

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1146/2016

CATCHWORDS

Retail tenancies, security deposit, costs and related expenses.

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| APPLICANT | Miss Maria Teresa Coelho Marques |
| RESPONDENTS | Mr Thomas Paul Vamos, Mrs Eileen Ruth Vamos |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member M. Lothian |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 23 March 2017 |
| DATE OF ORDER | 5 April 2017 |
| CITATION | Marques v Vamos (Building and Property) [2017] VCAT 458 |

ORDERS

- 1 The respondents must pay the applicant \$5,022.50 forthwith.
- 2 There is no order as to costs.
- 3 **I direct the Principal Registrar to send these orders and reasons to the parties by express post.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

| | |
|-----------------|---------------------------|
| For Applicant | Miss M. Marques in person |
| For Respondents | Mr J.B. Waters of Counsel |

REASONS

- 1 This relatively small and simple claim has been in the Tribunal in one form or another since September 2015. The distress of the applicant was obvious, but it is reasonable to assume that the respondents were also distressed.
- 2 The applicant, Miss Marques, was the tenant of retail premises in Ringwood North owned by the respondent-landlords, Mr and Mrs Vamos.
- 3 The tenancy commenced when Miss Marques bought the business from the previous tenant. It was transferred to her on 20 December 2004. The tenancy came to an end when Miss Marques sold the business and had the lease transferred to the purchaser (“the purchaser”) on 2 December 2009. Her claim is for \$14,668.85 being:
 - refund of the bond or security deposit of \$9,176.47
 - interest on the security deposit of \$3,573.17
 - refund of an overpayment of \$374.21
 - the fee for mediation at the Office of the Small Business Commissioner of \$195.00
 - legal fees of \$880.00
 - expenses including photocopying of \$390.00
 - the cost of travelling to and from her local library to use the computers for the purposes of checking her email of \$80.00
- 4 The parties agree that at the end of Miss Marques’ lease the premises were in good condition, all payments had been made and she was entitled to a refund of the entire security deposit.
- 5 Unfortunate things have been said by both parties about the other which I do not take into account unless they are relevant to the matters in contention between the parties.
- 6 Miss Marques appeared for herself. Mr Waters of Counsel appeared for the landlords.

Overpayment of \$374.21

- 7 The parties agree that Miss Marques had overpaid \$374.21 as evidenced by a letter of 1 December 2009 from Mr Di Donna of the real estate agent then acting for the landlords, to the solicitor for the purchaser. The letter, which was tendered by Miss Marques and identified as exhibit A1, states in part:

Ms Marques. Owes \$1997.80 and following overpayment of \$2372.01 will receive \$374.21 plus the bond and interest from the landlord.

Mr Wang [the purchaser]. Owes \$534.67 to TBM Commercial in addition to the bond. Mr Wang also owes \$342.56 to Ms Marques for insurance and water rates paid by her in advance.
- 8 Miss Marques said she did not receive this amount.

- 9 Exhibit A3 tendered by Miss Marques shows that the “net sale price to vendor”, being the payment by Mr Wang to Miss Marques, was \$55,000. Also attached to that exhibit is a copy of a bank cheque to Miss Marques dated 1 December 2009 for \$55,342.56.
- 10 The landlords submitted a tribunal book. At tab 12 of that book there is a letter dated 22 December 2014 to TBM Commercial from Miss Marques. The second paragraph of the letter commences:
- As per your letter dated 1/12/2009 (copy attached) addressed to the solicitor of the new owner, you stated, a refund of \$374.21 was due to me plus the bond and interest from the landlord. I received a cheque made out to me for the above amount but never received the bond money plus interest.
- 11 Miss Marques said that she believes she was mistaken in her letter of 22 December 2014 and the amount she was referring to was the \$342.56 that she was entitled to as adjustments from Mr Wang. Given that she received the adjustment as part of the bank cheque for the purchase of the business and she referred to a specific cheque for \$374.21, I am not satisfied that her evidence now is more reliable than her indication that she had received the refund more than two years ago in 2014.
- 12 Miss Marques has failed to prove that the amount of the refund is still owing to her and I make no allowance for it.

Refund of security deposit

Provision for security deposit in the lease

- 13 The parties agree that the lease provided for a security deposit of \$4,100.00 to be paid into a trust account and for any interest to become part of the security deposit. They agree that in the absence of a right of the landlords to receive payment from the security deposit, any interest in the trust account would be payable to Miss Marques.

The money in the security deposit trust account

- 14 Part of exhibit A1 is of the statement of account of the St George Bank Limited. The account is in the name of TBM Commercial Pty Ltd ITF [Miss Marques] and is described as “Bond Trust Account”. It is from 1 July 2009 to 7 December 2009 and shows that the balance of \$9,176.47 was debited on close of the account. No evidence was given about who this amount was paid to and neither party sought an order from the Tribunal to obtain details from St George Bank about who received the funds.
- 15 Similarly, neither party has provided the other 13 pages for this account or sought an order to require the bank to provide them. Interest was paid in this six-month period of \$95.54 but there is no evidence as to how much money was paid into the account or on what dates. Further, there is no evidence as to the amount of interest earned on this account from its commencement.

16 I note in particular that KBL Commercial was joined as a party to this proceeding on the application of the landlords and could, perhaps, have shed some light on precisely what happened to the proceeds of the “Bond Trust Account”. On 3 March 2017 the proceeding between the landlords and KBL Commercial was struck out by consent between them.

How much did Miss Marques pay?

17 The parties agree that the security deposit was paid to the agent for the landlords at the time Miss Marques took the lease. That agent was TBM Commercial which then sold its rent book to KBL Commercial.

18 The landlords say that the tenant paid \$4,100.00 in accordance with the lease and in accordance with page 4 of 29 of the “Archived Account Ledger” provided by KPL Commercial to the landlords for the purpose of this proceeding.

19 Miss Marques gave evidence that she paid more than \$4,100.00 to the then agent but said that she did not know precisely how much she had paid and she had no written evidence of how much she had paid.

20 I accept the evidence of Miss Marques that she came to Australia as a business immigrant which, in her case, involved purchase and operation of the business for five years until she became a permanent resident. She said that when she arrived in Australia she did not have a bank account because she did not have the required identification “points” and that early payments by her were in cash.

21 Miss Marques said that the agent was concerned about her lack of references when she was contemplating buying the business and said that the agent wanted more than the \$4,100.00 provided for as security deposit under the lease.

22 Nevertheless, although Miss Marques was, as she admitted under cross-examination, a book-keeper for 35 years, she failed to obtain any evidence of paying more than \$4,100.00. In the unlikely (but possible) event that an employee of the landlords’ then agent obtained money falsely from Miss Marques, her claim is against that person rather than against the landlords. Receiving money without a receipt, which is not in accordance with the lease, cannot be seen to be an act done as agent of the landlords, and Miss Marques cannot complain to the landlords if she has allowed them to be potentially defrauded.

23 Miss Marques wished to produce evidence that the agent had taken a bond from Mr Wang, the purchaser from Miss Marques and the next tenant, that was not reflected in the lease to him. I refused to accept that evidence on the basis that it was not relevant to this proceeding.

24 I am not satisfied, on the evidence before me, that Miss Marques paid more than \$4,100.00 for the security deposit.

Did Miss Marques receive part or all of the security deposit?

- 25 The only evidence that I have as to whether Miss Marques received a refund of the security deposit is her evidence that she did not. Although I have found her evidence about receipt of the refund of \$374.21 unconvincing, her statement that she did not receive any part of the security deposit is the best evidence before me. There is evidence that the security deposit was paid out of the St George account, but no evidence as to where it went after that.
- 26 Mr Waters said that his instructing solicitor asked Miss Marques to provide evidence of her bank accounts for the period around the payment out of the trust account being 1 December 2009 to 28 February 2010. Miss Marques responded that she had asked for details of bank statements from the landlords which had been refused on the basis that they were “confidential”. She said that she therefore concluded that the landlord’s solicitor was seeking material he was not entitled to.
- 27 Mrs Vamos gave evidence for the landlords that she did not personally witness the return of the security deposit to Miss Marques but she assumed that the managing agent would take care of such matters. She agreed that she had no documentary evidence that the security deposit had been returned to Miss Marques. Mrs Vamos appeared to me to be a truthful witness, who was prepared to give evidence that did not necessarily support her case.
- 28 I suggested to the parties that the questions between them could be readily answered by an order under s81 of the *Victorian Civil and Administrative Tribunal Act 1998* for the St George Bank to provide the other pages of the bond trust account statements of account and evidence regarding the recipient of the amount when the account was closed. Neither party sought such orders, and neither sought an adjournment to enable more information to be provided. My decision is therefore made on the basis of the incomplete evidence before me. The mystery about how such a relatively large amount could have been in the Bond Trust Account at the end of the tenancy remains unresolved.
- 29 Miss Marques said that she received page 14 of the St George statement of account when it was passed onto her by the purchaser. She said she contacted Mr Di Donna shortly after that to ask where the security deposit was and he said that he was “working on the interest”.
- 30 I note that in response to questions about why she did not pursue the security deposit between December 2009 and December 2014 her response was that both her parents had become ill and died during that time, which distracted her from the aftermath of the lease and caused her to return to her homeland on a number of occasions.
- 31 I find, on the balance of probabilities, that Miss Marques has not received the security deposit of \$4,100 and is entitled its return. I emphasise that I

accept the evidence of Mrs Vamos that she had nothing to do with payment out of the bond and that she assumed this would be done by the landlords' agent. I find that the landlords are responsible for the action or inaction of their agent with respect to paying the bond.

Interest on security deposit

- 32 I find that Miss Marques is entitled to interest on the bond that she would have received if the amount representing the bond had been paid to her at the end of the lease being from the date of the deposit, which I treat as 17 May 2005 to shortly after payment out of the bond on 7 December 2009. I treat the period as four and a half years.
- 33 I do not allow interest beyond that period because I am not satisfied that it is reasonable that the obligation to pay additional interest should be imposed on the landlords when Miss Marques knew she had not been paid, but they did not.
- 34 Miss Marques prepared a document headed "Calculations of Interest on \$9,176.47 since the Transfer of the Lease on 2 December 2009 Plus Overpayment Plus Other Costs".
- 35 As far as the interest is concerned, Miss Marques has calculated the interest on a number of different interest rates ranging between 6.8% and 2.7%. Under cross-examination she was unable to say precisely where she derived the interest rates from, although she mentioned both the St George Bank and the NAB fixed term deposits.
- 36 In his closing remarks Mr Waters' suggestion from the bar table that interest at 2.5% might be reasonable which he calculated was \$1433.00.
- 37 In the absence of better evidence I allow interest at a flat rate of 5% for 4 and a half years, being \$922.50.

Legal fees and similar expenses

- 38 Section 92 of the *Retail Leases Act* provides:

92 Each party bears its own costs

- (1) Despite anything to the contrary in Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act 1998* each party to a proceeding before the Tribunal under this Part is to be its own costs in the proceeding.
- (2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the preceding but only if the tribunal is satisfied that it is fair to do so because –
 - (a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or

(b) the party refused to take part in or withdrew from mediation or other form of alternative dispute resolution under this Part.

(3) In this section, costs includes fees, charges and disbursements.

39 Although this proceeding has been long and trying for both parties, I am not satisfied that either party has conducted the proceeding in a manner which satisfies the exacting standard of being vexatious. Further, there is no evidence that either party withdrew from mediation or refused to take part.

40 I make no order as to costs in favour of either party and I make no order as to the other amounts sought by Miss Marques including the fees of the Small Business Commissioner her disbursements being photocopies, phone calls, travel, parking, postage, stationery and the particular expenses of attending the library to check her email.

Conclusion

41 The landlords must pay Miss Marques a total of \$5,022.50.

Comment regarding appeal to the Supreme Court

42 Miss Marques made the somewhat surprising statement during the hearing that she would be appealing to the Supreme Court despite the fact that she was yet to receive my decision. The comment was irrelevant to the outcome of these reasons and orders, but I remind Miss Marques that if she seeks leave to appeal she has 28 days in which to do so from the date she receives these orders and reasons.

SENIOR MEMBER M. LOTHIAN