

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP790/2017

**CATCHWORDS**

Application made under *Retail Leases Act 2003* – applicant as tenant seeking specific performance of lease – property contains retail space and residential dwelling- is there a binding lease between the parties.

<b>APPLICANT</b>	Needlin Pty Ltd (ACN: 074 403 428)
<b>FIRST RESPONDENT</b>	Amelia Conell
<b>SECOND RESPONDENT</b>	Sam Conell
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member B. Josephs
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14 February 2018
<b>DATE OF ORDER</b>	29 March 2018
<b>DATE OF REASONS</b>	29 March 2018
<b>CITATION</b>	Needlin Pty Ltd v Conell (Building and Property) [2018] VCAT 496

**ORDER**

1 The application is dismissed.

B. Josephs  
**Member**

**APPEARANCES:**

For Applicant Ms A. Needham and Mr P. Chaplin.

For Respondents Mr S. Conell.

## REASONS

- 1 The applicant commenced this proceeding against the respondents by application dated 26 April 2017.
- 2 The claim is made under the *Retail Leases Act 2003* (“the Act”). It is alleged by the applicant that despite it having signed a commercial lease for the property at 65 Berry Street Edithvale (“the premises”) prepared by Collins Commercial and Industrial Pty Ltd (“Collins”) on behalf of the first respondent on 15 December 2016, the respondents as owners of the property have breached it and the applicant seeks specific performance.
- 3 After a Small Business Commissioner Certificate was provided by the applicant, a directions hearing was held at which the proceeding was fixed for hearing on 14 February 2018 for determination as to whether there is a binding lease between the parties, and if so, are the premises ‘retail premises’ within the meaning of the Act and on what bases are the respondents obliged to carry out repairs. Orders were also made for the parties to exchange documents prior to the hearing.
- 4 At the hearing, Ms Needham and Mr Chaplin, directors of the applicant, appeared on its behalf and Mr Conell appeared on behalf of the respondents.
- 5 Mr Conell brought documents to the hearing but the respondents had not provided copies to the applicant prior to the hearing. The applicant had provided documents to both respondents prior to the hearing and handed up copies to me. I heard evidence and submissions from each of the parties, including from the first respondent by telephone, and reserved my decision.
- 6 The applicant now trades as “Wagalot Brands.” At the time it first moved into the premises, it was trading as “Diamond Dog Food & Bakery.” In evidence, it described the business as a wholesaler and manufacturer of pet treats, half of which it makes itself with the other half being imported and repackaged.
- 7 It first looked at the premises in October 2016. They were being advertised by Collins. The representative from Collins was Marcus Sharman. At that stage, the applicant’s business was based in Seaford but the factory was too small. It was looking for a property which provided both a residence and storage facilities. It was also considering another property at the same time. Despite this, it completed a rental application to Collins for the premises dated 7 October 2016 in which it described its business as a manufacturer and packer of dog treats and its intended use of the premises as “any pet related business.” The lease term for the premises was specified in the tenancy application as being for one year, commencing 16 December 2016 (to be confirmed), with the only special condition being “90 days notice to vacate after commencing monthly.”

- 8 However, at the hearing, Mr Conell provided a copy document relating to the premises which he asserted was provided to the respondents some time before 16 December 2016. This document had at the foot of it the logo and name of the applicant's business, mobile phone numbers for Mr Chaplin and Mr Sharman and a proposal for a 3 year lease for the premises with two further options of 3 years each, a higher rent than shown on the applicant's tenancy application, and details of works to be performed by each of the landlord and tenant. Mr Conell gave evidence that the respondents had undertaken the works required of them as shown in the proposal (although the applicant disagreed with this evidence).
- 9 According to the applicant's evidence, it was again contacted by Mr Sharman in early December 2016 advising that the premises were still available to rent.
- 10 The applicant confirmed its interest and Mr Sharman then provided the applicant with a disclosure statement and an attached REIV Commercial Lease with Schedule and Special Conditions. These documents showed the landlord as Mrs Conell only. The applicant's evidence was that it had inspected the premises with Mr Sharman and Mrs Conell. The residence has four bedrooms and a backyard. The retail space had formerly been a milk bar and it was apparent that it had been in disuse for a period of time. It was boarded and locked. It could not be accessed from the exterior front door as there was no key. Indeed, the only access was from within the residence through an adjoining door.
- 11 The applicant sent a letter to Mr Sharman dated 9 December 2016 setting out some changes, on the oral advice of a solicitor, which it sought to the disclosure statement and lease. However, none of the parties formally engaged a lawyer for the matter.
- 12 Mr Sharman responded in writing to the proposed changes on 12 December 2016, agreeing with some, varying some and refusing the balance.
- 13 The Disclosure Statement provided to me is signed for the applicant tenant by the directors and for Mrs Conell as the landlord by Mr Sharman (purportedly as authorised agent of the landlord). The date under the applicant's signatures is 15/12/16 and under the agent's signature is 6/12/16.
- 14 The description of the permitted use is shown in the Disclosure Statement as warehousing of pet food and other pet products. The lease was to commence on 16/12/16 for a term of one year to expire on 15/12/2017. Two further options, each of one year, were to be exercised by 15 September 2017 and 2018. There was a description of various works to be undertaken by the lessor at the lessor's cost (which appear to have then become Special Conditions and only relate to the residence at the premises). Rent was shown as commencing on 16 December 2016. It was \$2250 plus GST. The Schedule also specified a security deposit of \$2250.

- 15 In an email dated 15 December 2016, Mr Sharman then confirmed that until the lessor's works are all completed, the lessor agrees to allow the applicant to occupy the premises on a rent -free basis. The applicant's evidence is that the lessor's works are still not completed.
- 16 Although it was not entirely clear from the evidence, the applicant appears to have commenced to occupy the premises on 16 December 2016.
- 17 On 28 December 2016, after significant rainfall, the applicant noted that water was dripping into the retail space. It had stored some packaging in that area which was damaged by the water. It therefore ceased using the shop area and went back for a period of time to using the smaller factory. According to the applicant, the area of the leaking was located in the lowest part of the ceiling where a security camera had been installed. Water continued thereafter to drip into the retail space whenever there had been a downfall of rain.
- 18 The directors of the applicant gave evidence that they may have noticed a damp smell but they did not see any leak, mould or water damage when they initially inspected the premises. Mr Conell denied that there was any roof leak and made it clear to Mr Sharman that the respondents were not going to repair any part of the roof.
- 19 The applicant has now moved its business operations to a much larger factory in Carrum Downs which adequately accommodates all its requirements including storage.
- 20 Between the date of the applicant commencing occupation of the premises and 13 February 2017, emails passed between the applicant and Mr Sharman about the outstanding works, the subject of the Special Conditions.
- 21 At the commencement of the hearing, Mr Conell advised me that he had the authority of Mrs Conell to appear on her behalf as well as on his own. I subsequently confirmed this with Mrs Conell when she gave evidence by telephone. However, the respondents have been divorced for some time and have lived apart for at least 30 years. They both own their residential properties.
- 22 Despite this situation between the respondents, they continue to own the premises as tenants in common in equal shares and have done so since 1980.
- 23 Attached to the premises is another property which is owned by Mrs Conell solely. It is, and has for some time been, leased to Watkin's Bay Trading Company Pty Ltd ("Watkin's Bay) for use as a coffee shop. It appears that Collins is the managing agent for this property of Mrs Conell.
- 24 When Mr Sharman prepared the documentation between the parties for the premises, he did not include Mr Conell as a landlord as he incorrectly assumed that Mrs Conell also owned them solely.

- 25 The evidence of Ms Needham and Mr Chaplin was that, in addition to signing the Disclosure Statement, they signed a lease for the premises which was also signed by Mr Sharman on behalf of Mrs Conell. When it was ascertained that Mr Conell is also a landlord, the lease was returned to Collins for amendment and signing by the respondents. However, the applicant has not received any such documents back.
- 26 Mr Sharman was not called to give evidence. No signed lease in any form was provided to me.
- 27 On 13 February 2017, Mr Chaplin wrote to Mr Sharman and advised that on the same terms and conditions as in the previous documentation, but with a reduced rent, the applicant wanted to rent the residence only at the premises. The applicant had also been informed by the director of Watkin's Bay that he wanted to lease the retail space at the premises to expand his coffee shop operation.
- 28 Mr Sharman responded by email dated 17 February 2017 that he had reached a verbal agreement with Watkin's Bay for it to lease the retail space of the premises to expand the coffee shop.
- 29 I was provided with a copy of a schedule to a lease which Mr Conell deposed that the respondents had signed for the use of the retail space of the premises. The lessee is shown as Watkin's Bay with the lease commencing on 13 March 2017 and terminating on 30 November 2019. It provided for two further terms of five years each with 31 August 2019 being the last date for exercising the first option. The use of the retail space of the premises is shown as coffee and take away food shop and the premises being leased are described as "Part A of 65 Berry Avenue, Edithvale as per the highlighted area of annexure 1." However, neither Annexure 1 nor any other portion of the lease was provided to me.
- 30 According to the applicant, when it was informed in March 2017 that the retail space had been let, it padlocked the adjoining door of the residence on the residential side. On 23 May 2017, the applicant negotiated with the respondents to lease the residence at \$15600 per calendar year with rent to commence on execution of the lease. This was \$11400 less than for the complete premises but with the retail section having been leased to Watkin's Bay for \$18250 per annum the combination would result in an increased return on the premises to the landlords.
- 31 Despite numerous requests from the applicant and correspondence between it and the respondents and various residential managing agents engaged by the respondents, no signed residential tenancy agreement had been provided to Ms Needham or Mr Chaplin for signing by the time of the hearing.
- 32 The applicant had, as at the hearing date, occupied the residence for 14 months. It paid \$4500 to Collins on 15 December 2016 for the first month's rent and the security bond. There is no record of the bond being held in any separate account and Collins have paid \$2000 to each of Sam and Amelia

Conell. The applicant has requested return of the funds but that has been ignored.

- 33 On 20 December 2016, the applicant also paid \$2700 to a plumber for installation of new hot water service and toilet and incidental works, reimbursement of which sum appears to have not yet been made by the respondents despite their apparent agreement to do so. Between January and December 2017, the applicant paid various sums for skip hire and water usage. In total, it has paid a net sum of \$8118.36 after deducting the amount of an outstanding water bill. Despite Watkin's Bay entering into the lease for the retail space of the premises it has not commenced occupancy thereof so it is only the residence which has used water throughout this period.
- 34 Mr Conell asserted that the initial purported agreement for the premises with the applicant was negotiated by the agent without his permission and authority. Mrs Conell also cast doubt in her evidence on Mr Sharman's authority to negotiate about, and sign, the Disclosure Statement and any lease on her behalf.
- 35 Mr Conell handed to the applicant and to the Tribunal at the hearing a letter from Collins. It provided its summary of events about the premises for the relevant time-frame as follows:
- retail space and dwelling were leased on 16 December 2016;
  - lease approved by Mrs Conell;
  - a dispute arose in the new year in regards to the occupancy;
  - lessor did not sign the lease;
  - agreement was reached to rescind lease and enter new agreement for the dwelling only;
  - residential tenancy was taken over by residential agent;
  - new tenancy agreement for the retail space was accepted by the lessor and Watkin's Bay;
  - lease was fully executed;
  - Watkin's Bay never paid their initial invoice or took occupation of the premises;
  - Collins leasing fee was refunded to both lessors.
  - Mr Sharman no longer works with Collins.
- 36 By proceeding R2017/40311, Mr Conell applied in the Residential Tenancies List for compensation pursuant to section 210 of the *Residential Tenancies Act 1997* against Alice Needham. The Member who heard the application on 8 January 2018 noted that Mr Conell co-owns the premises with Amelia Conell but otherwise ordered that, in light of this 'jurisdictional' hearing listed on 14 February 2018, the Residential

Tenancies proceeding be struck out with a right of reinstatement pending my orders.

- 37 Mr Conell ended his submissions by simply indicating that while he did not understand the process, he believed the applicant should pay some rent for its occupation and while continuing to live at the residence. The applicant ended its submissions by indicating that it was not seeking to avoid paying rent but it wanted a written lease beforehand.
- 38 I set out early in these reasons the nature and basis of the application before me. It requires to be heard in the Building and Property List and, given the relief sought, it is only necessary for me to find whether there is currently a binding commercial or retail lease agreement in existence between the parties.
- 39 On the evidence available to me, the applicant was let into the rented premises and, indeed, even at the date of hearing, there had been no request for return of the key provided. The applicant argues that a lease agreement for the premises has thereby been created by its part performance of commencing occupancy, together with its signing of the Disclosure Statement and lease for the premises and its intention to be bound by its terms.
- 40 Such arguments have some merit, even in the absence of production of a lease signed by all of the parties, concerns about the authority of Mr Sharman and the lack of certainty of the terms of any lease agreement that might have then been created in relation to the premises.
- 41 However, I am left in no doubt, again on the evidence available to me, that by express agreement between the parties and by their conduct, any lease agreement initially created at the time of the applicant commencing occupancy of the premises was terminated in March 2017 by Watkin's Bay entering into a lease with the respondents for the retail space (the fact of which I have accepted on Mr Conell's evidence) and the applicant assuming exclusive possession of that part of the premises constituted by the residence.
- 42 I therefore dismiss the application and have made an order accordingly. In so doing, the parties are not precluded from making application(s) arising out of the circumstances covered in these reasons in other Lists of the Tribunal such as the Civil Claims List or the Residential Tenancies List.

B. Josephs  
**Member**