

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP522/2018

### CATCHWORDS

**RETAIL LEASES ACT 2003**—successful claim by landlord against former tenant and guarantor for damages following landlord’s re-entry for non-payment of rent—counterclaim dismissed as being bound to fail.

**PRACTICE AND PROCEDURE**—Application made by respondents for adjournment of the hearing—Tribunal not satisfied from its own observations, those made by the Tribunal’s first aid officer and hospital paramedical officers who later attended that the tenant’s representative was not, as he had alleged, unfit to attend the Tribunal and represent the interests of the respondents—in the exercise of the Tribunal’s discretion, the hearing proceeded against the tenant and guarantor in the absence of their representative.

<b>APPLICANT</b>	Hannah Vic Pty Ltd (ACN 618 822 352)
<b>FIRST RESPONDENT</b>	Zenith Netcare Pty Ltd (ACN 103 839 149)
<b>SECOND RESPONDENT</b>	Ekejiuba Uzoho
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	A T Kincaid, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	29 November 2018
<b>DATE OF ORDER</b>	29 November 2018
<b>DATE OF REQUEST FOR WRITTEN REASONS</b>	13 December 2018
<b>DATE OF WRITTEN REASONS</b>	30 January 2019
<b>CITATION</b>	Hannah Vic Pty Ltd v Zenith Netcare Pty Ltd (Building and Property) [2019] VCAT 146

### ORDERS

1. The application by the second respondent for an adjournment of the hearing is refused.
2. On the application of the applicant pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, the counterclaim is dismissed because in the opinion of the Tribunal, it is frivolous, vexatious (in the sense of being bound to fail), misconceived and lacking in substance.
3. The respondents must pay \$56,306.64 to the applicant.

4. Any application by the applicant for costs must be filed and served by 27 December 2018.

A T Kincaid  
**Member**

**APPEARANCES:**

For Applicant

Mr L M Stanistreet of Counsel

For Respondents

Mr E Uzoho (until 12.00 midday only).

## REASONS

1. I heard this proceeding on 29 November 2018, in the absence of the respondents. I gave my decision orally.
2. By email dated 13 December 2018, the second respondent requested written reasons.

### General Background

3. I found as proven those facts referred to in the applicant's written outline of submissions, upon which it relied.
4. The proceeding concerns retail premises in Puckle Street, Moonee Ponds, Melbourne (the "**property**").
5. By a lease dated 4 July 2012 the property was leased to Meridian Pharmacy Group Pty Ltd ("**Meridian**") which granted a sub-lease to the first respondent. The guarantor of the first respondent's obligations under the sub-lease is the second respondent.
6. The first respondent used its sub-leased premises as a pharmacy.
7. By a deed of assignment and novation dated 13 June 2017, Meridian's rights and obligations as sub-lessor under the sub-lease were transferred to the applicant, which carries on the business of a medical centre at the property.
8. I found that in the period following 13 June 2017, the first respondent as sub-lessee committed numerous breaches of the sub-lease,<sup>1</sup> including a failure to provide a \$15,000 bank guarantee required by the sub-lease.
9. On 21 March 2018, the applicant re-entered the sub-leased premises, and the sub-lease was terminated at that time.
10. I found by reference to particulars of loss and damage, filed at the hearing, that on 6 September 2018 the applicant re-let the premises to a new tenant. I found that the new letting was on the reasonable and not unusual basis that the first 2 months of the new lease, in this case September and October 2018, would be rent-free.

### Procedural Background

11. By an injunction application filed 11 April 2018, the applicant sought an order restraining the respondents from continuing to occupy the property.
12. On 23 April 2018, at the hearing of the injunction application, Senior Member Riegler made an order restraining the respondents from

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<sup>1</sup> As set out in paragraph 5 of the applicant's Points of Claim dated 17 August 2018 and also in paragraph 5 of the first affidavit of Mr Ezabadi on behalf of the applicant sworn 10 April 2018, and as referred to in subsequent affidavits of Mr Ezabadi sworn 21 April 2018, 25 May 2018 and 28 June 2018.

continuing to occupy the property. The respondents did not appear. The order was stayed until 14 May 2018.

13. Following receipt of an application by the respondents for review, on 15 May 2018 Senior Member Riegler listed the matter for a review hearing, which was subsequently fixed for 25 May 2018.
14. On 25 May 2018, Senior Member Vassie made further orders, including to amend the respondents' review application to include an application for relief against forfeiture, and adjourned the hearing of the review application to 28 June 2018. By order of Senior Member Riegler made in chambers on 4 June 2018, that hearing was vacated and re-listed for 29 June 2019.
15. Also, on 25 May 2018, the respondents filed an affidavit of Sylvia Uzoho, which was stamped 'Counterclaim' by the Tribunal's Registry.
16. At the review hearing on 29 June 2018, Senior Member Vassie made orders:
  - (a) refusing an application by the respondents for an adjournment;
  - (b) dismissing the respondent's application for a review;
  - (c) dismissing the respondent's application for relief against forfeiture;
  - (d) permanently restraining the respondents from continuing to occupy the property; and
  - (e) listing a directions hearing in relation to the first respondent's counterclaim.
17. Despite the 29 June 2018 orders, the first respondent remained in possession of the property until 6 July 2018.<sup>2</sup>
18. On 27 July 2018, Senior Member Lothian made further orders, including:
  - (a) for the applicant to file and serve points of claim;
  - (b) for the respondents to file and serve amended points of counterclaim;
  - (c) for the applicant to file and serve points of defence to counterclaim; and
  - (d) the listing of the proceeding for hearing on 29 November 2018.

**Application by the second respondent for adjournment of the hearing**

19. At 4:35 pm on 28 November 2018 the second respondent emailed the applicant's representatives, seeking an adjournment of the hearing. It read:

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<sup>2</sup> See Respondent's Points of Defence at Applicant's Tribunal Book 47.

Please find attached request for consent to adjournment of tomorrow's hearing to a date not earlier than 15 January 2019 because of director's illness, no staff and no lawyer, thanks.

Regards

Dr Uzoho

20. The applicant's counsel's instructors responded by email dated 28 November 2018 at 5:35 pm, to which I had regard. It read:

We refer to your below email and note that you have requested an adjournment at 4:23pm on the afternoon before the hearing.

[The applicant] does not consent to an adjournment and we are instructed to proceed tomorrow.

We make the following observations:

1. You have been aware of this hearing date since 27 July 2018, but have only requested an adjournment now, at 4:23 the day before the hearing.
2. The reasons you have offered for requesting an adjournment...are vague, unsubstantiated and patently unsatisfactory.
3. We note for instance that you have not provided details, let alone evidence, of any illness.
4. You have made a number of adjournment requests in relation to previous hearings in the matter, often immediately prior to the hearing as happened today, including failing to attend on the first return date of 23 April 2018, then asking to adjourn the hearing on 29 June 2018.
5. Senior Member Vassie recommended to you a number of times at the hearing on 25 May 2018 that you should obtain legal advice (see for instance, the transcript of that hearing at T40:5-31). Senior Member Lothian also recommended that you obtain legal advice on 27 July 2018 (see transcript of that directions hearing at T:91:1-24). You had had over 6 months to make such arrangements.
6. We refer to the warning given by Senior Member Lothian at the directions hearing on 27 July 2018 and recorded in the orders made that day, in particular that costs may be ordered if the hearing is adjourned or delayed.

We reserve the right to rely upon this and previous correspondence in support of an application to oppose the adjournment request, and/or to seek an order that the Counterclaim be dismissed...

21. At 8:37 am on 29 November 2018, the day of the hearing, the Tribunal received an email from the second respondent enclosing an application for an adjournment. Among the lengthy written reasons that accompanied his request was an allegation that the second respondent:

...was unwell and unable to represent himself at the hearing...consequent of an exacerbation of a medical condition and the psychological trauma and stress inflicted upon [the second respondent] when [the applicant] shut down and prevented relocation of [his] medical centre business which is my family's source of livelihood as I and my wife worked there only.

22. The application also attached a doctor's certificate dated 28 November 2018 stating:

[The second respondent] is receiving medical treatment for the period Thursday 29 November 2018 to Thursday 29 November 2018 inclusive. He will be unfit court hearing (sic).

Dr Michael Saeed

23. The other grounds for seeking an adjournment contained in the Reasons, were to the effect that, by reason of the re-entry undertaken by the applicant, the respondents had been left:

high and dry and without money and opportunity to earn an income [and that as a result] it has been extremely difficult for [the respondents] to raise money to hire the services of a lawyer...

24. Much emphasis was placed by the respondents, in their Reasons, on the allegation that upon re-entering the premises, the applicant

...had ransacked the medical centre and deliberately seized ...vital documents and [destroyed] the records vital to proving [the respondents'] case.

25. In respect of the latter allegation, Mr Stanistreet of counsel for the applicant drew my attention to paragraph 24 of the applicant's defence dated 23 November 2018 to the amended points of counterclaim dated 2 November 2018, to the effect that the applicant afforded ample opportunity to the respondents to collect their items of property remaining at the premises following re-entry.<sup>3</sup>

26. The applicant opposed an adjournment, for the reasons set out in its solicitor's email.

27. The second respondent, a medical practitioner, declined to provide me with any details concerning the nature of the sickness for which, the medical certificate states, he was receiving medical treatment.

28. Upon the second respondent exhibiting symptoms of chest pain and stress, I requested the attendance of the Tribunal's medical officer who, following an examination, declared that she did not think that the calling of an ambulance was necessary.

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<sup>3</sup> The relevant correspondence having been tendered at the Applicant's Tribunal Book at pp 318, 327 and 333.

29. The second respondent then called for an ambulance. Paramedical officers from the Alfred Hospital arrived, and, in my absence, performed an examination upon the second respondent. Upon my returning to the bench, they declared that, in their view, hospitalisation of the second respondent was not necessary.
30. The second respondent informed the Tribunal that notwithstanding the conclusions expressed by the paramedical officers, he intended to take himself to hospital, and departed.
31. For the reasons expressed in the applicant's email dated 28 November 2018, and in view of the above matters, I formed the view that there were insufficient grounds for an adjournment of the proceeding. I also determined, from my engagement with the second respondent during his extended and voluble adjournment application, that he was well capable of representing the respondents at the hearing. I dismissed the adjournment application, in the absence of the second respondent.

#### **The claim made in the proceeding**

32. I then heard evidence from Mr Ezabadi on behalf of the applicant. Having regard to his evidence, the contents of the material contained in the applicant's tribunal book and its detailed particulars of loss and damage filed at the hearing, I found that the applicant had proved its entitlement to be paid \$56,306.64, as particularised below:

\$49,602.18	<p><b>Damages</b></p> <p>Loss of benefits the landlord would have received had the sub-lease continued to term (including interest of \$2,393.84)</p> <p>From 1 April 2018-1 October 2018 (see particulars of loss and damage).</p>
\$3,283.34	<p><b>Council rates</b></p> <p>21 March 2018-30 June 2018, 101 days \$1,944.17</p> <p>1 July 2018-6 September 2018, 67 days \$1,339.17</p> <p>(relevant documents contained in Applicant's Tribunal Book)</p>
\$1,234.44 including GST	<p><b>City West Water</b></p> <p>(relevant documents contained in pages 304-314 of Applicant's Tribunal Book)</p>
\$1,219.68	<p><b>Security costs</b></p> <p>(relevant documents contained in pages</p>

	302, 303 of Applicant's Tribunal Book filed by applicant)
\$967.00	<b>Locksmith costs</b> (relevant documents contained in pages 296, 300 of Applicant's Tribunal Book)
<b>\$56,306.64</b>	

33. I found that there was no lawful basis, on the first respondent's material, for the withholding by the first respondent of rent, or the failure by the first respondent to provide a bank guarantee.<sup>4</sup>

### **The counterclaim made in the proceeding**

34. I was informed by my bench clerk prior to the start of the hearing that notwithstanding the Tribunal's request made of the respondents on 5 November 2018 to pay the further amount of \$1,049.50 for the Tribunal's fees in respect of the increased quantum claimed in the respondents' amended counterclaim, no payment had been received from them.
35. I proceed to hear the applicant's application that the counterclaim should be dismissed under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**").
36. Section 75 of the Act provides:
- At any time, the tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion-
- (a) is frivolous, vexatious, misconceived or lacking in substance; or
- (b) is otherwise an abuse of process.
37. I found that insofar as the first respondent sought relief relating to the alleged wrongful repossession of the premises by the applicant on 21 March 2018,<sup>5</sup> it thereby sought to challenge the Tribunal's final orders on 29 June 2018 permanently restraining the first respondent from wrongfully continuing to occupy the premises. Those orders, not having been appealed, meant that this aspect of the counterclaim was also bound to fail.
38. Insofar as the first respondent sought unparticularised damages in the sum of \$500,000 relating to the alleged wrongful conversion of the respondents' alleged chattels and records,<sup>6</sup> that was well met by the contents of paragraph 24 of the applicant's defence to the amended points of counterclaim. The ample opportunity given to the first respondent to

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<sup>4</sup> Having also considered paragraphs 9-15 of the Amended Points of Counterclaim.

<sup>5</sup> See paragraphs 16-24 of the Amended Points of Counterclaim

<sup>6</sup> See paragraphs 25-26 of the Amended Points of Counterclaim and paragraph 7 of the prayer for relief.



recover its property was also supported by evidence given by Mr Ezabadi at the hearing.

39. I found that there were no satisfactory particulars provided of the alleged “disruptive and sabotaging conduct” of the applicant, as may support any allegation of unconscionable conduct on the part of the applicant which, it appeared, was the allegation that the respondents wished to make good.
40. I found that there were no particulars provided of the claim by the respondents in the amount of \$100,000 as compensation for breach of section 54 of the *Retail Leases Act 2003*.
41. I found that there were no particulars provided in respect of the claim by the second respondent in the amount of \$100,000 for “emotional and psychological trauma” alleged by him. I found that the prospects of sustaining such a cause of action, said to arise from a re-entry by a landlord of retail premises, were hopeless.
42. I concluded that all causes of action in the Amended Points of Counterclaim were hopeless, and I dismissed them under section 75 of the Act.
43. Finally, I accepted the applicant’s counsel’s submission that the second respondent was liable to indemnify the applicant under clause 10.1.3 of the guarantee in respect of the applicant’s proved damages, and that the making by the applicant of a prior “demand” of the second respondent was not a pre-condition to the liability of the second respondent to do so.
44. I made the orders attached.

A T Kincaid  
**Member**