

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP2058/2019

CATCHWORDS

Retail tenancy – section 60 of the *Retail Leases Act 2003* (Vic) -Assignment of lease-whether landlord entitled to withhold consent to assignment.

APPLICANT	Keech & Co Pty Ltd (ACN 615 472 029)
RESPONDENT	K & K Autos Pty Ltd (ACN 080 446 877)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	12 November 2019
DATE OF ORDER	13 November 2019
DATE OF REASONS	25 November 2019
CITATION	Keech & Co Pty Ltd v K & K Autos Pty Ltd (Building and Property) [2019] VCAT 1859

ORDER

Having regard to the nature of the proceedings and in particular the pending settlement of the applicant's sale agreement with a prospective purchaser scheduled for 15 November 2019 the Tribunal makes the following orders with reasons to follow within 60 days in accordance with section 117 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic):

1. The applicant's application seeking a declaration that the respondent unreasonably withheld its consent to the assignment of the applicant's leasehold interest in respect of premises at 195 – 199 Ascot Vale Road, Ascot Vale, Victoria, is dismissed.
2. Liberty to apply.

SENIOR MEMBER L. FORDE

APPEARANCES:

For the Applicant: Mr L. Virgona of Counsel

For the Respondent: Ms C. Jones of Counsel

REASONS

- 1 On 12 November 2019 I heard an application by the applicant for an order in the form of a declaration that the respondent is not entitled to withhold consent to the assignment of the applicant's leasehold interest in premises at 195- 199 Ascot Vale Road, Ascot Vale, Victoria. Given the urgency of the application orders were made on 13 November 2019 and published without reasons. Those orders stated in part:

The applicant's application seeking a declaration that the respondent unreasonably withheld its consent to the assignment of the applicant's leasehold interest in respect of premises at 195 – 199 Ascot Vale Road, Ascot Vale, Victoria, is dismissed.

- 2 What follows are my reasons for the orders pronounced on 13 November 2019.

Background to the application

- 3 The applicant is the tenant of premises on Ascot Vale Road, Ascot Vale. From which it owns and operates an Enhance branded petrol station. The premises are owned by the respondent landlord.
- 4 The lease expires in May 2026.
- 5 On 18 October 2019, the applicant entered into a Contract of Sale of Business with Wilderness Group Pty Ltd (proposed assignee)¹ to sell the petrol station business. Settlement was due on 15 November 2019. Enhance Fuel company has approved the proposed assignee.
- 6 The landlord refused consent to the assignment of lease from the tenant to the proposed assignee on the basis that the proposed assignee has insufficient business experience to operate the petrol station and lacks financial resources. All third-party suppliers (such as fuel) have agreed to the proposed assignee taking over the business.

What does the tenant need to prove?

- 7 The tenant bears the onus of proof. It must show that the landlord unreasonably withheld its consent to the assignment of lease.
- 8 Section 60 of the *Retail Leases Act 2003* ('the RLA') provides, in part:
- (1) A landlord is only entitled to withhold consent to the assignment of a retail premises lease if one or more of the following applies –
- ...
- (a) the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease;

¹ A Heads of Agreement for the sale of business was entered into on 23 August 2019. – see affidavit of Antony Hill sworn 29 October 2019.

- 9 The landlord's refusal to consent to an assignment under s 60 (1)(b) must proceed on the basis of a reasonably held belief that a proposed assignee does not have sufficient financial resources or business experience to meet its obligations under the lease².

Does the proposed assignee have sufficient business experience?

- 10 The landlord refused to consent to the assignment on the basis that the proposed assignee did not have sufficient business experience.
- 11 It is common ground that the tenant provided the landlord with the proposed assignee's two-page business plan. The business plan did not contain a budget or any projected financial information in respect of the proposed assignee's business.
- 12 The business plan contained very limited details of the proposed assignee's relevant business experience. On the page headed "business history and experiences" its stated "family-owned petrol station in overseas, my father has worked within petrol station industry over 20 years." The landlord argues that it is the business experience of the proposed assignee that is the relevant consideration not the business experience of a proposed assignee's family members.
- 13 The tenant submitted that the proposed assignee was entitled to have other people assist in the business and draw on the experience of others. It was also noted that the business plan referred to the director of the proposed assignee as having worked in the family petrol business for three months a year in the period 2000 to 2011. It was also noted that the director had operated, with friends, a Bubble tea store in Australia.
- 14 It is open for the proposed assignee to gain the requisite experience or employ someone with the requisite experience as a way of satisfying the landlord that it has sufficient business experience³.
- 15 The tenant submits that two of its employees will be staying on in the business so that the proposed assignee is not starting afresh. The evidence presented does not go that far. The business plan simply states under the human resource section "try to keep the existing staff." The tenant relies upon an exhibit to one of its affidavits as evidence of details of the two employees who will remain with the business. The exhibit is a one-page document entitled "Enhance Ascot Vale – Employees are being retained". It identifies the two current employees one full-time and one part-time who are said to stay with the business. There is no evidence other than a mere intention to retain these employees that they will remain with the business.

² AVC Operations Pty Ltd v Velly Pty Ltd [2018] 1 Qd 131 at 931

³ MD and S Griggs Pty Ltd v DDWH Pty Ltd [2016] 1 Qd 131 at 42

- 16 The landlord referred the Tribunal to a provision in the Contract of Sale of Business which provided for all employees of the tenant to be terminated upon settlement. I accept this is a standard provision in a sale agreement and does not mean the employees will not be hired by the new owner. However, I am not satisfied that there is any arrangement in place that would satisfy me that the two employees will be staying with the business.
- 17 While mention is made of the father of the sole director of the proposed assignee having the relevant business experience, there is no detail whatsoever about what that experience is or how the proposed assignee might benefit from that experience. It is unclear if the father is in Australia or China.
- 18 The landlord referred to the market rent review provision in the lease due on 16 May 2020. It expects the rent to increase significantly on the basis that the original rent was set at a reduced rent in recognition of the fact that the tenant was required to carry out works to the premises⁴.
- 19 The landlord anticipates the market rent is likely to be approximately \$105,000 plus GST and outgoings. This belief is based upon a market rent appraisal obtained from Nelson Alexander⁵.
- 20 Submissions were made on behalf of the tenant, although without any supporting evidence, that two of the three properties relied upon in the Nelson Alexander appraisal were not comparable because they were located on busier roads.
- 21 The current rent is approximately \$60,000. I am satisfied based on the Nelson Alexander appraisal and the lack of any other evidence that the rent will likely increase significantly from this figure.
- 22 I find it was reasonable for the landlord to reject the proposed assignee on the basis that it lacked the business experience to meet the obligations under the lease for the following reasons: -
- a there is no description of what experience the director of the proposed assignee obtained during his time working between 2000 and 2011 in his family's petrol station business in China. His driver's licence is in evidence and shows his year of birth as 1989. On the evidence, between 2000 and 2011 he was aged 11 through to 22 years of age;
 - b there is no evidence that the two current employees of the tenant will or have accepted positions with the proposed assignee if the sale proceeds;
 - c there is no evidence about the support the proposed assignee will receive from the director's father;

⁴ Affidavit of Giovanni Brancatisano sworn 6 November 2019 – paragraph 8 and 9

⁵ Ibid paragraph 9 and exhibit JB-5

- d the tenant's business based on the financial information provided to the proposed assignee as part of the sale arrangement shows that the business is not without its challenges. For example, in the last financial year it recorded a profit of \$24,724 and an adjusted net profit to the owners of the business of negative \$147,900;⁶
- e there is a real prospect that the rent will increase when a market rent review occurs in 2020 which will impact upon the business;
- f the business plan lacks information about how the proposed assignee will operate the business. There is no budget or projected financial information; and
- g the only Australian business experience of Mr Yin, the director is owning and operating a Bubble tea shop with friends while at university. No evidence was provided of his duties. A Bubble tea shop is vastly different from a petrol station.

Does the proposed assignee have sufficient financial resources?

- 23 The tenant relies upon a Balance Sheet as at 27 August 2019 for Mr Yin, a director of the proposed assignee, to show the tenant has sufficient financial capacity. The Balance Sheet records Mr Yin's total net assets as \$880,627.
- 24 The landlord challenges the quantum of some entries in the Balance Sheet and says the proposed assignee does not have sufficient financial resources. After the landlord rejected the assignment, the tenant furnished further information such as bank statements of account to the landlord and the tribunal to support the tenant's position that the proposed assignee has sufficient financial resources.
- 25 The Balance Sheet lists current assets valued at \$442,891. This included the balances of two NAB accounts, an ANZ account and a Bank of Melbourne account. It also included \$130,000 said to be money in transit.
- 26 After queries raised by the landlord, a NAB Certificate of Balance for two accounts was produced showing balances totalling \$386,024.46. The landlord disputes the quantum of the proposed assignee's net assets. It asserts that there is no evidence of the alleged \$130,000 cash in transit.
- 27 Documents from the ANZ and Bank of Melbourne show the total in three accounts held with those banks as at 12 October 2019 as \$22,806.79.⁷
- 28 I accept the bank records as being an accurate statement of the position of the accounts at the date of the records.
- 29 There is no evidence whatsoever about the \$130,000 said to be money in transit. I do not accept this amount can be included as an asset of Mr Yin.

⁶ Exhibit ACH 2 to the affidavit of Anthony Christopher Hill sworn 29 October 2019. Said

⁷ Ibid

- 30 The Balance Sheet identified several fixed assets the most relevant being a property at Hoppers Crossing valued at \$550,000 and a property at Tarneit valued at \$520,000. The Tarneit property is vacant land. The value of these properties is taken from council rate notices. The capital improved value for the Hoppers Crossing property is stated to be \$520,000 and the capital improved value (although it is vacant land) of the Tarneit property is stated as \$205,000.
- 31 Counsel for the tenant concedes that the Balance Sheet value for the Tarneit property is overstated but submitted that it is usual for rates notice values to be lower than market value. No other valuation evidence was before me.
- 32 The properties are encumbered. According to the Balance Sheet total liabilities on the properties are \$727,264. A NAB Certificate of Balance showed the amount outstanding on the home loans secured by the properties as at 12 October 2019 as \$752,913.48.⁸
- 33 The proposed assignee included home contents with a value of \$60,000 in the Balance Sheet. The landlord submits this amount should be disregarded as being excessive and not a saleable asset. At most I would allow \$15,000 for home contents as I accept the landlord's submissions.
- 34 At the outset of the hearing the tenant advised the Tribunal that the purchase price for the business had reduced by \$100,000. This was not contested. The impact of this is that the proposed assignee now has a liability of approximately \$233,000 being the purchase price amount rather than \$333,000. The landlord says this amount should be included in the Balance Sheet. The tenant contends that if this amount is taken into account the value of the business must be included as an asset. There is merit in this argument.
- 35 There is no evidence before the Tribunal that the Tarneit property has a value more than \$205,000 being the unimproved value stated on the rates notice. I do not accept that the vacant land is valued at \$520,000 as stated on the Balance Sheet. For the purpose of this exercise I accept the value of Hoppers Crossing property at \$550,000 and the Tarneit property at \$205,000.
- 36 The table below shows the figures contained in the Balance Sheet⁹ and the figures which I accept for reasons stated as accurate. There was no objection taken to the value attributed to two vehicles in the Balance Sheet.

⁸ Exhibit ACH 10 to the affidavit of Antony Hill sworn 1 November 2019.

⁹ As at 27 August 2019

BALANCE SHEET

	Proposed assignee 27/8/19 \$	Tribunal finding \$
CURRENT ASSETS		
Cash on Hand	3,000	3,000
NAB account No 6094	239,775	304,352.15
NAB account No 6814	4,861	81,672.31
ANZ account No 3841	16,567	13,763.92 ¹⁰
BOM account no 1355	11,689	9,042.87
Money in Transit	130,000	-
Deposit – Enhance Ascot Vale	37,000	37,000
	442,891	448,831.25
FIXED ASSETS		
2019 Nissan Qushqai	28,000	28,000
2012 Holden Cruze	9,000	9,000
Hoppers Crossing	550,000	550,000
Tarneit	520,000	205,000
Home Content	60,000	15,000
	1,165,000	805,000
TOTAL ASSETS	1,607,891	1,253,831.25
NON CURRENT LIABILITIES		
NAB Home Loan #2155	169,603	
NAB Home Loan #3839	186,306	
NAB Home Loan #4137	78,867	
NAB Home Loan #9746	292,488	
TOTAL LIABILITIES	727,264	752,913.48
NET ASSETS	880,627	500,917.77

- 37 The landlord submits that the proposed assignee has not made provision for its liabilities for the lease security deposit of approximately \$30,249.99 and the purchase of stock which according to the sale documents will have a maximum value of \$85,000. These two amounts total \$115,249.99.

¹⁰ This includes balance of account No 0762

- 38 I accept that these are amounts the proposed assignee will have to pay. That said the purchase of stock will also become an asset and should be reflected in the asset provisions. On this basis I will not take stock into account as the figures will cancel each other out. The security deposit should be taken into account.
- 39 Even with deducting the security deposit, Mr Yin has net assets of about \$470,000. I am satisfied that the proposed assignee has sufficient financial resources based on Mr Yin's financial position as a proposed guarantor. Even if the rent increases to \$105,000 per annum, there are assets to cover 4 years rent without taking into account any income of the business.

Conclusion

- 40 Given my finding that insufficient evidence has been adduced to demonstrate that the proposed assignee, its director or other associated persons with the proposed assignee, have sufficient business experience in running or managing a petrol station to meet the obligations under the lease, I find that the landlord has acted reasonably in refusing consent on this ground.
- 41 I note that circumstances may change. Therefore, my finding that the landlord has acted reasonably in withholding consent, is confined to an examination of the evidence and materials produced in this hearing.

L. Forde
Senior Member