

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. BP1359/2015

**BUILDING AND PROPERTY LIST**

**CATCHWORDS**

RETAIL TENANCY DISPUTE: Terms of settlement executed by Lessor and Lessee following resolution of retail tenancy dispute; Lessee claims that it has complied with Terms of Settlement and seeks a refund of its security deposit; whether Lessee has complied with Terms of Settlement; whether Lessee entitled to remove Lessee's fixtures; whether Lessor entitled to damages.

<b>APPLICANT</b>	Photo Image Works Pty Ltd
<b>RESPONDENT</b>	M3 Property Group Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member F. Marks
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	17 February 2016
<b>DATE OF ORDER</b>	18 March 2016
<b>CITATION</b>	Photo Image Works Pty Ltd v M3 Property Group Pty Ltd (Building and Property) [2016] VCAT 406

**ORDERS**

1. The respondent must pay the applicant \$19,800 forthwith.
2. The respondent must pay the applicant interest of \$1,029.59.
3. The applicant must pay the respondent \$912 within 14 days of the respondent complying with Orders 1 and 2 above.
4. The respondent must reimburse the applicant, the applicant's filing fee of \$575.30.

**MEMBER F. MARKS**

**APPEARANCES:**

For the Applicant

Mr Brett Anthony, Director

For the Respondent

Mr John Marro, Director

## REASONS

- 1 This proceeding concerns the respondent landlord's failure to refund the applicant tenant's security deposit of \$19,800 in accordance with terms of settlement.

### Background

- 2 On 9 January 2012 the applicant ("**Tenant**") entered into a lease with the respondent ("**Landlord**") for the lease of premises situated at 8-14 Eastern Road, South Melbourne ("**Lease**"). The Lease commenced on 31 March 2012. The Lease was for a period of two years with two options to renew. The Tenant exercised its first option to renew the Lease.
- 3 On 31 March 2015 the Landlord issued a notice to vacate the premises ("**Notice to Vacate**") in accordance with Special Condition 2 of the Lease. Special Condition 2 allowed the Landlord to issue a notice to vacate during the second term of the Lease if the Landlord required the property to be vacated due to substantial works or the demolition of the premises.
- 4 After the Landlord served the Notice to Vacate on the Tenant, a dispute arose over the payment of management and administration fees and rent, amongst other things. On 11 May 2015 the parties signed terms of settlement ("**Terms of Settlement**") following the resolution of the dispute at mediation.

### The Tenant's claim

- 5 The Tenant says that it has vacated the premises as required by the Terms of Settlement. It says it is entitled to a refund of its security deposit of \$19,800, paid on 29 March 2012. The Landlord says it has suffered damage as a result of the Tenant removing fixtures and fittings and leaving rubbish at the back of the premises after signing the Terms of Settlement. It claims unpaid rent and payment of unpaid water rates.

### The Hearing

- 6 The parties were self represented at the hearing. Mr Anthony, director of the Tenant, appeared for the Tenant and gave evidence. Mr Marro, director of the Landlord, appeared for the Landlord and gave evidence.
- 7 The issues for determination are:
  - (a) Whether the Tenant has complied with paragraph 2 of the Terms of Settlement;
  - (b) Whether the Tenant was entitled to remove any fixtures;
  - (c) Whether the Landlord is entitled to damages;
  - (d) Whether the Tenant is liable to pay outstanding rates and four days of rent.

## **Has the Tenant complied with paragraph 2 of the Terms of Settlement?**

8 Paragraph 2 of the Terms of Settlement provides:

“The Tenant or the Guarantor shall not be required to make good or reinstate the Premises, but the Tenant shall be required to leave the Premises in a clean and tidy condition on the date of vacating the Premises.”

9 It is accepted that the Tenant left the premises in a clean and tidy condition on vacating the premises.

10 Mr Marro gave evidence that after signing the Terms of Settlement the Tenant removed fixtures from the premises in breach of paragraph 2 of those Terms. He said that he was told that the Tenant removed light fittings, doors, door handles, an oven and carpet tiles from the premises.

11 Mr Anthony gave evidence that after the Lease started, the Tenant took up the original upstairs carpet, which had rotted and replaced it with new carpet tiles. He said he arranged for the premises to be fitted out as required for the Tenant’s business. He said this included installing about 20 down lights, and putting on new door handles, amongst other things.

12 Mr Anthony gave evidence that on 31 March 2015, the Landlord’s solicitors sent the Tenant the Notice to Vacate because the Landlord intended to demolish the premises or carry out substantial works on the premises. He said that the Tenant had no option but to vacate the premises having been served with the Notice to Vacate issued by the Landlord. He said that at all times he had been led to believe that the building would be demolished or substantial works carried out.

13 Mr Anthony said that after signing the Terms of Settlement he only removed items which the Tenant owned and had installed in the premises. He said he removed those items because he understood that the premises were to be demolished. He said that after signing the Terms of Settlement he removed, amongst other things, about 20 down lights, four door handles and the carpet tiles that the Tenant had installed in the upstairs area. He said he left the door handles that were originally on the doors and only took the newer door handles that the Tenant had installed.

14 I accept and prefer Mr Anthony’s sworn evidence to Mr Marro’s evidence, about the items which the Tenant removed. Mr Marro’s evidence was hearsay. A good deal of Mr Marro’s evidence was based on what he had been told by his site foreman/ project manager who was not called to give evidence. On being questioned about the items that he claimed the Tenant had removed, he appeared to be unsure about what had been removed from the premises.

15 Mr Marro said when his solicitors sent the Notice to Vacate to the Tenant on 31 March 2015, he intended to sell the property. He said he had no intention of demolishing the premises or carrying out substantial works as

required by Special Condition 2. He said that he used Special Condition 2, which he called the demolition clause, to end the Lease as this was the only clause that he could use to obtain early occupation of the building. He said that his intention was for the premises to be vacated earlier than otherwise under the Lease so that he could sell the building.

- 16 Paragraph 2 of the Terms of Settlement does not deal with the removal of tenant's fixtures. I do not accept Mr Marro's contention that I must read into, or imply into paragraph 2, a term which prohibits the Tenant from removing Tenant's fixtures and fittings.
- 17 I find that paragraph 2 of the Terms of Settlement does not prohibit the Tenant from removing tenant's fixtures and fittings. I therefore find that the Tenant, in removing the Tenant's fixtures, has not breached paragraph 2 of the Terms of Settlement.

### **Was the Tenant entitled to remove the fixtures?**

- 18 The issue is whether the Tenant is entitled to remove its fixtures at the end of the Lease. Clause 1(m) of the Lease deals with the reinstatement and delivery up of the premises. It relevantly provides that:

"1 The Lessee covenants and agrees with the Lessor as follows:

- (m) At the expiration or earlier termination of the Term, to remove any Lessee's partitions, fixtures and fittings and to reinstate the Premises to their original condition as at the commencement of the Lessee's occupancy of the Premises and to make good any damage to the Premises to the reasonable satisfaction of the Lessor. The Lessee must also deliver up possession of the Premises to the Lessor together with all Lessor's fixtures and chattels in accordance with the Lessee's covenants contained in this Lease."

- 19 The Terms of Settlement incorporate the Lease by reference. The Terms of Settlement refer to various items included in the lease, such as rent and outgoings, amongst other things. Paragraph 2 of the Terms of Settlement expressly removes the obligation on the Tenant to make good and reinstate the premises. The Terms of Settlement expressly state that the Tenant is not required to reinstate the premises to their original condition as at the start of the Lease. Paragraph 2 of the Terms of Settlement also expressly states that the Tenant is not required to make good any damage to the premises to the reasonable satisfaction of the Landlord.
- 20 I find that paragraph 2 does not expressly remove the Tenant's right to remove its fixtures and fittings as provided under clause 1(m) of the Lease. I therefore find that on vacation of the premises, the Tenant was entitled to remove its fittings and fixtures under clause 1(m) of the Lease.

### **Is the Landlord entitled to damages?**

- 21 The Landlord claims that it has suffered damage as a result of having to engage contractors to fix the damage caused by the Tenant on vacating the premises.

- 22 Mr Marro said that the Landlord was entitled to be paid for the rectification work set out in following invoices:
- North Star Electrical Services invoice dated 15 September 2015: \$1,980;
  - W&D Henderson invoice dated 23 September 2015 for carpet installation: \$2,123.55;
  - CB Office Partitioning Solutions invoice dated 4 September 2015 for new ceiling tiles: \$4,950;
  - Aram Master Painters invoice dated 18 September 2015: \$1,980;
- 23 Mr Marro contended that the expenses incurred were not for work done to reinstate the premises to the state they were in at the time that the Lease commenced. He said the expenses were for work done to fix the damage caused by the Tenant on vacating the premises.
- 24 I am not persuaded that that Tenant is liable for any of these expenses incurred by the Landlord. The Terms of Settlement did not require the Tenant to make good or reinstate the premises. As there was no obligation on the Tenant to make good the premises, there was no breach of the Terms of Settlement. Therefore, the issue of damages does not arise here.
- 25 Further, it is difficult to see how the Landlord can claim damages for expenses incurred to restore the premises, when the Notice to Vacate required the Tenant to vacate the premise for the purpose of the Landlord demolishing the premises or carrying out substantial works.
- 26 Mr Marro also claimed that the Landlord had incurred costs of \$1,320 in engaging contractors to remove rubbish from the back of the premises on the Tenant vacating the premises. He relied on a photograph in evidence showing rubbish in the laneway at the back of the premises.
- 27 Mr Anthony gave evidence that the rubbish shown in the photo was not the Tenant's rubbish. He said that in November 2014, Port Phillip Council had removed rubbish from the laneway behind the premises. He said he had spoken to the Council who confirmed that they issued a work order for the clean up of the laneway at the back of the premises in November 2014. I accept Mr Anthony's evidence that the rubbish was not the Tenant's rubbish and was removed by the Council about 10 months before the Tenant vacated the premises.

**Is the Tenant liable to pay South East Water rates: \$912.45?**

- 28 Mr Marro claimed that the Tenant was liable to pay the outstanding South East Water rates as required by paragraph 5 of the Terms of Settlement. The due date for payment of the rates was stated on the copy invoice to be 14

August 2015. Part of the copy invoice in evidence was covered over with a copy of a receipt of payment by the Landlord on 17 September 2015.

- 29 Mr Marro gave evidence that the Landlord paid the invoice for the South East Water rates because the Tenant had failed to pay it. Mr Anthony was unable to say whether the Tenant had paid these rates.
- 30 I accept Mr Marro's evidence that the Tenant is liable to pay the South East Water rates of \$912 under the Terms of Settlement and that the Landlord has paid these rates on the Tenant's behalf. I find that the Tenant is liable to pay the Landlord the amount of \$912.

**Is the Tenant liable to pay 4 days of rent of \$976.40?**

- 31 Mr Marro claimed that the Tenant vacated the premises on 4 September and not 1 September 2015 as required by paragraph 1 of the Terms of Settlement. He claimed that the parties met for handover and inspection on 4 September 2015. He said he did not get the keys to the premises until 4 September 2015. Mr Marro said that the Tenant was liable to pay four further days of rent because he was not given the keys on 1 September 2015. Mr Marro's evidence was based on what he said he had been told by his staff.
- 32 Mr Anthony gave direct evidence that the Tenant vacated the premises on 1 September 2015 and that he dropped the keys off as required on that day. He said that he met with Mr Marro for the inspection on 4 September 2015 and gave him a further set of keys that he had found. I accept Mr Anthony's evidence which I prefer to Mr Marro's as it is direct sworn evidence and not hearsay. I find that the Landlord had not made out this claim.

**Conclusion**

- 33 For the reasons set out above I find that the Landlord must refund to the Tenant, the Tenant's security deposit of \$19,800 in accordance with the Terms of Settlement.
- 34 However, I find that the Tenant has not made out its claim for accrued interest to be paid by the Landlord on the security deposit of \$19,800. I find that the Terms of Settlement do not define accrued interest. I find that the meaning of accrued interest is uncertain. I find that the Terms of Settlement do not specify a method for, or calculation of, the accrued interest.
- 35 Pursuant to s 91(2) of the *Retail Leases Act 2003*, I will order that the Landlord pay interest on the amount of \$19,800 from 1 September 2015, being the date when the security deposit should have been paid to the tenant, up to 18 March 2016. The penalty interest for that period is \$1,029.59.
- 36 I will order that the Landlord must pay the Tenant \$19,800 being the refund of the security deposit and interest of \$1,029.59. I will order that within 14 days of receipt of payment of \$19,800 and interest of \$1,029.59, the Tenant

must pay the Landlord \$912. I will order that the Landlord must reimburse the Tenant, the Tenant's filing fee of \$575.30.

**MEMBER F. MARKS**

18 March 2016