposit was paid by ABC on 31 July 2009. The balance was payable on 31 July 2011.
7. A special condition of the lease provided:

The parties acknowledge that no rental shall be payable pursuant to this lease so long as the contract of sale for the Motel freehold between [the applicant] and [ABC] is still current or if that Contract is not completed due to [the applicant’s] inability or refusal to do so for any reason not as a result of [ABC’s] default. All repairs and maintenance on whole premises be it structural or otherwise are sole responsibility of [the respondent] at its own cost.
8. Pursuant to the special condition, the respondent did not pay rent. ABC failed to pay the balance of the purchase price on 31 July 2011. The applicant granted further time to ABC in respect of the payment of the balance.
9. The balance of the purchase price was not paid by ABC. On 14 February 2014, the applicant served a rescission notice in respect of the contract of sale on ABC. From that date, the applicant says, the entitlement of the respondent not to pay any rent pursuant to the terms of the lease came to an end.
10. ABC was deregistered on 6 June 2014.

11. The applicant issued a proceeding on 25 June 2014 seeking an order for possession, and unpaid rent. It also sought mesne profits from the date of the issue of the proceeding.

The counterclaim

12. The respondent makes a claim for damages against the applicant for alleged misleading and deceptive conduct and/or misrepresentation about the lawful use of the property. He says that, contrary to his expectations, he was not able to conduct a motel business at the property.
13. Partly because he is self-represented and does not have the ability to do so, the respondent has been unable to file points of counterclaim.
14. In general terms, I understand the respondent's counterclaim to be that in July 2009, when the lease and the contract of sale were entered into, the applicant failed to disclose to him the existence of a building order served on the applicant under section 111 of the Building Act 1993,¹ and a letter from Swan Hill Rural City Council to the applicant's solicitors dated 6 May 2009.² The respondent alleges that as a result of this conduct, he was unable to conduct a motel business at the property. This general description of the counterclaim appears to be accepted by the respondent.
15. I understand that the respondent wishes to claim for his losses arising from his going into and, if it happens, going out of the property.³
16. In his letter to the Tribunal dated 17 February 2015, the respondent has purported to provide general details of the quantum of his counterclaim. It appears to be a combination of reliance and expectation losses. \$50,000 is claimed for unparticularised expenses that he has allegedly incurred in respect of the property, \$250,000 is claimed for "no substantial income from 2009-2014",⁴ and \$1 million is claimed for general damages for "physical and mental distress" caused to him by "the matter". There is little particularisation of damages beyond these general assertions.

Hearing of the claim

17. On 20 November 2014, I heard the applicant's claim for possession of the property, rental arrears and mesne profits. I gave my decision orally, with reasons.
18. The respondent submitted during the hearing that, on a proper construction of the lease and contract of sale, ABC was entitled to become registered proprietor of the property upon payment of the deposit. It is not in dispute that ABC duly paid the deposit. The respondent relied, for his submission, on the description of "Settlement Date" in the contract of sale.

¹ "Ref 4" in the respondent's letter to the Tribunal dated 30 September 2014.

² "Ref 5" in the respondent's letter to the Tribunal dated 30 September 2014.

³ Of the type considered in *Yorke v Ross Lucas* (1982) 69 FLR 116; 45 ALR 299.

⁴ The respondent explained during the hearing that this was calculated by multiplying \$50,000 by 5 years, for each of the years 2009-2014

19. The respondent also submitted that he had since taken a lease from ABC and that, in this circumstance, the applicant had no right to seek an order for possession against him.
20. I rejected this argument. In summary, I found that on a proper construction of the lease and the contract of sale, ABC was not entitled to become registered proprietor of the property upon payment of the deposit and that, in any event, ABC had since ceased to exist (having been deregistered on 6 June 2014).
21. I found that the applicant had duly rescinded the contract of sale. This being the case, ABC, when purporting to grant a lease to the respondent, was purporting to act in the capacity of a purchaser under a rescinded contract of sale. ABC's interest in the property was only as good as its power to seek specific performance of the contract of sale which, being in default, and having been properly served with notice of rescission, it could not.
22. It also followed that the respondent was not entitled to withhold the payment of mesne profits from the date of rescission of the contract of sale or, as the evidence was to disclose, 1 November 2013.
23. Prior to orders being made on 20 November, I had to adjourn the hearing to 4 December 2014. This was because the respondent was required to be urgently hospitalised following a cardiac arrest in the hearing room. This arose from the respondent's heart condition for which, I am satisfied, he is receiving ongoing treatment.

Orders dated 4 December 2014

24. On 4 December 2014 the respondent appeared by telephone. Mr Hopper appeared for the applicant. I made the following Orders:
 1. This proceeding (including the respondent's counterclaim) is listed for hearing before any Member on **5 March 2015** commencing at 10:00 a.m. at 55 King Street Melbourne, with an estimated duration of 2 days.
 2. **The applicant have possession of [the property] by 4:00 p.m. on 18 December 2014.**
 4. (sic) **For the reasons given orally, the respondent pay to the applicant the sum of \$39,216.97.**
 5. On the applicant giving the usual undertaking as to damages, the respondent is restrained until hearing and determination of this proceeding or further order from removing from the Property any and all of the items enumerated in the attached three page schedule marked "A" (being a list of chattels attached to the contract of sale dated 31 July 2009 in relation to the Property).
 6. By 30 January 2015 the applicant must file and serve any amended points of claim.

7. By 20 February 2015 the respondent must file and serve any further documents on which he intends to rely at the hearing, and any further or amended defence and counterclaim on which he intends to rely.
8. In the absence of the respondent filing a counterclaim pursuant to paragraph 7, the undated letter from the respondent to Senior Member Farrelly filed 30 September 2014 (a copy of which was provided to the applicant at the hearing on 20 November 2014) shall stand as the respondent's points of counterclaim.
9. By 20 February 2015 the respondent must provide a full breakdown of any sum of money he claims in his counterclaim, including but not limited to all costs he has allegedly incurred by going in and out of the property.
10. By 27 February 2015 the applicant must file and serve its points of reply and defence to counterclaim, and any affidavit material on which it intends to rely at the hearing.

...

12. Costs reserved.

13. Liberty to apply.

(emphasis added)

25. The amount referred to in order 4 is mesne profits claimed by the applicant for the period 1 November 2013-20 November 2014.⁵

Adjournment of counterclaim

26. One of the reasons for the adjournment of the counterclaim was because the respondent was not in a position to fully particularise and prove his damages. The extent of such damages may also be subject to the outcome of any appeal by the respondent against Orders 2 and 4 of the Tribunal's orders dated 4 December 2014.
27. The reason for the further adjournment of the proceeding was to enable the applicant to bring a further claim for damages to the extent that the respondent may be found to have lost or destroyed various fixtures and chattels at the property that the applicant says belong to it. The chattels are listed in schedule "A" to the Order (and referred to in Order 5 of the orders). The extent of such any such loss or destruction could not be assessed at the time of the hearing, because the applicant had not then had an opportunity to undertake an inspection.

⁵ In the proceeding, the applicant claimed rent and mesne profits from 14 February 2014. I found on the evidence that the alleged lease in favour of the respondent in fact came to an end on 31 October 2013, by the respondent having purported to give one month's notice to ABC dated 30 September 2013.

Respondent seeks to appeal to Tribunal against orders of 4 December 2014

28. By letter dated 16 December 2014, received 22 December 2014, the respondent sought to appeal against Orders 2 and 4 of the Tribunal's orders dated 4 December 2014. He relied on the "Liberty to Apply" contained in Order 13 of those orders.

29. The Tribunal responded by email dated 6 January 2015, as follows:

You have informed the Tribunal that you wish to appeal to the Tribunal against two of the Orders made by Member Kincaid on 4 December 2014. The first order (Order 2) requires you to deliver up possession of the land by 4 pm on 18 December 2014. The second order (Order 4) requires you as tenant to pay rent in respect of your occupation of the land calculated from 1 November 2013.

These orders followed from the rejection by Member Kincaid of your argument that on a proper construction of the [contract of sale] and the lease entered into contemporaneously between the applicant and yourself dated 10 July 2009, [ABC] was entitled to become registered proprietor of the land upon payment by [ABC] of the deposit.

The Tribunal is unable to hear any appeal from Orders that it makes.

Section 148(1) of the [Act] provides, in effect, that a party to a proceeding may appeal, on a question of law, from an order by a Member of the Tribunal, to the Trial Division of the Supreme Court if the Trial Division gives leave to appeal.

Section 148(2) of the Act provides that an application for leave must be made no later than 28 days after the Order of the Tribunal. Section 148(5) of the Act provides, in effect, that the Trial Division may extend this period.

Section 148(2)(b) of the Act provides, in effect, that an application for leave must be made in accordance with the Rules of the Supreme Court. The formalities are generally described in *Pizer's Annotated VCAT Act* (4th edition) at paragraph 148.100. This book is available for purchase from the Tribunal's Public Counter on the ground floor of 55 King Street.

We suggest that you familiarise yourself with these references, and also consider engaging a solicitor to assist you with the process.

Respondent seeks stay of orders 2 and 4 made 4 December 2014

30. The respondent emailed the Tribunal on 16 January 2015 seeking a stay of Orders 2 and 4 of the Tribunal's orders dated 4 December 2015. The email was taken by the Tribunal as an application by the respondent pursuant to section 149 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "Act") for a stay of those orders

31. The respondent stated in the email that he attended the Supreme Court on 15 January 2015, and that he was then informed by the Supreme Court assistant

for unrepresented persons that that he would need to obtain from the Tribunal a stay of Orders 2 and 4, before he could apply for leave to appeal.

32. The respondent provided no further information about this alleged advice. The Tribunal's own enquiries of the unrepresented litigants division of the Supreme Court indicates that such advice would not have been given by that division.
33. On 28 January 2015, the following orders were made:
 1. The application by the respondent for a stay of the operation of the Order of the Tribunal dated 4 December 2014 is listed for 5 March 2015 at 9.00am before Member Kincaid at 55 King Street, Melbourne, allow 1 hour.
 2. **The respondent must file with the Tribunal and provide by the applicant's solicitors by 27 February 2015 copies of any application he has made to the Supreme Court of Victoria pursuant to section 148(2) of the Act, seeking leave to appeal.**

(emphasis added)

Applicant seeks certified copy of 4 December 2014 order pursuant to section 122(1)(c) of the Act.

34. Section 122(1)(c) of the Act provides that if a party wishes to enforce a non-monetary order in the Supreme Court of Victoria, one of the documents that must be filed in the Supreme Court is a certificate from a judicial member stating that the order of the Tribunal is appropriate for filing in the Supreme Court. By email dated 22 January 2015 the solicitors for the applicant made a request for such a certificate.
35. The granting of this certificate by a judicial member has been deferred pending the outcome of the respondent's stay application.

Applicant seeks earlier hearing of stay application

36. By email dated 6 February 2015, copied to the respondent, the applicant sought an earlier hearing of the stay application than 5 March 2015. It will be recalled that this was the date fixed on 4 December 2014 for the hearing of the Counterclaim (and any amended claim by the applicant for damages). The applicant apprehended that if the stay application was successful, the hearing of the proceeding may need to be adjourned until after any appeal was heard and determined. Given this possibility, the applicant was understandably anxious not to incur the costs of preparing both for opposing the stay application, and for a hearing if the stay application as unsuccessful.
37. By order in chambers dated 12 February 2015 I listed the respondent's stay application for 18 February 2015 at 9.00 am. The order read as follows:
 1. The application by the respondent for a stay on the application of orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 listed for 5 March 2015 at 9.00am is vacated.

2. The application by the respondent for a stay on the application of orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 is listed for 18 February 2015 at 9.00am before Member Kincaid at 55 King Street, Melbourne.
3. Orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 are stayed pending the hearing and determination of the respondent's stay application.
4. **The respondent must file with the Tribunal and provide by the applicant's solicitors by 17 February 2015 copies of any application he has made to the Supreme Court of Victoria pursuant to section 148(2) of the Act, seeking leave to appeal.**
(emphasis added)

Applicant submits that he is unable to attend hearing on 18 February 2015.

38. The respondent emailed the Tribunal on 13 February 2015, acknowledging receipt of the orders dated 12 February 2015. He said that he could not attend on 18 February 2015, because he had an appointment with his cardiologist on that day.
39. The respondent also informed the Tribunal that he is earning an income from the property, sufficient to place his solicitors in funds in respect of appeals by the respondent and an associated company against a conviction, that are listed for hearing in the County Court of Victoria at Mildura.
40. The Tribunal responded by email dated 16 February 2015 as follows:

Please inform the Tribunal by email today on what day between now and 24 February 2015 you will be available to apply for a stay.

Please note that you have not been granted a stay [other than pending the hearing and determination of your stay application]. You need to apply for it with material in support. The Tribunal has indicated to you, by Order 4 of the Orders dated 12 February 2015 what that material is.

(emphasis added)
41. The respondent did not appear for his stay application on 18 February 2015.
42. I was provided that morning with a copy of a letter from the respondent to the Tribunal dated 17 February 2015. Relevantly, it read as follows:

I have a pre-existing cardiology appointment in Bendigo [on 18 February 2015] refer attachment 1 and 2.

This is the second appointment I have had the 1st one given was to occur on the 4/2/15 but I changed it because it clashed with a Magistrate Court hearing I had previously listed for that day. I will not be able to cancel it on such short notice & it is imperative that my treatment not be delayed any longer if it can be helped.

You require me to nominate another day before 24/2/15.

Unfortunately at the mention in the Mildura County Court refer attachment 3 Judge Bourke refused to grant me an adjournment and ordered that I return to court again at 10 am on 19/2/15 for a further mention and preferably with [solicitor] Mr Hugh Middleton (a copy of the orders is not available). He said that he wishes that the matter then proceed during this circuit on a day that he will nominate. As the circuit finishes on the 27th I do not know when that will be. But I do know from past experience that the Judges wait for no one regardless of why you can't attend.

...The problem with the orders [of 4 December 2014] as they now stand is that prior to the hearing [set down for 5 and 6 March 2015, Orders 2 and 4] are considered to be interim orders.

Under the legislation, I cannot appeal interim orders in the Supreme Court. The Supreme Court assistant for unrepresented persons told me I need to obtain a stay of the Interim Orders in VCAT first and then lodge the appeal after the final hearing [in March 2015].

If the stay [is] not granted it would be like what is happening to the Bali drug traffickers now...

Similarly, it will be too late if the Supreme Court overturns the eviction notice at my appeal after the March hearing and I have already been evicted because the legislation said I couldn't yet appeal the order and VCAT didn't grant a stay. Natural justice would not have been given and this is unfair.

Though the above should be reason enough for granting [a stay], I will write setting out my reasons for seeking [a stay] along with supporting material which I do not have at hand by a scanned email by 5.00pm Friday [20 February 2015].

[Mr Hugh Middleton, solicitor] has been given all the info regarding the purchase and lease of the motel from the Ting's company by phone and had \$5,000 paid into his trust account.

Thus he should be in a good situation by Friday to take on this matter if he will (sic) and this will be more efficient for VCAT...

43. Having considered this letter, and heard submissions from Mr Hopper for the applicant, I made findings and orders as follows:

Findings:

- A. The Tribunal accepts the allegation of the applicant, through its Counsel, that the respondent has failed to pay to the applicant the amount of \$39,216.97 (being [rent and] mesne profits found to be owing by the respondent for the period of the respondent's occupation of the premises from 1 November 2013-20 November 2014), in breach of Order 4 of the Orders of the Tribunal dated 4 December 2014.
- B. The Tribunal accepts the allegation by the affidavit sworn 17 February 2015 of Glen Robert Hodges, solicitor for the applicant that the respondent refused to grant possession of the premises to

the applicant on 18 December 2014, in breach of Order 2 of the Orders of the Tribunal dated 4 December 2014.

- C. The Tribunal accepts the allegation of the applicant, through its Counsel, that the respondent has not paid any amount to the applicant in respect of the respondent's continuing occupation of the premises since 20 November 2014, and continuing.
- D. By email to the Tribunal dated 13 February 2015 the applicant has informed the Tribunal that he is earning an income from the premises, sufficient to place his solicitors in funds in respect of appeals by the respondent and an associated company against a conviction, that are listed for hearing in the County Court of Victoria at Mildura.
- E. **Notwithstanding that the Tribunal has by its email dated 16 January 2015 informed the respondent of the procedural requirements to be complied with on his part, should he wish to seek leave of the Supreme Court of Victoria to appeal against Orders 2 and 4 of the Orders of the Tribunal dated 4 December 2014, the respondent has since informed the Tribunal by his letter dated 17 February 2015 that no such application has been filed by him.**
- F. **The respondent has incorrectly stated by his letter to the Tribunal dated 17 February 2015 that he is required to obtain from the Tribunal a stay of Orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 before he can apply for leave to appeal against those orders.**
- G. The Tribunal accepts the submission of the applicant, through its Counsel, that given that the applicant has been unable to recover possession of the premises, it has been unable to identify the extent to which (if at all) the respondent has caused loss and damage to the applicant's chattels and equipment at the premises, and thus may not in a position to make such a claim, as previously contemplated [at the hearing on 20 November 2014], at the hearing on 5 and 6 March 2015.
- H. The respondent has provided a letter to the Tribunal dated 17 March 2015 stating why he will not attend the hearing on 18 February 2015.

Orders

1. This hearing shall proceed as a directions hearing.
2. The application by the respondent for a stay on Orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 is listed for hearing on **Monday 2 March 2015 at 9.00 am** before Member Kincaid at 55 King Street, Melbourne, allow 1 hour.
3. Given the distance from Melbourne of the residence of the respondent, his ongoing commitment to the proceeding before the County Court of Victoria at Mildura, and his cardiological condition and ongoing treatment, the respondent is given leave to

make his application by telephone. He must by **4.00 pm on Thursday 26 February 2015** inform the Tribunal in writing at which telephone number he can be contacted on Monday 2 March 2015. He must make himself available on that number on **Monday 2 March 2015** from 9.00 am and must remain available that morning until he is contacted by the Tribunal on that number.

4. Should the respondent fail to make himself available on that number, without good cause, the Tribunal will give consideration to any application by the applicant for summary dismissal of the respondent's application for a stay.
5. Orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 continue to be stayed pending the hearing and determination of the respondent's application for a stay.
6. **For the purpose of the Tribunal considering whether to grant a stay, the respondent must by 4.00 pm on Friday 27 February 2015 file with the Tribunal, and serve on the applicant's solicitors, copies of any application he has made to the Supreme Court of Victoria for leave to appeal against Orders 2 and 4 of the Order of the Tribunal dated 4 December 2014 pursuant to section 148(2) *Victorian Civil and Administrative Tribunal Act 1998*.**
7. Upon reading the affidavit of Glenn Robert Hodges sworn 17 February 2015, the deputy registrar is directed to refer the Order of the Tribunal dated 4 December 2014 to a judicial member with a request for a certificate pursuant to section 122(1)(c) *Victorian Civil and Administrative Tribunal Act 1998* stating that the order is appropriate for filing in the Supreme Court.
8. Having regard to 92(2)(a) *Retail Leases Act 2003* and section 109(3) *Victorian Civil and Administrative Tribunal Act 1998*, and finding that it is fair to do so having regard to the findings above, the respondent must pay to the applicant its costs of and incidental to the hearing on 18 February 2015 fixed at \$3,000.

(emphases added)

44. It will be recalled that the respondent undertook in his letter dated 17 February 2015 to file material supporting his stay application to the Tribunal. The respondent sent an undated letter to the Tribunal, which was received on 2 March 2015, but was not put on the file until 3 March 2015. I was provided with a copy of the letter by Mr Hopper, Counsel for the applicant. Again, the respondent based his application for a stay on the ground that he was not able to appeal Orders 2 and 4 of the Tribunal's orders dated 4 December 2014 as they are "each considered interim orders", and that, in order to appeal the orders, he "would need to wait for the VCAT hearing on 5 and 6 March to conclude."

Findings

Refusal to pay monies

45. Relying on an affidavit of Glenn Robert Hodges, solicitor for the applicant, sworn 18 November 2014 I find that that the respondent has failed to pay to the applicant monthly rent in advance in the sum of \$2,383.34, in breach of Order 7 of the Tribunal's orders dated 19 September 2014.
46. Relying on submissions by the applicant's Counsel Mr Hopper, I find that the respondent has failed to pay to the applicant the amount of \$39,216.97, in breach of Order 4 of the Tribunal's orders dated 4 December 2014.
47. Relying on submissions Mr Hopper, I also find that the respondent has not paid any amount to the applicant in respect of the respondent's continuing occupation of the property since 20 November 2014, and that this failure continues.

Refusal to deliver up possession

48. Having read the affidavit of Glen Robert Hodges sworn 17 February 2015, I find that the respondent refused to grant possession of the property to the applicant on 18 December 2014, in breach of Order 2 of the Tribunal's orders dated 4 December 2014.
49. I find that, as a result of not being granted possession, the applicant has been unable to conduct a stock audit of its assets at the property for the purposes of its bringing the further claim against the respondent, as foreshadowed at the hearing on 20 November 2014.

Refusal to seek leave to appeal

50. I find that the respondent has incorrectly stated in his letter to the Tribunal dated 17 February 2015 (and in previous communications) that he is required to obtain from the Tribunal a stay of Orders 2 and 4 of the Tribunal's orders dated 4 December 2014, before he can apply for leave to appeal against those orders. Orders 2 and 4 of the Tribunal's orders dated 4 December 2014 are final orders, made on the applicant's claim in the proceeding.

Hearing of the respondent's stay application on 2 March 2015

51. I heard the respondent's stay application on 2 March 2015, and reserved my decision. I made the following notes and orders:

Noted:

- A. The Respondent remains self-represented. He is receiving treatment from a cardiologist, and also informs the Tribunal that is being treated for depression, and that he is consulting with a psychiatrist and psychologist.
- B. He alleges that he is having trouble with respect to receiving emails from the Tribunal.

- C. The Respondent sent an undated letter by registered post to the Tribunal last Thursday 26 February 2015 in support of his application for a stay of orders 2 and 4 of the Order of the Tribunal dated 4 December 2014. It had not reached the Tribunal's correspondence file by the date of the hearing, but Counsel for the applicant provided a copy received also by his instructors.
- D. In respect of the respondent's counterclaim, the respondent mainly relies on his allegation that when the relevant transactions between the parties were entered into in July 2009, the applicant failed to disclose to him the existence of:
- A building order served on the applicant under section 111 of the *Building Act* 1993 ("Ref 4" in the respondent's letter to the Tribunal filed 30 September 2014); and/or
- A letter from Swan Hill Rural City Council to the applicant's solicitors dated 6 May 2009 ("Ref 5" in the respondent's letter to the Tribunal filed 30 September 2014).
- E. The undated letter received from the respondent [on 2 March 2015] does not comply with Order 6 of the Orders made on 4 December 2014 in that the respondent, relying on the above alleged failures, claims a global unparticularised sum of \$250,000 for "loss of income" over a 5 year period between 2009-2014. The claims appears to be in respect of "expectation" loss of the type usually brought for breach of contract. The respondent also makes a claim for unparticularised alleged expenditure by the respondent in respect of the premises of \$50,000. This appears to be a damages claim for "reliance loss" of the type more usually brought as a result of conduct contravening a provision of Chapters 2 or 3 of the *Australian Consumer Law (Victoria)*.

Findings:

- A. Whist he remains unrepresented, and having now read his correspondence and observed him over 3 hearing days, the Tribunal concludes that the respondent does not have the ability to prepare a counterclaim, being a sequential account of the material facts upon which he relies for the relief he seeks at law.
- ...
- D. The respondent has failed to grant possession of the premises to the applicant on 18 December 2014, in breach of the Order 2 of the Orders dated 4 December 2014.
- E. The failure to grant possession of the premises to the applicant has resulted in the applicant being unable to conduct an audit of the fixtures and fittings at the premises, as intended by the applicant at the hearing on 20 November 2014, such audit being required to be completed by the applicant prior to amending its Points of Claim dated 26 September 2014.
- F. The respondent has failed to file a counterclaim by 20 February 2015 pursuant to order 7 of the Order dated 4 December 2014. Pursuant to order 8 of that Order, the undated letter from the

respondent to Senior Member Farrelly filed 30 September 2014 (a copy of which was provided to the applicant at the hearing on 20 November 2014) shall stand as the respondent's counterclaim.

ORDERS

1. In addition to sending correspondence to the respondent at his email address macdonald1301@dodo.com.au the principal registrar is directed to address all correspondence to the respondent at 222 Murray Valley Highway, Lake Boga 3584.
 - ...
 3. **For the avoidance of doubt, the Tribunal declares that orders 2 and 4 of its Order dated 4 December 2014 are final orders, made in respect of the claims made by the applicant in its Points of Claim dated 26 September 2014.**
 4. The date by which the applicant is required to file and serve any amended points of claim, pleading a separate cause of action, will be subject to further order.
 5. The hearing on 5 March 2015 is vacated, and the proceeding (including the respondent's counterclaim) is listed for hearing before Member Kincaid on 28 May 2015 commencing at 10:00 a.m. at 55 King Street Melbourne with an estimated duration of 2 days.
 6. Having regard to the letter [received by the Tribunal from] the respondent on 2 March 2015, the respondent must by 16 April 2015 file and serve any further documents on which he intends to rely at the hearing, including those documents that may be in addition to those documents referred to in paragraph (D) of the "Noted" section above (if any) and which, he alleges, ought to have been disclosed to him by the applicant when the relevant transactions between the parties were entered into in July 2009;
 7. The respondent must by 7 May 2015 file and serve a full breakdown of any sum of money he claims in his counterclaim, including but not limited to all costs he has allegedly incurred by going in and (if applicable) going out of the Property, and all documents as evidence the incurring of any such expenditure.
 8. The applicant must by 7 May 2015 file and serve its defence to counterclaim, being its response to the allegations in the undated letter from the respondent to Senior Member Farrelly filed 30 September 2014 (a copy of which was provided to the applicant at the hearing on 20 November 2014), the core allegation of which is summarised in [Note] D above.
 9. Costs reserved.
 10. Liberty to apply.
- (emphasis added)

Is there jurisdiction to consider a stay application where there is no intention to appeal until after hearing and determination of counterclaim?

52. Section 149 of the Act provides as follows:

149 Tribunal may stay its order pending appeal

- (1) The Tribunal, on the application of a party or on its own initiative, may stay the operation of any order it makes pending the determination of any appeal that may be instituted under this Part.
- (2) The Tribunal may attach any conditions it considers appropriate to a stay of an order under subsection (1).

53. What is sought now is that there be a stay pending the respondent's application for leave to appeal. Whilst there have been views expressed in some of the earlier authorities that the jurisdiction could not be exercised until leave to appeal has been granted, I accept that that is not the current opinion.⁶
54. What distinguishes this case, however, is the fact that not only has there been no application for leave to appeal Orders 2 and 4 of the orders dated 4 December 2014, and no origination motion has been filed in the Supreme Court. The respondent wrongly asserts that he is unable to file any such application until after he obtains from the Tribunal a stay of Orders 2 and 4 of the orders dated 4 December 2014.
55. The respondent has been informed, as late as Order 3 of the Tribunal's orders dated 2 March 2015, that Orders 2 and 4 are final orders. Such orders may obviously be the subject of appeal on a question of law.
56. Indeed, interlocutory orders of the Tribunal (or "interim" orders, in the terminology of the Act) may also be the subject of appeal. An example is where, it is argued, an interlocutory order has resulted in a denial of natural justice, such as to give rise to a question of law.⁷
57. It has also been held that the words "any appeal" not only allows the Tribunal to grant a stay where an application for leave has been issued but not been heard,⁸ but also where the application for leave has not been issued.⁹
58. I find on the evidence of the respondent that, based upon what he appears to have been told by an officer of the Supreme Court of Victoria on about 15 January 2015 or some other enquiry, and notwithstanding what he has been

⁶ *State of Victoria v Bradto Pty Ltd and Anor* [2006] VCAT 100; *Bob Jane Corporation Pty Ltd v Commercial Road Developments Pty Ltd and Anor* [2007] VCAT 2120; *Skordakis v Contractors Bonding Limited* [2013] VCAT 122.

⁷ See, for example, *Collection House v Taylor* [2004] VSC 49 at [20]; *Metricon Homes Pty Ltd v Hooper* [2014] VSC 12 at [46].

⁸ See, for example, *Bradto* (supra) where

⁹ See *Bob Jane Corporation Pty Ltd* (supra), where Deputy President Aird stayed the order of the Tribunal on the condition that if an application for leave to appeal was not instituted within the 28 day statutory period, the stay would be dissolved.

informed by orders of this Tribunal, he has erroneously concluded that he is not able to file an application for leave to appeal until he had obtained from the Tribunal a stay of Orders 2 and 4 of the orders dated 4 December 2014.

Stay applications-the principles

59. In *Brown and Anor v AEP Belgium SA and Anor*¹⁰ Hollingworth J was asked by the plaintiffs to extend a stay that had already been granted by the Supreme Court pending the hearing of the plaintiffs' application for leave to appeal. Her Honour stated:

There is no real dispute between the parties as to the relevant principles which govern such an application for a stay. I accept that the Court has inherent jurisdiction and the principles that govern the exercise of that jurisdiction are well established. I accept that it is an extraordinary jurisdiction and **exceptional circumstances must be shown before its exercise is warranted**. There have been many cases considering the grant or refusal of a stay pending an application for the grant of leave or special leave, as the case may be. As Hayne J commented in the decision in *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia (No. 3)*, all the decisions must be read in the light of the circumstances of the individual cases. Nothing that is said in them is to be read as identifying immutable principles which fetter the court's discretion to grant a stay. The jurisdiction is ample. The relevant question which falls for decision is whether it should be exercised in this case (**emphasis added**).

60. I also note the observations of Senior Member Walker of the Tribunal that, in granting a stay until the application for leave to appeal, it is unclear which of the circumstances her Honour regarded as exceptional. However he observed that it was a residential tenancy matter, and if a stay were not granted, the plaintiff would have been evicted and the property sold, rendering the appeal pointless.¹¹

61. In *Medical Practitioners' Board v Lal*¹² the Court of Appeal (Redlich and Weinberg AJJ) said:

15 It goes without saying that an appeal does not of itself operate as a stay. Moreover, the jurisdiction to grant a stay pending an application for leave to appeal will only be exercised in exceptional circumstances. This Court, having already granted leave to appeal, may not be so constrained.

16 But, in any event, the factors that are relevant include the prospects that the appeal will be successful, the balance of convenience, and any prejudice that will flow to either party from granting or refusing the stay. As a general proposition, the respondent should not lightly be denied the 'fruits' of his

¹⁰ [2004] VSC 255

¹¹ See *Skordakis v Contractors Bonding Limited* [2013] VCAT 122 at [13]

¹² [2008] VSCA 264

success before the Tribunal. It is clear that the onus rests upon the party seeking the stay.

17 Despite the careful findings of the Tribunal, we have concluded that the Board has discharged that onus. We are influenced to some degree in arriving at that conclusion by the fact that this appeal can be expedited and heard relatively soon. Enquiries with the Registry indicate that the appeal can be listed for hearing very early on in term two next year. We propose to direct that that course be followed.

62. In *Brown & Anor*¹³ Hollingworth J also adopted the approach earlier described by Gillard J. She stated:

...In [*Scandi Pty Ltd v Wright*¹⁴], Gillard J faced the same question that I face today, namely, whether to grant a stay of orders of VCAT giving possession of rented properties governed by the *Residential Tenancies Act 1997*. His Honour posed three questions which he found relevant to the consideration of whether to grant a stay. The questions are: (1) Is there a substantial prospect that leave to appeal would be granted? (2) What effects would the grant or refusal of the stay have? (3) Where lies the balance of convenience?

63. A more comprehensive statement of the principles is to be found in the case of *Maher v. Commonwealth of Australia*¹⁵ a decision of the Court of Appeal. That was an application for a stay under Rule 66.16 of the *Rules of Civil Procedure*. In a judgment with which Redlich AJ concurred, Dodds-Streeton AJ said:

19 The principles governing a stay of execution of judgment pending the hearing and determination of an appeal are well established.

20 Prima facie, a successful party is entitled to the benefit of the judgment obtained below and the presumption that the judgment is correct. The applicant for a stay therefore bears the onus of demonstrating that a stay is justified.

21 In *Cellante and Ors v G Kallis Industries Pty Ltd* [1991] VicRp 99; [1991] 2 VR 653 ('*Cellante*'), Young CJ (with whom Brooking J agreed), cited with approval (p.655) the observation of Mahoney JA (with whom Moffit P and Glass JA agreed) in *Re Middle Harbour Investments Ltd (in liq)* (Unrep.NSW Ct of App. 15 December 1976). that:

“...where an applicant for a stay has not demonstrated an appropriate case but has left the situation in the state of speculation or of mere argument, weight must be given to the fact that the judgment below has been in favour of the other party.”

¹³ (supra) at [8].

¹⁴ [2000] VSC 149

¹⁵ [2008] VSCA 122

- 22 Young CJ concluded that an applicant for a stay under Rule 66.16 must show special or exceptional circumstances to take the case out of the general rule that an appeal does not operate as a stay.
- 23 The Court has a wide discretion, which is not circumscribed by rigid rules. It should take into account all the circumstances of the case.
- 24 In *Scarborough's v Lew's Junction Stores Pty Ltd*¹⁶ (approved in *Cellante*), Adam J recognized that special circumstances might exist where a successful appellant would be deprived of the fruits of the appeal if a stay of execution were not granted. In such a case, the appeal might be rendered nugatory.
- 25 In *Cellante*, Young CJ stated that special circumstances would 'exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed'.(p.657).
- 26 An appeal could be rendered nugatory in that sense in a variety of ways. The test could be satisfied where a defendant appeals and there is a real risk that the plaintiff would remove the proceeds of the judgment from the jurisdiction. Similarly, special circumstances may be recognised where, for example, although the respondent is solvent, the subject matter of the appeal is, in substance, irreplaceable.
- 27 The prospect that the appeal may be rendered nugatory must be balanced against the principle that the successful party is entitled to the fruits of the judgment. A stay should not be granted unless there **is at least an arguable ground of appeal**, although otherwise speculation as to the ultimate prospects of success is usually inappropriate.

(emphasis added)

Prospect of obtaining leave to appeal

64. I propose to adopt the approach described by Gillard J.
65. Mr Hopper submitted that there is no arguable question of law arising out of my orders dated 4 December 2014 as would warrant the granting of a stay of those orders.
66. He submitted that the respondent would be unable to demonstrate, on appeal, a right to possession of the property. The respondent would need to show, he submitted, that ABC was entitled to grant a lease to him as would now bind the applicant. This, he says, will not be possible, as the contract of sale upon which ABC would need to rely for its interest as purchaser, had been rescinded by the applicant because of the failure of ABC to pay the purchase price. Prior to that date, he submitted, ABC held only an equitable

¹⁶ [1963] VR 129

interest in the land as the interest of a purchaser under a contract of sale. Not having paid the purchase price, he contends that ABC never put itself in a position whereby it could seek specific performance of the contract of sale.¹⁷ It follows, he submitted, that ABC never had any power to grant a lease over the property to the respondent.

67. These arguments presuppose that the proper construction of the contract of sale and lease is as Mr Hopper contends viz. that title to the property was not to pass until payment of the balance of the purchase price on 31 July 2011 or such later date for payment as may have been agreed. The respondent contends otherwise, that is to say, on a proper construction of the contract of sale and lease ABC was entitled to become the registered proprietor of the property upon payment of the deposit.
68. It would be open to the Supreme Court, when considering the prospects of leave to appeal being granted, to hear argument about the relative merits of the dispute between the parties concerning the construction of the relevant documents. Where, however, an application for a stay is made to the Tribunal, it is naturally unable to comment on what it may consider are the respondent's prospects of success in persuading the Supreme Court of the construction of the documents for which he contends. It cannot sit in an appeal against its own decision.
69. This being the case, I find that the rights and liabilities of the parties depend on the construction of documents evidencing the contract of sale and lease. The proper construction of these document is a question of law. I am therefore unable to say that there is no arguable ground of appeal.

Effect of a stay and balance of convenience

70. I now consider the second and third questions posited by Gillard J in *Skandi*.
71. The respondent, as the applicant for a stay, must still satisfy me that a stay is justified.
72. The respondent says that the effect of not granting a stay, in this case, is that he will be dispossessed from the property, and thus deprived of the fruits of any appeal. In such a case, he says, the appeal might therefore be rendered nugatory. I accept that this gives rise to an special or exceptional circumstance upon which a stay may be seen as justified.
73. If, on the other hand, a stay of Orders 2 and 4 is granted, the respondent will be entitled to continue to occupy the property, but that:
 - (a) the applicant will continue to be shut out from exercising its lawful rights to the property as an incident of its ownership of it;

¹⁷ See *Land Law* by Peter Butt (6th edition) Lawbook Co 2010 see paragraph 7.33 at p. 120

- (b) the applicant will not, it can be inferred, receive a monthly rent of \$2,383.34 from 1 October 2014, as ordered by the Tribunal dated 19 September 2014;
 - (c) the applicant will not, it can be inferred, receive the amount of \$39,216.97, in breach of Order 4 of the Orders of the Tribunal dated 4 December 2014;
 - (d) the applicant will be required to await the decision of the respondent as to when and if he applies for leave to appeal against Orders 2 and 4 of the orders dated 4 December 2014, thus extending the period for which losses of this nature continue;
 - (e) there is no evidence of there being any reasonable prospect of the applicant receiving any monies to make up for the losses it has incurred, and will continue to incur, by reason of the respondent's occupation and failure to pay monies owing; and
 - (f) the applicant will not, it can be inferred, be able to conduct a stock audit for the purpose of bringing its claim in respect of alleged damage to stock and chattels.
74. I take these matters into account when assessing the balance of convenience.
75. I also consider that the current circumstances are in contrast to those before Hollingworth J in *Brown*. In that case, an order for possession was made by the Tribunal in favour of landlords. An originating motion seeking leave to appeal was subsequently filed in the Supreme Court by the tenant. Byrne J, sitting in the Practice Court, granted a stay based on the tenant undertaking, in effect, to pay rent that had in the meantime fallen due. Hollingworth J was subsequently asked to extend the stay until the hearing of the tenant's application for leave to appeal. Her Honour was only prepared to do so on the basis that rent would continue to be paid by the tenant to the landlord. No such consideration for the respondent's proposed continuing possession, in this case, is being offered to the applicant.
76. The respondent says that he is justified in not paying rent, because of the loss and damage allegedly suffered by him in reliance upon the applicant's alleged misleading and deceptive conduct in failing to disclose the existence of certain matters in 2009.
77. The respondent's counterclaim in this respect has barely been particularised. No counterclaim, in terms, has been filed by the respondent. The Tribunal has, in such circumstances, by its orders, attempted to outline what it understands is the general nature of the counterclaim, drawing from the contents of correspondence received from the respondent. In doing so, the Tribunal has had regard to the fact that the respondent is an unrepresented party. Further, the respondent's \$1.3 million claimed loss and damage has, in breach of orders of this Tribunal made 4 December 2015, only been particularised at a most superficial level.

78. There is also some doubt as to whether the party having the cause of action in the counterclaim is ABC (a company that no longer exists), or the respondent.
79. I am of the view that the matters relating to the counterclaim provide no basis for the respondent making no payment to the applicant for his continuing occupation of the property.
80. There is also evidence that although the respondent has had some difficulty renting out the motel units, allegedly for lack of the necessary consents from authorities, a limited permit has apparently been granted. This has enabled him to rent out 18 units of the 36 units to “residential and semi-permanent guests”. I observe that the respondent also has funds sufficient to place in his solicitor’s trust account for the purpose of other litigation. No attempt has been made by him to place the applicant in funds in return for occupation.
81. Having carefully considered these matters, I believe that the balance of convenience favours the applicant being entitled to recover the property. The respondent has his claim for damages.
82. The absence of willingness on the part of the respondent to make an application seeking leave to appeal, notwithstanding the opportunity that he has had to do so, is a further factor that inclines me to exercising my discretion against the respondent.
83. I am prepared to order pursuant to section 118 of the Act that these orders do not come into effect until 4 pm on 8 May 2015. The delay in the coming into effect of these orders provides an opportunity for any urgent application to the Supreme Court that the respondent may wish to make. If I am wrong in refusing to grant a stay of Orders 2 and 4 of my orders dated 4 December 2014, the Supreme Court will remedy the situation.
84. I made the Orders attached.

A T Kincaid
Member