

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. R9/2013

**CATCHWORDS**

Landlord and tenant; rent, outgoings and interest; make good cost; misleading and deceptive conduct; misrepresentation about permitted use of premises.

<b>APPLICANT</b>	Ms Thanh Tra Nguyen
<b>RESPONDENT</b>	Mr Wiendwosen Shetu
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	R. Buchanan Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 June 2014
<b>DATE OF ORDER</b>	14 July 2014
<b>CITATION</b>	Nguyen v Shetu (Building and Property) [2014] VCAT 864

**ORDERS**

1. The respondent must pay to the applicant the sum of \$101,436.99.
2. Liberty is reserved to apply on the question of costs.

**R. BUCHANAN  
MEMBER**

**APPEARANCES:**

For the Applicant	Mr S. G. Mann
For the Respondent	Mr I. Szmerling

## REASONS

- 1 In this case, the applicant landlord, after a tenancy was terminated, sought to recover from the respondent tenant rent and the cost of making good the premises. For his part, the tenant brought a counterclaim seeking damages for misleading or deceptive conduct, alleging that the landlord had misled him about the use of the premises permitted by law.

### Background

- 2 By an undated lease the tenant agreed to lease a two-storey building in a shopping strip in Barkly Street, Footscray. The lease was for a term of five years, starting on 1 March 2010, the permitted use was 'restaurant, cafe and bar' and the rent was \$52,000 a year.
- 3 The leased premises consisted of, on the ground floor, a shop/showroom area at the front, with a kitchen behind. On the first floor there were two bedrooms, a lounge and a bathroom. The first floor area was only accessible through the ground floor area and did not have a separate, external entrance.
- 4 The landlord served a default notice dated 28 December 2012 on the tenant. The notice alleged that the tenant had failed to pay rent and outgoings and had failed to take out public risk insurance and loss of rental insurance.
- 5 On 29 January 2013, the landlord issued the present proceeding, seeking possession of the rented premises.
- 6 On 20 May 2013, a hearing was held before me, dealing with the landlord's application for possession. I ordered the tenant to give up possession to the landlord and I reserved liberty to the landlord to apply for orders in relation to rent, compensation, outgoings and interest.
- 7 On 5 June 2013, the tenant issued a counterclaim seeking damages of \$63,099.75 on the basis of the landlord's misleading and deceptive conduct.
- 8 On 17 September 2013, the Tribunal made orders allowing the tenant to inspect the premises for the purpose of preparing an expert report, which report was to be filed by 4 October 2013 (later extended to 24 December 2013).
- 9 On 20 February 2014, no expert report having been filed by the tenant, the Tribunal made further orders about inspection by the tenant and extended the time for filing any expert report until 24 April 2014.
- 10 On 11 June 2014, the proceeding came on before me for hearing of the landlord's application for an order for rent, compensation, outgoings and interest.

## **Rent, outgoings and interest**

- 11 In relation to the landlord's claim for rent, outgoings and interest, evidence was given for the landlord by Trevor Powell, a certified practising accountant. Mr Powell had produced a report dated 30 January 2014, which the landlord had previously served on the tenant. Mr Powell's report was tendered in evidence and its contents were adopted by him. The report recorded that, in preparation of the report, Mr Powell had available to him:
- (a) A transcript of my decision in the possession hearing in this matter on 20 May 2013.<sup>1</sup>
  - (b) Documents tendered by the tenant at the possession hearing on 20 May 2013, detailing payments alleged to have been made by him, but not recorded by the landlord.
  - (c) Copies of lease receipts and accounting records of the landlord's managing agents.
  - (d) A copy of the default notice issued by the landlord to the tenant, with its attached schedule of rent payments, arrears and interest.
  - (e) The landlord's summary of position and her points of claim, containing a schedule of arrears and interest.
  - (f) 'Various rate notices and evidence in relation to outgoings claimed'.
- 12 Mr Powell found that unpaid rent and outgoings totalled \$35,589.70; interest under clause 2.1.10 of the lease totalled \$11,883.07 to the date of hearing; and that interest would continue thereafter at \$11.70 per day.
- 13 The parties agreed that Mr Powell had included two sums, totalling \$1,512.50 for which the tenant was not responsible. Accordingly, Mr Powell's sum for unpaid rent and outgoings would need to be reduced by that amount, giving a total of \$34,077.20, and his figures for interest would need to be reduced proportionately.
- 14 The tenant extensively cross-examined Mr Powell about the accuracy of his calculations. Mr Powell gave satisfactory answers and explanations in response to all matters raised in that cross-examination. I accept Mr Powell's evidence and find that the amounts owing by the tenant for rent, outgoings and interest are as I have set out in the preceding paragraphs.

## **Make good**

- 15 Clause 5.1.1 of the lease required that when the term of the lease ended the tenant must return the premises to the landlord 'in clean and repaired condition'.
- 16 The landlord gave evidence about the condition of the leased premises at the beginning of the lease. She said that the previous owner had fully

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<sup>1</sup> It was necessary for Mr Powell to have reference to the transcript of the possession hearing on 20 May 2013, because at the end of that hearing I had made findings about rental payments by the tenant which had not been recorded in the records of the landlord's agents.

renovated the premises, that she had occupied the premises prior to leasing them to the tenant, that she had the premises painted prior to leasing them to the tenant, that when the tenant took possession of the premises, the floors and tiles were undamaged, all fixtures and fittings were in working order and the property was in excellent condition throughout. Photographs of the downstairs area, which the landlord said she had taken immediately before the premises were let to the tenant, were consistent with the landlord's evidence.

- 17 The landlord said that when she had inspected the premises after recovering possession from the tenant, she was shocked by its condition.
- 18 The landlord said that she had obtained two quotations to make good the premises. The first, from Multifield Constructions, dated 12 June 2013, which detailed the works necessary to make good and gave a cost of \$55,660 including GST to make good the premises.
- 19 The second quotation was from from Steve Caterino and was dated 12 June 2013. Mr Caterino told the landlord that he could not do all of the make good works and he only quoted to do some of those works. He quoted \$30,809.
- 20 In addition, the landlord tendered a detailed report by Cunningham Lindsay Australia Pty Ltd, chartered loss adjusters, dated 29 July 2013, which confirmed the scope of make good works set out in the Multifield Constructions quotation.
- 21 The landlord tendered a letter from her agent, Warwick Burnham, which also confirmed the scope of works and also tendered photographs taken by the landlord after recovery of possession, which showed that:
  - ⤴ the main, downstairs area was heavily degraded,
  - ⤴ a hole had been knocked in one wall,
  - ⤴ light fittings had been removed,
  - ⤴ a second toilet had been installed in the bathroom and the original toilet had been repositioned,
  - ⤴ the kitchen area (in which, the landlord said, she had given the tenant permission to install a commercial kitchen, upon his promise to reinstate the kitchen at the end of the lease) was gutted, with a large hole left in the floor,
  - ⤴ there was cut PVC piping in the backyard,
  - ⤴ there was corrugated iron fencing installed on the rear boundaries,
  - ⤴ rubbish had been left in the yard and in the rest of the premises.
- 22 Other make good works identified in materials tendered by the landlord included, but were not limited to:
  - ⤴ missing blinds,

- ⤴ conduit and electrical flex run on internal walls,
- ⤴ internal walls and woodwork painted dark colour, not off-white,
- ⤴ missing doors,
- ⤴ a waste pipe attached to a kitchen wall,
- ⤴ kitchen cabinets, stove and dishwasher removed,
- ⤴ walls and woodwork damaged,
- ⤴ tiles damaged.

- 23 The landlord said that the two quotations tendered by her did not include all of the make good works and nominated replacement of blinds and light fittings as items not claimed. She said that she was content to limit her claim to the items set out in the Multifield Constructions quotation and also said that the doing of those works would not amount to any improvement of the premises over and above their condition when they were let to the tenant.
- 24 The tenant did not rebut the landlord's evidence about the state of the premises when the landlord recovered possession and in evidence only said that he had offered to return to the premises to clean up and install a door. I therefore find that the scope of the necessary make good works was as is set out in the Multifield Constructions quotation of 12 June 2013.
- 25 The landlord tendered a table which compared the quotations from Multifield Constructions and Mr Caterino. The table showed that the Multifield Constructions quoted price for those works on which Mr Caterino had quoted was similar. Given that those costings were uncontested, I accept the prices quoted in the Multifield Constructions quotation as fair and reasonable and that the cost of make good works was \$55,660.
- 26 The landlord gave evidence that she had not been able to afford to do all of the make good works and that she had done some, but not all of them at a cost to her of between \$9,000 and \$10,000. The landlord said that she recently had re-let the premises, at a rental which was reduced to reflect the state of the premises and the new tenant's agreement to carry out make good works. The landlord was not questioned about the amount of that reduction in rent or the works agreed to be done by the new tenant.
- 27 I note that although the tenant had sought and obtained orders which gave him ample opportunity for an inspection of the premises and production of an expert's report, the tenant had not availed himself of that opportunity and that no evidence was given on behalf the tenant about the proper cost of the make good works.
- 28 The tenant submitted that, because the landlord had re-let the premises, no damages (over and above, I presume, the \$9,000 to \$10,000 said by the landlord to have been spent by her) should be awarded for the tenant's

breach. I reject that submission. The measure of the landlord's loss caused by the tenant's breach is the cost of making good. Absent any other evidence (and here there was none), the mere fact that a landlord delays doing works, then funds them by giving a new tenant a lower rental, set to reflect the new tenant's agreement to do the make good works, does not necessarily extinguish the landlord's claim.<sup>2</sup>

### **The tenant's counterclaim**

- 29 By his counterclaim the tenant alleged that prior to entering into the lease, the landlord and her agent told him that the rent for the premises was high because they contained an upstairs area in which the tenant and his family could live. The statement, the tenant alleged, was false; in or about October 2012 a council inspector came to the premises and told the tenant that it was against council regulations and by-laws for anybody to live in the upstairs area. The tenant claimed by way of damages \$63,099.75 as the amount overpaid by him in reliance on the landlord's misrepresentations.
- 30 In his evidence, the tenant said that, initially, he had only been interested in leasing the downstairs part of the premises. Two days after he had inspected the premises, the landlord's agent had contacted him and had said that for an extra \$300 per week the tenant could rent the upstairs area. The tenant asked, 'What can I do with it?', to which the agent replied, 'You can live there'.
- 31 About three days later, the tenant met the landlord and the agent at the premises. The tenant asked the landlord if he could live upstairs, to which the landlord replied, 'Of course'. The tenant agreed to pay the landlord \$300.00.
- 32 About one and a half years into the term, the council told the tenant that he could not live there.
- 33 On occasion, the tenant and his brother had slept upstairs, when finishing late in the restaurant business run by the tenant in the downstairs part of the premises. In addition, the tenant's wife had sometimes stayed there. Otherwise, at all times, the tenant, his wife and two children had lived in their own house, in Yarraville.
- 34 The landlord gave evidence that the leasing to the tenant was the first time that she had done any leasing and that she dealt with her agent and did not speak to the tenant. She said that before executing the lease, she had not discussed with the tenant what he could or would do with the upstairs area. She only knew that he would have a cafe downstairs. She denied agreeing to lease the upstairs area to the tenant for \$300 per week. Once the tenant took possession, she did not go to the premises and her agent did not tell her that the tenant was living upstairs.

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<sup>2</sup> *Roman Catholic Trusts Corporation v Van Driel Ltd* [2001] VSC 310.

35 The evidence of the parties presents a choice between the tenant's and the landlord's version of events. For a number of reasons, I prefer the evidence of the landlord:

- (a) Clause 2.2.1 of the lease says that the tenant must not '... use the Premises except for the permitted use stated in [the schedule]'. The schedule to the lease says, 'Permitted use: Restaurant, cafe and bar'.  
The tenant said that he had not read the lease. The schedule is, however, a simple document and it shows signs of review by the parties, with handwritten amendments and initialling by the parties.
- (b) The upstairs area of the premises was only accessible through the downstairs area and therefore could not be leased separately. Why would the landlord's agent have initially only offered the ground floor for lease (at \$700 per week, according to the tenant) and not have offered to include the upstairs area (at an extra \$300 a week, according to the tenant) until some two days later?
- (c) Perhaps most significantly, why would the tenant agree to pay \$300 per week to be allowed to live in the upstairs accommodation area when he and his family already had their own home and, on his own evidence, the tenant and his family only slept at the premises on the odd occasion?

36 As I said, for these reasons I prefer the evidence of the landlord and, accordingly, I find that the landlord did not make the representations alleged by the tenant in his counterclaim, which I therefore dismiss.

### **Orders**

37 I find that the amounts payable under the lease by the tenant to the landlord are as follows:

- (a) For unpaid rent and outgoings, the amount of \$34,077.20, being the amount calculated by Mr Powell, less the sum of \$1,512.50 agreed by the parties not to be the responsibility of the tenant.
- (b) For interest to the date of hearing, the sum calculated by Mr Powell (\$11,833.07), but adjusted to make allowance for the agreed reduction of \$1,512.50. I have calculated that adjusted figure to be \$11,330.19.
- (c) For interest from the date of hearing, again, the sum calculated by Mr Powell (\$11.70) per day, but also adjusted to make allowance for the agreed reduction of \$1,512.50. I have calculated that adjusted figure to be \$11.20 per day, which gives a total from the date of hearing to today's date of \$369.60.
- (d) For make good works \$55,660.00.

The total of those three sums is \$101,436.99.

38 Accordingly, I will order that the tenant pay to the landlord the sum of \$101,436.99 and I will reserve liberty to apply on the question of costs.

**R. BUCHANAN**  
**MEMBER**