VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP398/2018

CATCHWORDS

Whether tenant entitled to set off against rent for defects in rented premises pursuant to s54 or s57 of the *Retail Leases Act 2003* or pursuant to contract. Whether sufficient evidence of inability to use or access premises. Relief against forfeiture denied.

APPLICANT	Masoud Motevali
RESPONDENT	Moniton Proprietary Limited
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATE OF HEARING	7 March 2019
DATE OF ORDER	29 March 2019
DATE OF REASONS	12 April 2019
CITATION	Motevali v Moniton Proprietary Limited (Building and Property) [2019] VCAT 531

REASONS

BACKGROUND

1 The applicant, Masoud Montevali (**tenant**), made an application to the Tribunal dated 23 January 2019. (Orders were made on 29 March 2019). The application is made on two grounds. First, it seeks relief from forfeiture of the premises at 127 Puckle Street, Moonee Ponds, under a Lease dated 15 March 2017, as varied by transfer of Lease dated 26 March 2018 (**Lease**). Second, it seeks reinstatement of the proceedings originally brought on 16 March 2018 which were struck out with a right to apply for reinstatement under an order made 26 October 2018. The March proceedings were not concerned with any question of relief from forfeiture.

2 Counsel for the tenant, in his written outline of submissions, submits that the tenant in his application dated 23 January 2019 also applied for injunctive relief on the basis that there was a serious question to be tried that the Lease had not been validly determined.[1] This ground is not apparent from the application. (The only injunctive relief arises from the struck out proceeding of 16 March 2018 which sought quite different relief, being to compel repairs, to which see below).

3 The affidavit of the tenant dated 23 January 2019 does not refer to injunctive relief as being sought by him. At paragraph 17 of his affidavit is a reference to the landlord wrongfully taking possession of the premises. At the hearing on 7 March 2019, counsel for the tenant submitted that the claim is made in the alternative. That is, if the Tribunal determines that there was no valid forfeiture, that possession was wrongfully taken, then the tenant is entitled to injunctive relief, presumably ordering the restoration of possession. I will proceed on that basis.

4 The 16 March 2018 proceeding was struck out following consent orders for an adjournment to an administrative mention on 14 August 2018, in response to which the parties made no request in writing to the Registrar to proceed.

5 The proceeding brought on 16 March 2018 sought the following:

(a) An injunction compelling the respondent, Moniton Proprietary Limited (**landlord**), to undertake repairs of certain parts of the premises;

(b) Orders permitting the tenant to suspend payment of rent until the above repairs are completed;

(c) Damages;

(d) In the alternative, rent paid by the tenant to the landlord since 5 July 2017 be repaid.

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[1] Applicant's outline of submissions dated 7 March 2019, paragraph 11.

6 The Lease is subject to the *Retail Leases Act 2003* (**RL Act**). The use of the premises is described as a hair salon at a rent of $65,000 per annum. Item 22.1 of the schedule to the Lease provides for a 3 month rent free period from 15 March 2017 to 14 June 2017, with the first monthly rent due on 15 June 2017. Rent was waived for the months of April and May 2018,[2] with rent to recommence from 15 June 2018.

7 The landlord says the tenant has not paid rent since 15 June 2018[3] up to and including the rent due date of 15 September 2018 nor paid rent thereafter. The tenant disputes this but acknowledges he ceased paying rent from 16 August 2018.

8 There are terms of the Lease for the landlord to maintain the structures of the premises consistent with the condition when the Lease was entered into. The tenant's complaint includes that the premises were subject to water and termite damage allegedly rendering it unsuitable for use as a hair salon.

9 The landlord served a notice dated 19 September 2018 pursuant to s146 of the *Property Law Act 1958* requiring the tenant to pay within 14 days $30,944.05 in respect of rent and outgoings outstanding, failing which it would reserve the right under the Lease to re-enter and take possession.

10 On 9 October 2018, the landlord took possession of the premises.

11 On 5 December 2018, the premises were sold to a third party with vacant possession and settlement due on 5 April 2019.

12 The tenant did not bring action for relief against forfeiture or other relief prior to his application, referred to above, made on 23 January 2019.

13 On 2 January 2019, the tenant lodged a caveat over the premises claiming a leasehold interest.

14 The tenant claims that rental and outgoings are not due to the landlord under a claimed right of set off due to the landlord's failure to maintain the premises and a right of the tenant to be paid compensation for loss of use of the premises due to the defects.

15 Pursuant to the Tribunal's orders made 24 January 2019, the landlord filed and served affidavit material dated 14 February 2019. The tenant failed to file or serve affidavit material in reply, as required under order 4 of the above orders.

16 By orders dated 29 March 2019, I ordered the reinstatement of the proceeding. The order for reinstatement is of an interlocutory nature and, to that extent, does not require the provision of reasons.

17 The remaining issues for determination are:

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2 Affidavit of Chelsea Brown, 14 February 2019, paragraphs 19 to 22.

3 S146 *Property Law Act 1958* notice, exhibit CB 8 and paragraph 21, affidavit of Chelsea Brown, 14 February 2019.

(a) Whether the tenant is entitled to relief against forfeiture for non payment of rent based on a right to set off payment of rent as compensation for loss and damage allegedly suffered;

(b) If tenant found not to be entitled to a right to relief against forfeiture based on right of set off under (a), whether tenant entitled to relief against forfeiture for non payment of rent based on equitable principles;

(c) If a right to relief against forfeiture is established, whether that right is lost due to unreasonable delay in seeking relief;

(d) If a right to relief against forfeiture is established and there is no valid forfeiture, whether the tenant is entitled to injunctive relief granting possession.

IS THE TENANT ENTITLED TO RELIEF FROM FORFEITURE FOR NON PAYMENT OF RENT BASED ON A RIGHT OF SET OFF?

18 There is a difference between the parties about the date from which rent ceased to be paid by the tenant. The landlord contends in its s149 notice of 19 September 2018, that rent is owing from 15 June 2018 to 14 October 2018 plus monies owing for non payment of outgoings. The tenant concedes that rent and outgoings have not been paid since 16 August 2018. The landlord also claims rent, or alternatively damages, for the period beyond that stated in the s146 notice.

19 In any event, the tenant submits that the landlord was not entitled to possession of the premises due to the tenant's non payment of rent and outgoings. The tenant contends he is entitled to set off rent as compensation for loss and damage suffered arising from defects in the premises due to the landlord's failure to maintain the premises.

20 The tenant contends that the premises were damaged and unfit for use as a salon, giving rise to a claim for damages. The tenant's submission includes a right to compensation arising under s54(2) of the RL Act. A claim for damages is the subject of the reinstated proceeding, which is for future determination pursuant to the orders of 29 March 2019.

21 In support of the right to a set off, the tenant submits on a number of grounds as follows:

(a) General right of abatement for payment of rent and outgoings where premises damaged and cannot be used or are inaccessible due to that damage;

(b) Implied term of the Lease under s54(2) of the RL Act: right to claim compensation;

(c) Implied term of the Lease under s57(1)(a) of the RL Act: statutory right not to pay rent or outgoings where premises damaged and cannot be used or are inaccessible due to that damage;

(d) Implied term of the Lease under s57(1)(b) of the RL Act: statutory right to reduce payment of rent or outgoings, where premises are damaged causing use to be reduced, proportionate to the extent of the reduced use;

(e) Clause 8 of the Lease: contractual right to suspend a fair proportion of the rent and outgoings where premises are damaged so as to be unfit for the permitted use or inaccessible.

22 In respect of a general right of rental abatement, the tenant submits *Braxo Pty Ltd v Pialbla Commercial Gardens Pty Ltd*[4] as authority for a set off being permissible where the tenant was prevented from trading. In that case, the landlord warranted in its lease that the premises may be used as a nightclub and sports bar. In fact, the premises could not be so used to the effect that it was prevented from trading. The tenant claimed a set off against rent for damages suffered. The Court found the tenant was deprived of the use of the premises for a material period and that there was nothing in the lease that prevented the tenant from claiming a set off.

23 Unlike *Braxo*, in the present case, clause 2.1.1 of the Lease is express and states that the tenant must pay the rent without any set off, whether legal or equitable, or deduction whatever. Subject to clause 8 of the Lease (discussed below), set off is expressly excluded. Also, unlike *Braxo*, the landlord does not warrant that the premises may be used as a hair salon. On the contrary, clause 2.2.1 of the Lease states 'the tenant agrees the landlord has not represented that the premises may be used for that use [hair salon] according to law or that the premises are suitable for that use.'

24 The tenant also relies on the decision of *Phoenix Commercial Enterprises v City of Canada Bay Council*[5] as authority for a set off being permissible if the reason for set off against payment of rent (in that case an alleged debt owed by the landlord to the tenant) was so closely connected with the obligation to pay rent that it would be unjust for the landlord to recover rent without deduction of the debt the landlord owed the tenant. The facts in *Phoenix* concerned the very close connection between the payment of rent and a collateral debt obligation owed by the landlord to the tenant. In *Phoenix*, White J held that equitable set off can be excluded by a contract.

25 In oral submission in reply, the tenant's counsel argued that clause 2.1.1 of the Lease, excluding set off, is invalid as it offends against s94 of the RL Act, which states that a term is void to the extent it is contrary to provisions of the Act. One relevant provision affecting financial relations between landlord and tenant where premises are damaged is s54 of the RL Act. S54 does not provide a right to abate rent or set off rent. It does provide a right to seek payment of compensation, agree the amount of compensation to be paid and, if no agreement, to have the amount of compensation determined. As a matter of statutory construction, there is no basis to give to s54 a

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4 [2010] QSC 259 per Mullins J.
5 [2009] NSWSC 17.

meaning other than the meaning that follows from a plain reading of the text. It was not contended that s54 ought to be construed by reference to context giving it some expanded scope. Clause 2.2.1 of the Lease does not offend against s94 of the RL Act so far as the operation of s54 is concerned where the tenant seeks compensation. Any question of entitlement to compensation and what that compensation may be is not for determination by me. It may be the subject of the reinstated proceedings and the tenant's claim for damages, a matter for future determination.

26 The next ground for establishing a right of set off is based on both a statutory right under s57 of the RL Act and a contractual right under clause 8 of the Lease, as summarised in sub paragraphs 21(c), (d), and (e) above. These grounds all depend on proof that the premises were damaged and could not be used or were unfit for the permitted use as a hair salon or were inaccessible or that they were damaged causing use to be reduced.

27 As a matter of contractual construction, I accept that the exclusion from set off under clause 2.1.1 must be read as subject to the express term contained in clause 8 which permits suspension of rent and outgoings payments where the premises are unfit for use or inaccessible. Clause 8 of the Lease provides a right of suspension of rent and outgoings payments in a like fashion to the statutory rights contained in s57 of the RL Act. I also accept that the rights of set off, afforded under by s57 of the RL Act, having regard to a plain reading of s94 of the RL Act, prevail to the extent that clause 2.1.1 of the Lease may provide to the contrary.

28 In support of his submission, the tenant's evidence includes his affidavit, dated 23 January 2019, and a document titled 'Jim's Building Inspections Building Inspection Report', dated 14 February 2018, made in respect of the rented premises (**Jim's report**). It will be recalled that under the Lease, the tenant's occupation was permitted from 15 March 2017.

29 First, concerning alleged water damage, the tenant attests that around 5 July 2017 the roof of the premises became defective causing significant water penetration into the rented premises due to loose flashing, loose and deteriorated roof sheeting, inadequate drainage of a neighbouring roof, poor condition of eaves and improper installation of air conditioner. As a consequence, the tenant says he was unable to commence trading.

30 Second, concerning alleged termite damage, the tenant attests that around 30 October 2017 he informed the landlord of termite damage to the store room section of the premises. He says that as a consequence he was unable to open the hair salon. Six months prior to notifying the landlord of the termite issue, the tenant asked the local Council to advise about registration requirements under the *Public Health and Well Being Act 2008*. He says that the Council refused to accept registration until the termite damage was repaired and relies on exhibit MM6 to his affidavit. Exhibit MM6 is an email dated 1 May 2017. The email of the Council appears to refer simply to the manner in which an application for registration should be made, but

does not refer to termite matters or whether such matters have an effect on registration.

31 In response to the contentions, the landlord's evidence includes reliance on the affidavit of Chelsea Bristow, dated 14 February 2019. Ms Bristow is an employee of the landlord's managing agent for the premises. She attests that on being advised of a water leak on 5 July 2017, a plumber was sent the next day to inspect, with remedial works completed on 11 July 2017. A further complaint about leaking was made on 24 July 2017. After some delays, the repairs were undertaken on 1 September 2017. She says that no complaint was made by the tenant to the managing agent that the premises could not be used.

32 Further complaint about water leaking was made and the plumber attended on 30 November 2017 but could not identify a location of a leak. In June 2018, the landlord undertook a significant refit of the roof to avoid any further issues. Ms Bristow says that, since June 2018, no further complaint was brought to attention about water ingress.

33 Concerning termite damage, Ms Bristow says that on 9 November 2017, following the complaint of 30 October 2017, they engaged 'Fumapest' to investigate, but termite infestation could not be found. They acknowledged that in a store room at the rear of the premises there were visible signs of damage. The premises were fumigated. The rear of the premises and rear toilet remained usable.

34 As support for a right of set off in respect of termite damage, the tenant alleges that around 1 May 2017 the Council required action be taken to remedy termite damage before registration under the *Public Health and Wellbeing Act 2008* could be granted. Ms Bristow says she contracted the Council around 13 March 2018. A council officer advised her that there is no regulation concerning termites as would prevent the tenant fitting out the premises. She did not recall the name of the Council officer.[6]

35 On the question of whether there was a requirement for Council regulatory approval concerning termites, the absence of which allegedly resulted in an inability of the tenant to open the business, thus giving rise to a purported right to set off under s57(a) or (b) of the RL Act or otherwise, there is insufficient evidence before me that proves the contention. If it was a requirement of the Council, that much could be easily established. The tenant has had the opportunity of establishing whether this is a requirement. He has not done so and he did not file an affidavit in reply on this important matter which could have assisted the Tribunal. To the extent the tenant's right of set off relies on being unfit for use or being inaccessible because of Council refusal to grant registration due to termite damage, that ground is not made out.

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6 Affidavit of Chelsea Brown, 14 February 2019, paragraph 16.

36 In addition to the above matter, there are significant differences in the evidence of the parties about the state of the premises and the impact that may have on the landlord's obligations under both s57 of the RL Act and clause 8 of the Lease.

37 A review of Jim's report may provide some insight. It is made by one Mehran Orangi, a civil engineer. Jim's report was obtained by the tenant. It is not an expert report that complies with the VCAT Practice Note.

38 The report suffers a number of problems. On the third page, under 'Special conditions or instructions', it states that the report may be conditional on information provided by the person who requested it. What instructions were provided has not been disclosed. In the same section, but by way of conclusory comment, it states:

> Due to major issues which have been addressed in this report, there is potential of interruption in the business when it becomes operational. Landlord is obliged to fix major defect to make sure tenant lives in a safe and sound condition. Major defects in this report are listed as 'Urgent repair' items in Residential Tenancies Act 1997.

39 Jim's report is misconceived in several respects. The premises in question are the subject of the Retail Leases Act, not the Residential Tenancies Act. The expression 'urgent repairs' is a term defined under the Residential Tenancies Act but is not defined under the Retail Leases Act. There is no definition around the expression 'in a safe and sound condition'. There is no suggestion by the parties that the premises are used or to be used as a residence governed by the Residential Tenancies Act. The report appears to conclude that there is 'potential of interruption in the business when it becomes operational'. It does not, in this statement, make a conclusion as to defects based on a found present state, or findings that may be relevant to a consideration of the matters prescribed under s52 and s57 of the RL Act. S52 of the RL Act implies into a retail lease an obligation on the landlord for maintaining the rented premises in a condition consistent with the condition of the premises at the time when the retail premises lease was entered into.

40 The summary on the fifth page is inconsistent. It states 'additional specialist inspections' and lists various trades and specialists. The inference is that the listed specialists were used, including termite and timber technician/licensed pest controller, registered builder and licensed plumber specialising in roof plumbing. The names, qualifications and experience of these additional people, if used, are not disclosed. The end of the report at section 'D5' is a reference to advice that such additional specialists should be consulted.

41 However, with those observations and the caution necessarily attendant to receipt of such evidence, the report does provide some assistance to the Tribunal.

42 The focus is whether the tenant is entitled to set off rent against the alleged state of the premises. Based on the submissions of the tenant, this depends on proof that the premises were damaged and could not be used or were unfit for the permitted use as a hair salon or were inaccessible or that they were damaged causing use to be reduced. This is the purpose underlying the review of Jim's report.

43 Subject to the above described caution with which the Tribunal receives Jim's report, I note the following conclusions, relevant to each of the heads of complaint made by the tenant:

(a) Issue of water penetration from roof: Report – 2.02 Roof plumbing: The flashing appears to have come loose. It is suspected that this minor defect has occurred as a result of general deterioration over time. Failure to perform these works 'may result in water damage';

(b) Issue of water penetration caused by cooler: Report – 2.03 Roof sheets: Loose, deteriorated and damaged roof sheets 'are susceptible to water penetration …';

(c) Issue of water penetration issue caused by eaves: Report – 2.07 Eaves: Detracts from appearance of the structure 'as well as potentially compromising the structural integrity of the roofing area… remedial works may be required';

(d) Issue of termite infestation and damage: Report - 2.01 Store room:

> 'Despite no live termite or timber pest activity being identified, previous termite damage was found in this area. This damage is considered to be major and structural in nature' … If left unattended, this damage creates an unsafe environment 'and is likely to lead to the need for major structural works'.

44 Pursuant to s57(1) of the RL Act, summarised in sub paragraphs 21(c), (d) and (e) above, the right to set off against the payment of rent or reduce a proportionate payment of rent, arises where damage to the premises means they cannot be used, are inaccessible or use is reduced to some extent.

45 Jim's report does not make the case or prove on the balance of probabilities that the premises cannot be used or are inaccessible (s57(1)(a)), or that use is or has been reduced to some extent by the damage (s57(1)(b)).

46 The landlord's counsel submits that the report uses language, referred to above in paragraph 40, that makes findings, in respect of water penetration, such as 'may result in water damage', 'are susceptible to water penetration', and 'remedial works may be required'. She further submits, in respect of termite damage to the premises, that the report finds 'and is likely to lead to the need for major structural works' and that the only conclusive finding is in respect of a roof leak, in section 2.04 of the report, which is in respect of the neighbour's building.

47 The submission of counsel for the landlord is that, in the absence of adequate proof, the tenant has only made a bald assertion in paragraph 7 of

his affidavit that he could not open his hair salon at the premises. I accept this submission. There is insufficient evidence of the tenant in support of the basis on which he alleges he could not take possession or open the hair salon due to water damage or termite damage or that his use was reduced to some extent by the damage.

48 Also, to the extent the tenant relies on Jim's report, Jim's report fails to provide adequate evidence as would assist me to conclude that the premises cannot be used or be accessed, in the manner contemplated in s57(1)(a) of the RL Act, or use was reduced, in the manner contemplated in s57(1)(b) of the RL Act, or that the landlord was in breach of clause 8 of the Lease in respect of the condition of the premises.

49 Of the observations made in Jim's report, only the comment in respect of termite damage in the rear store room comes anywhere near to addressing whether the room is not usable or inaccessible. The conclusion that it 'is likely to lead to the need for major structural works.' It is not a statement of that need for repair being at the present time. To that extent, reduced usage at the present time has not been established. Further, it is an observation in respect of one room, a store room at the rear of the premises, and is not expressed as a finding that the rented premises are unable to be used or are inaccessible.

50 The tenant's right to set off payment of rent and outgoings against the purported damage, whether under the RL Act or clause 8 of the Lease has not been made out and must fail.

WHERE NO RIGHT TO RELIEF AGAINST FORFEITURE BASED ON SET OFF IS FOUND, WHETHER TENANT ENTITLED TO RELIEF AGAINST FORFEITURE FOR NON PAYMENT OF RENT BASED ON EQUITABLE PRINCIPLES

51 The tenant submits, uncontroversially, that granting of relief against forfeiture is founded upon the equitable jurisdiction to intervene where it would be unconscionable for a party to insist on forfeiture: *Impact Funds Management Pty Ltd v Roy Morgan Research Ltd*.[7]

52 Further, the tenant submits that granting of relief will be granted in all but rare or exceptional cases as no damage will be suffered if the unpaid rent, interest and costs are paid: *Koofoo Sussex Pty Ltd v Commerce Building Pty Ltd*.[8]

53 The tenant also referred to the earlier case of the Supreme Court of New South Wales, *In the Matter of Hi-Fi Sydney Pty Ltd (Administrator Appointed)*.[9] In the case cited, *Shiloh Spinners Ltd v Harding*,[10] it was observed that there are three situations where equity gives relief. First,

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7 [2016] VSC 221 at [188] per Croft J.
8 [2014] NSWSC 1079.
9 [2015] NSWSC 1297 (23 June 2015) per Brereton J at paragraph 26.
10 Per Lord Wilberforce: [1973] 1 All ER 90; [1973] 2 WLR 28; [1973] AC 691, 722-7

where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, second, where there has been fraud or mistake and third, where the primary object of a bargain is to secure the stated result which can be effectively obtained when the matter comes to court and where the forfeiture provision is security for the production of that result.

54 The landlord submits that it is incumbent on the tenant to make good the breaches which resulted in that forfeiture or establish that the alleged breaches neither existed or were remedied prior to the return date of hearing the application. It relies on the authority of the Supreme Court of Victoria in *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd*.[11] At paragraph 442, the court stated:

> the test to be applied is one of unconscionability – that is, whether in the light of the tenant's remedying breach of covenant, resort by the landlord to the strict legal right of re-entry would be unconscionable.

The court continued, at paragraph 443:

> … much of the court's consideration of whether or not to grant relief will focus on the conduct of the tenant. A tenant must, so far as possible, attempt to remedy the breach or breaches alleged in the notice served and pay reasonable compensation for the breaches which cannot be remedied. The tenant must come to court with clean hands and ought not to be relieved if evincing an intention to continue or to repeat the breach of covenant. Where the conduct of the tenant reveals a clear history of wilful breaches of more than one covenant, a case of contumacious disregard by the tenant of the landlord's rights over a period of time, and a total lack of evidence as to the tenant's ability to speedily and adequately make good the consequences of the default, relief against forfeiture will not be granted.

55 Ormiston J's decision in *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd*,[12] is much relied upon in cases of relief against forfeiture. His Honour stated:

> … but [the tenant's] acts did not display a deliberate denial of the landlord's rights, nor were the earlier breaches of that obligation of a kind which could place this case in the "exceptional" category. The proposal for payment of rent, together with the guarantee, provide at least some assurance against immediate repetition of the breach.

56 In my opinion, a consideration of the facts of this case and the acts of the tenant, are demonstrative of a tenant who has not sought in a meaningful manner to attempt to remedy the breach of the Lease, specified in the notice dated 19 September 2018 pursuant to s146 of the *Property Law Act 1958*, issued in respect of the tenant's non payment of rent and outgoings. The tenant has not attempted to make good such breaches. The tenant has not come to the Tribunal with clean hands.

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11 [2005] VSC 236.
12 [1989] VR 584 (25 October 1988).

57 On the tenant's evidence, the tenant still complains of a leaking roof and still complains of termite damage. For the reasons given above, I find that the tenant's reliance on the observations contained in Jim's report, to the extent that that report may be relied on, is not any reasonable basis for withholding the payment of rent and outgoings. The situation is one where the tenant has not sought to further substantiate it concerns as to a leaking roof causing inundation and as to termite damage, both allegedly making the premises unfit to be used or reduced in use. Further, an affidavit in reply was not made.

58 In respect of the qualified offer to now pay the rent, the offer would appear to be futile. The tenant disputes the amount of the rent claimed to be outstanding under the s145 notice. The tenant made only a qualified offer to pay the rent, if the Tribunal found against the tenant and subject to there being an agreement as to the amount claimed, and subject to any such amount not to be paid until a day or so after the hearing. The qualified offer to pay was only made through the tenant's counsel toward the end of submissions. The qualified offer is made some 5 months after re-entry, retaking of possession and termination of the Lease. Nor has the basis of the tenant's dispute about the amount of the rent owing been made clear and, more importantly, nor has the tenant paid to the landlord rent for the period that he admits he has not paid. Providing an affidavit in reply in compliance with directions may have assisted the Tribunal.

59 The tenant says the landlord made no attempt to re-let the premises. The evidence of the landlord, which I accept, is that the premises were advertised for sale from on or about 3 November 2018 with the tenant aware of it being put up for sale, including by the placement of a billboard at the premises. The premises were sold to a third party on a vacant possession basis on or about 5 December 2018. During this time the tenant did not lodge a caveat to protect his purported interest in the premises and did not seek to make an application for relief from forfeiture, either at the time of service of the s146 notice or following re-entry on 9 October 2018.

60 Instead, not until a material time after these events did the tenant lodge a caveat (on 2 January 2019) or make an application for reinstatement (23 January 2019). It is said by the tenant this delay was due to mediation with the Small Business Commissioner being commenced on 4 December 2018.

61 I do not find that the date of an application to the Small Business Commissioner on 4 December 2018 is any proper basis to explain the tenant's reason for not seeking, at a much earlier date, to protect his purported interest in the land under the Lease or lodging a caveat to put vendor and purchaser under a contract of sale on notice that it is contested that the premises were being sold with vacant possession.

62 The third requirement for equity to give relief against forfeiture referred to in *Hi-Fi Sydney,* above, of the primary object of a bargain 'being to secure the stated result which can be effectively obtained when the matter comes

to court' is a requirement where the stated result cannot be effectively obtained given the circumstances of this case where the property was sold with vacant possession 3 months ago.

63 For these reasons, on the balance of probabilities, the tenant has failed to prove any valid basis for being granted relief from forfeiture of the Lease dated 15 March 2017, as varied by transfer of Lease dated 26 March 2018. The application for relief against forfeiture must be dismissed. The landlord has validly achieved forfeiture of the Lease due to non payment of rent with re-entry and termination of the Lease on 9 October 2018.

QUESTION OF DELAY AND QUESTION OF ALTERNATIVE INJUNCTIVE RELIEF

64 Given my findings that the tenant is not entitled to relief against forfeiture, the question of the effect of any delay by the tenant seeking relief against forfeiture does not arise.

65 In respect of injunctive relief sought by the tenant, I have found that forfeiture of the Lease was validly exercised. The question of whether the tenant may be entitled in the alternative to injunctive relief where forfeiture was invalid does not therefore arise.

CONCLUSION

66 The application dated 23 January 2019, seeking to be relieved from forfeiture of the Lease dated 15 March 2017, as varied by transfer of Lease dated 26 March 2018, is refused. The applicant's application for relief against forfeiture is dismissed.

MJF Sweeney
Member