VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP487/2018

BUILDING AND PROPERTY LIST

CATCHWORDS

Building and Property List – Retail Lease – Tenant in breach of Lease – Option for Renewal denied – Claim of Unconscionable Conduct – Claim for Relief Against Forfeiture – *Retail Leases Act 2003* – s.27(2) and s.77.

APPLICANT	M&M Pty Ltd
RESPONDENT	600 Collins Pty Ltd
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	9 October 2018
DATE OF ORDER	9 October 2018
DATE OF WRITTEN REASONS	20 November 2018
CITATION	M&M Pty Ltd v 600 Collins Pty Ltd (Building and Property) [2018] VCAT 1830

ORDER

1 The proceeding is dismissed.

2 The injunction referred to in paragraph 1 of the order of 30 April 2018 is dissolved.

Robert Davis
Senior Member

APPEARANCES:

For Applicant	Mr R. Wu, Solicitor
For Respondent	Mr R. Peters of Counsel

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS

Background

1 The applicant was a tenant of premises - shops 6 and 7, 600 Collins Street, Melbourne which I will refer to as the premises.

2 The applicant conducted a business and still conducts the business of dry cleaning from the premises.

3 At one stage, part of those premises were sub-let to a telephone accessories shop that repaired telephones but I do not believe there was permission for sub-letting.

4 There is not a great deal of relevance in the issue before me today in relation to that subletting.

5 The premises have been let as a dry-cleaning shop since 1997 where the premises were leased to the applicant by the respondent's predecessor in title.

6 That lease was renewed on many occasions and the last time it was renewed was in 2015 and that renewal expired in May 2018, that is this year.

7 It is not clear from either the submissions of Mr Wu, solicitor for the applicant, or the points of claim as to precisely how the applicant is putting its case.

8 However, it does appear that the applicant is not conceding any breaches and states that it is entitled to exercise its option and there has been unconscionable conduct by the landlord and that the applicant may be entitled to relief against forfeiture.

The Lease

9 The relevant provisions of the lease are as follows: there is the initial demise of the lease and terms set out in clause 3.1 of the schedule.

10 Clause 3.4 of the lease states:

> That the lessee will at all times during the whole of the term as its own expense comply in all respects with all present and future statues rules by- laws orders regulations and other provisions having the force of law or any amendment enactment or substitution which now are or may at any time hereafter be enforced affecting or relating to the use or occupation of the premises whether by the owner or occupier thereof and with all requirements which may be made or notices or order which may be given PROVIDED ALWAYS that this covenant shall not oblige the Lessee to effect any structural altercations to the Building or the premises or any part thereof unless the same is

required by the nature or conduct of the Lessee's business or of the Lessee's use or occupation of the premises.

11 Clause 3.5 of the lease is extremely important in this particular instance and read as follows:

> That the lessee will at all times through the whole of the term at its own expense comply with all respects, with all present and future statute rules by laws, orders, regulations and other provisions having the force of law or any amendment and enactments or substitution which now are or may at any time here and after be enforced affecting or relating to the use or occupation of the premises whether by the owner or the occupier thereof and all requirements which may be made or notices or orders which may be given.

12 Later in that clause it is stated:

> Provided always that the lessor shall not be obliged to the lessee to affect any structure alterations to the building or premises or any part thereof unless the same is required by the nature or conduct of the lessee's business or the lessee's use and occupation of the premises.

13 Clause 3.8 of the lease states:

> That the lessee will not without the consent in writing of the lessor first hand and obtained make or permit any alternation or addition to the exterior or interior of the premises or the building or any part thereof of a structural nature or make or permit to be made any structural alteration to the existing ceiling or walls installed in the premises or any plant, equipment, appliances or fixtures of a structural nature.

14 Clause 8.3 of the lease refers to structural alteration requested by the lessee and that relevantly states as follows:

> If during the term of the lease the lessee shall have requested and the lessor shall have consented to the carrying out of the structural alteration or additions (including alterations or additions to fittings and other fixtures) to the premises.

15 Clause 8.3.1 refers to the plans and specifications in the building contract.

> Any or contract price in respect thereof shall have been approved in writing by the lessor or by the lessee and by all necessary confident persons and authorities.

16 Clause 8.3.3 states:

> The lessor and lessee shall have agreed in writing upon the respective amounts which shall be payable by the lessor and by the lessee in respect of such alterations or additions. The lessor upon payment by the lessee to the lessor of the lessee's agreed proportion of the cost of work shall consent to such alterations and additions to be carried out in a proper and workmanlike manner.

17 Clause 4.2 of the lease relevantly provides:

> That at the lessee's own expense, the lessee will provide … at the lessee's own expense and cost and supply the premises with all fittings, equipment, floor coverings, lighting and facilities necessary and adequate for the conduct of the business of the lessee therein to the best advantage to the extent to which the same are not provided for or by the costs of the lessee.

The Breach

18 In 2017, it became apparent to the landlord's agent that there were fumes in the premises which were not being properly ventilated or extracted from the premises and as a result, a considerable amount of correspondence passed between the parties.

19 The respondent by letter dated 30 May 2017, notified the tenant of the breach. The respondent, by letter dated 25 August 2017, delivered a notice pursuant to section 146 of the *Property Law Act* that the tenant was in breach and there was a further notice on 14 December 2017 at which time, the section 146 notice was withdrawn and, by a further section 146 notice, the tenant was given until the 14 February 2018 to remedy the situation in relation to the fumes that were in the building.

20 In that notice, clause (k) referred to clause 3.4 of the lease and it also contained an extra report by Mr Anderson as to what was required in order to remedy the breach. There were two possibilities that Mr Anderson referred to in his report. One possibility was having a proper extraction system so that the fumes in the building would be removed into the open air. The other possibility was to increase the size of the shop front so that it complied with regulations and the Building Code in the sense that it would be 5% of the area of the shop, which the Building Code and regulations required, rather than the 2.6% as it is at present.

21 Apparently, the mechanical extraction system would have cost somewhere between $76,000 and about $85,000. Those figures are approximate.

22 In the reply submission, Mr Wu said that a proposition was put to the landlord in about June of this year. No history was given to me as to what happened to the proposition and it appears that the offer may have been without prejudice because it was something that happened during a compulsory conference, or at the beginning of the compulsory conference.

23 The breach that is complained of is referred to in the Australian Building Code which is made law by Regulation 109 of the *Building Interim Regulations 2017* (Vic) which I will refer to as "**The Regulations**". That states that the Building Code of Australia is adopted by and from parts of this Regulations as modified.

24 Regulation 4.5 of the Building Code of Australia provides:

> A habitable room, office or shop and any other room occupied by a person for any other purpose must have a natural ventilation compliant

with (a) F4.6 or (b) mechanical ventilation or air conditioning system complaint with AS16.68.2 and AS1ZS366.1.

25 Paragraph 4.6 of the Building Code of Australia relevantly provides:

> Natural ventilation in accordance with F.45A must consist of openings, windows, doors or other devices which can be opened:
>
> (i) with a ventilating area of not less than 5% of floor area of the room required to be ventilated.

26 If indeed paragraph 4.6 is not complied with then there must be a mechanical ventilation system which is referred to in the two expert reports of Mr Anderson and he indeed states how that has not been done.

27 There is also a cost of remedying, as I said, but I do not have the precise figures of $76,800 and $83,000 plus GST.

28 Even though the applicant made a proposal at one stage that it might be looking at something, by putting a window at the rear of the premises, nothing eventuated from that proposal.

29 The applicant has denied in correspondence that it is in breach of the lease. As a result, in January of this year, it wrote a letter purporting to exercise the option.

30 It is apparent that as a result of section 27(2) of the *Retail Lease Act* that a tenant cannot exercise an option if in fact it is in breach of the lease.

31 This indeed is what was found by Member Kincaid in *Grenville Trading Pty Ltd* v *Braszell* (VCAT reference BP179/2014).

32 Thus, I now turn to the matters relevant to this proceeding.

Unconscionable Conduct

33 The first matter is whether there has been unconscionable conduct by the landlord. That is, unconscionable conduct pursuant to section 77 of the *Retail Lease Act.* Unconscionable conduct has been summarised in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 1344 referred to by the Federal Court of Australia in *Australian Competition and Consumer Commission v ACM Group Limited (No.2)* (2018) FCA 1115 at [189]. It is there said that the word 'unconscionability' means something not done in good conscience. It also said in the *ACM* case that it is not a finding that should be made lightly.

34 In this particular case, the tenant has been given many notices over a long period of time, dating back to the 30 May 2017, to rectify the breaches. It was also given, in the second section 146 notice, two months to rectify the breach. Mr Peter's, Counsel for the landlord, stated correctly that the tenant was only entitled to 14 days' notice but, because the landlord was keen for the tenant to be able to rectify the breach, in fact, two months' notice was given.

35 The tenant relies on the fact that the landlord is a large developer company and the applicant company is a small company with directors of minimum financial worth and refers to section 77(2)(a) of the *Retail Lease Act.*

36 However, that is clearly right, but that is not the end of the matter; otherwise a wealthy landlord would never be able to get rid of a tenant through unconscionability.

37 There has also perhaps been suggested that the landlord has been motivated in its action for other reasons. However, I find it difficult to understand this because the ball has always been in the tenant's court as to whether it can or cannot exercise the option and fix up the problem which caused the breach.

38 The tenant relies on section 77(2)(i) and refers to the extent in which the landlord unreasonably failed to disclose to the tenant. In this particular instance, as I have said, there has been considerable disclosure. Also, section 77(f) talks about the extent which the landlord's conduct towards the tenant was consistent with the landlord's conduct with the simple transactions between the landlord and other tenants.

39 While there has been a broad allegation in relation to this matter in the points of claim, nothing has been proved about the same and indeed the tenant did not give any evidence in this proceeding whatsoever.

40 Section 77(2)(n) concerns unreasonable fit out costs. In this particular instance, this is not a situation of a fit out of a shop, this is a situation of an extraction system to get rid of the fumes.

41 The landlord requires no fit out. What it required was to be able to comply with the regulations in law.

42 Thus, I find that there has not been unconscionable conduct in relation to this matter by the landlord against the tenant. The landlord is doing no more than seeking to have what is proper rectification.

43 I also note mechanical air conditioning system in the premises at the moment, to which reference has been made by Mr Anderson in his expert report, that the evaporating cooler is indeed owned by the tenant and not by the landlord. But, in my view, even though there has been considerable reference in the documents about this system it is no more than a "red herring" because the purpose of the evaporating cooler is to eject cool air into the premises. What is needed here is an extraction system for ventilation.

Relief against Forfeiture

44 I now turn to relief against forfeiture.

45 In the applicant's points of claim, it is stated that the applicant is willing to comply with its obligations under the lease and is now in the process of seeking feasible solutions to resolve the outstanding issues and will submit a specific plan and proposal.

46 In fact, a plan was submitted, but nothing has happened and that was back in June 2016, as I have previously mentioned.

47 I have also referred to the fact that the current lease has expired. The option, as referred to by Member Kincaid in the *Glenville* case, is nothing more than a contractual right.

48 In this particular instance, because of the provisions of section 27(2) of the *Retail Lease Act*, the tenant and the breach by the tenant, the tenant lost the right to exercise the option. As such, one cannot give relief against forfeiture for a contractual right. One can only give relief against forfeiture for a property proprietary right and the proprietary right was the lease and that finished in May of this year. So therefore, relief against forfeiture in my view cannot be given.

49 Even if I am wrong in that view, I do not believe this is an appropriate case to give relief against forfeiture in any event. To give relief against forfeiture I would have to be satisfied that the tenant was likely, willing and able to rectify the breach which I have referred to.

50 Mr Peters, in paragraph 87 of his submissions, made it clear that the applicant had, in the year ending June 2016, a taxable income of $5,946 and in the year ending 30 June 2017, had a taxable income of $3,974. Bearing that in mind, in my view, would be unlikely that the tenant would be able to afford to rectify the breach.

51 In any event, it is now so long since the breach has been notified to the tenant which was in May last year and little has been done to rectify that breach. It is unlikely that such rectification is going to happen.

52 Given all those circumstances, I do not believe that this is where relief against forfeiture should be given and I would refuse such relief.

53 Bearing those matters in mind, I will dismiss the application and I note on the 30 April 2018 ad injunction was made by Senior Member Riegler in joining the landlord from retaking position of the premises and as a result I will dissolve that injunction.

Robert Davis
Senior Member