VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP620/2018

CATCHWORDS

Building and Property List – Landlord and Tenant – Interlocutory Injunctions – Tenant in liquidation – Assignment of lease without landlords' consent – Whether serious issue to be tried – Balance of Convenience

FIRST APPLICANT	Sky Communications Aust Pty Ltd (ACN 624 723 995)
SECOND APPLICANT	Lek Supply Pty Ltd (ACN 113 176 659)
RESPONDENT	38 Pacific DR Pty Ltd (ACN 155 122 473)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Davis
HEARING TYPE	Directions Hearing
DATE OF HEARING	11 May 2018
DATE OF ORDER	11 May 2018
CITATION	Sky Communications Aust Pty Ltd (ACN 624 723 995) v 38 Pacific DR Pty Ltd (ACN 155 122 473) (Building and Property) [2018] VCAT 781

ORDER

1. The applicants' application for an interlocutory injunction is dismissed.
2. **This proceeding is listed for a compulsory conference to be conducted by any member on 28 May 2018 commencing at 10.00 am at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.**
3. The parties may each be represented by professional advocates at the conference.
4. All parties must attend a compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited

authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.

5. The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must exchange copies by 4.00 p.m. on the business day prior to the compulsory conference, and provide the Tribunal with a copy at the commencement of the conference.

6. Costs reserved.

SENIOR MEMBER R. DAVIS

APPEARANCES:

For the First Applicant:	Mr S. Hopper, of counsel
For the Second Applicant:	Mr S. Hopper, of counsel
For the Respondent:	Mr D. Harrison, of counsel

Note:

These written reasons consist of an edited transcript of reasons given orally at the conclusion of the hearing.

REASONS FOR DECISION

1 By a lease dated 12 October 2016 Sky Coms Property Pty Ltd (Sky Coms) took a lease (the lease) of land being 42-50 Pacific Drive, Keysborough (the property). Apparently at some point in time part of the property was sublet to the second applicant Lek Supply Pty Ltd and there was no notice of that subletting given to the landlord, the respondent in this proceeding.

2 On or about 23 February 2018 Sky Coms was placed in liquidation. The landlord was not notified about this liquidation until the 9 March 2018.

3 On 28 February 2018 Mr Ben Lek entered into an agreement with the liquidator to acquire the business including the assets of the business that was operated from the premises which were a warehouse and Mr Lek apparently nominated the first applicant Sky Communications Pty Ltd to which I will refer to as Communications, as the nominee entitled to the assignment of lease.

4 On the same day Communications was registered by ASIC as a company. It wasn't until, as I have said, the 9 March that the liquidation was notified to the landlord and that Communications had bought the business and they were finalising the sale which was subject to a court approval. There was a subsequent court approval on 10 April 2018 by Judge O'Callagen in the Federal Court but the landlord was never given notice of that application even though it involved an assignment of a lease to which it was clearly a party. It is difficult to understand why no notice was given.

5 I note that the rent has continued to be paid in relation to these premises. Rent has continued to be paid and I am told it will continue to be paid by Communication. What is now been sought is an interlocutory injunction to stop the landlord retaking possession of the premises.

6 On the 3 May of this year a section 146 notice pursuant to *Property Law Act* 1958 was given to the tenant citing grounds for termination which included the liquidation and the subletting. At this stage I should note the clauses of the lease which is clause 4 of the lease, prevented the transfer of the lease without the landlord's written consent pursuant to section 144 of the *Property Law Act* and that consent must not be unreasonably withheld and clause 7 of the lease permitted the landlord to terminate the lease if there was inter alia a liquidation of the tenant.

7 There has clearly been a liquidation of the tenant and the landlord has attempted to terminate the lease by a letter of 20 March 2018 that the landlord solicitors wrote to Communications and, notified it that the landlord was entitled to terminate the lease and inform it that it should vacate the premises. As I have said a 146 notice was served on the 3 May which has not yet expired. There was 14 days' notice but it is said in relation to that notice that the breaches cannot be remedied in particular the breach in relation to the liquidation of the original tenant company and the assignment without the landlord's consent.

8 Mr Hopper who appears on behalf of the two applicants for the interlocutory injunction has submitted that the lease may be assigned even without the landlord's consent and even if there is prohibition on that assignment. He has cited a number of cases referred to in *Braybrook Croft and Hay Commercial Tenancy Law* 2018 at page 489 as authority for that proposition. It is also stated that the termination clause which I have referred to being clause 7 of the lease is not an early break clause but in substance a default clause that requires a notice pursuant to 146 of the *Property Law Act.* He has cited several authorities referred to in *Duncan Commercial Leases Australia 2014* at page 130.10 for that proposition. He has also said that these breaches can be remedied by relief against forfeiture

and again has cited the two authors which I have already referred to in support of that proposition.

9 Mr Harrison who appears on behalf of the landlord submitted that the relief against forfeiture could not be given in this Tribunal as this is not a retail lease but a lease concerning a warehouse. He said in those circumstances that this is not a proper case for an interlocutory injunction in this Tribunal because it could not give final relief. He also said that on the balance convenience the undertaking has dubious worth as nothing is known about the financial circumstances of the company Communications. He also said that even if a section 146 notice is required which has unexpired it was useless to give the interlocutory injunction because that is going to expire in six days it cannot be remedied and the landlord has made it clear that it will not give an assignment. He referred to the fact that in granting an injunction which is an equitable remedy, I should exercise discretion in favour of his client because he said that the applicants do not have clean hands in the sense that they failed to disclose the tenant's liquidation for a number of weeks and they failed to give notice of the hearing before Justice O'Callagen in the Federal Court.

10 I will first of all deal with the matter of jurisdiction. I do not have to find whether this Tribunal has jurisdiction in relation to relief against forfeiture or otherwise as at this particular time. I only need to find that there is a reasonable argument in relation to whether there is jurisdiction or not.

11 Mr Hopper made the point that the occupants of the premises making telecommunication parts which are sold to Telecom are used by Telecom for their business. Telecom and other organisations in their business of providing telecommunication services to various consumers. Thus, it seems to me that there is at the very least an arguable case that this Tribunal has jurisdiction. I do not find as a fact that it does have jurisdiction but I do find that there is an arguable case in relation to jurisdiction.

12 I now turn to whether there is an arguable case in relation to whether it is likely that relief against forfeiture would be granted in these circumstances.

13 Mr Hopper presented me with a number of authorities where relief against forfeiture was granted when companies had gone into liquidation. However, Mr Hopper and Mr Harrison also referred me to a decision of this Tribunal in *N R Reid and Co Pty Ltd & Pencarl Pty Ltd* a decision of Judge O'Neill on 30 November 2011 [2011] VCAT 2241. In that particular case the facts were very similar to the present and His Honour refused relief to the assignee after the tenant had gone into liquidation. At paragraphs 43 to 46 His Honour stated as follows:

> [43] Mr Lucas' submission as to the proper interpretation of clause 7 is that the bankruptcy by Mr Shadbolt gave rise to a contractual right to the landlord to re-enter the premises. The landlord's re-entry of the premises was evidenced by the execution of the subsequent lease with Santosa. Re-entry by the landlord terminated the lease (clause 7.2). Clause 7.5, that is the clause requiring notice of breach to be given, was necessary only in the case of repudiation of the lease. This was not a case of repudiation, but rather a case of termination pursuant to a contractual right under the lease.
>
> [44] If this argument was wrong, and either pursuant to clause 7.5 of the lease, or s 146 of the *Property Law Act*, a notice was required providing NR Reid with 14 days within which to remedy the breach, the breach was incapable of remedy. Further, in accordance with s 146(2), there is a wide discretion to a court to either grant or refuse relief as the circumstances of the case deemed appropriate. Mr Lucas noted that there had been no attempt by Mr Shadbolt when he had become aware of the subsequent lease and the termination of the franchise arrangement in February 2011, to remedy the breach in any way. Thus, said Mr Lucas, the tribunal ought to exercise its discretion against providing any relief against forfeiture or damages.

[45] In my view, the interpretation proffered by the respondents is correct. Mr Shadbolt, the guarantor under the lease, became bankrupt in March 2010. He did not advise any of the parties of that bankruptcy. It is clear from clause 7 that that bankruptcy entitled the landlord to re-enter the premises. It was a clear act of re-entry that the landlord entered the subsequent lease with Santosa. That occurred on 25 November 2010. Pursuant to clause 7.2, that re-entry terminated the lease.

[46] Even accepting that either pursuant to clause 7.5, or s 146 of the *Property Law Act*, that the notice required Pencarl to give a 14 day period within which to rectify the breach, in my view, the breach was incapable of rectification. There was no attempt made by Mr Shadbolt to have his bankruptcy annulled or set aside or discharged. At the time, even accepting it was not until February 2011 that he was aware of the subsequent lease, there was no offer of an appropriate alternate guarantor, even if Pencarl had any obligation under the lease or at law to accept an alternate guarantor, in my view, Mr Shadbolt's father could well have been rejected on reasonable grounds.

14 Mr Hopper said that I should not follow Judge O'Neill's decision in this particular case because Judge O'Neill did not have the advantage that I have had of being cited a number of authorities that showed persons in possession such as the applicants could obtain relief against forfeiture.

15 I accept that Judge O'Neill was not cited with all those authorities, however, I also accept that Judge O'Neill was a Vice President of this Tribunal and is a decision that I am bound to follow. There is a principle within the Tribunal and this was referred to by Balmford J first in the Mornington Shire case in the Supreme Court.

16 I am concerned in this matter that the number of important factors have not been disclosed to the Tribunal. One of those factors is the financial position of the assignee, that is, Communications. Mr Hopper has said that this was

brought on short notice and was not in a position to give those financial details. However, I noticed that this was a proceeding that was issued on or around the 2 May which is some 9 days ago. It would not have been difficult position to show bank accounts or the financial position of Communications, but nothing has been shown whatsoever. In giving an assignment of lease a landlord is entitled to know the financial position of the incoming tenant. This has not been disclosed, other than to say the rent has been paid and would continue to be paid. I find this quite surprising.

17 I also note that the second applicant Lek Supply Pty Ltd does not appear to have any interest in this proceeding at all save and accept that it somehow occupies the premises. I am also concerned that when the proceeding for the assignment of lease came before Judge O'Callagen in the Federal Court on the 4 May this year no notice was given to the respondent. I find that quite extraordinary considering that at that particular time this proceeding had already been issued.

18 I also note that there is a collateral proceeding in the County Court in this matter concerning the sale of these premises. I do not have to go in to that but it may well be that that would have been a proper place for a different type of relief to be sought that is interlocutory relief.

19 In my view, looking at all these matters as a whole, I cannot be satisfied that the case is sufficiently strong case for the applicant to argue in final relief for relief against forfeiture. It would at the very best be an extremely weak case.

20 In relation to the matters of the balance of convenience while it is clearly always convenient for the tenant to remain in the premises which it operates and I am told that the tenant will continue to pay the rent, however nothing was shown as to its ability to pay rent. I am given no basis for the applicants being able to fulfil their undertaking should it not be successful in the proceeding. This again relates to the lack of financial position that has been displayed before me. I note that the tenant company have revealed it owed

many millions of dollars at the time it went into liquidation. Communications is a related company. Given those circumstances I will dismiss the application for the interlocutory injunction. As I find the balance of convenience favours refusal of the injunction.

SENIOR MEMBER R. DAVIS