VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP250/2019

CATCHWORDS

Retail tenancy, interlocutory injunction, serious issue to be tried – notice of less than 14 days when clause 7.5 of the Copyright Law Institute of Victoria Lease of Real Estate August 2014 Revision noted in appendix of lease as "is to be deleted"; alleged misleading conduct concerning condition of premises when appendix contains a provision that the tenant accepts the condition of the premises, relief against forfeiture – tenant offers to forfeit the security and repay it by instalments – not "immediate payment".

APPLICANTS	Elizabeth Zahariev, Natalie Zahariev
RESPONDENT	Po Yan Pty Ltd ACN: 007 403 769
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	20 February 2019
DATE OF ORDER	6 March 2019
CITATION	Zahariev v Po Yan Pty Ltd (Building and Property) [2019] VCAT 327

ORDERS

1 The Tenants' applications for an interlocutory injunction or for relief against forfeiture are dismissed

2 Costs reserved.

3 Liberty to apply.

4 Any application regarding recovery of the applicants' property is to be treated as urgent and the applicants may make reference to this order when seeking a hearing.

5 If no further application is made by either party by 5 June 2019 the proceeding will be struck out.

6 I direct the Principal Registrar to refer the file to Senior Member Lothian on 12 June 2019 for the purpose of order 4.

7 I direct the Principal Registrar to send copies of these orders and reasons to the parties by email marked "Urgent".

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Ms A. Hando of Counsel
For Respondent	Mr L.P. Wirth of Counsel

REASONS

BACKGROUND

1 In brief, the applicant-Tenants applied for an injunction to require the respondent-Landlord to restore possession of the rented premises to them, or in the alternative, relief against forfeiture.

2 The hearing came before me on 20 February 2019 and was due to commence at 11:30 am. Around 11:00 am that day the Tenants filed by email proposed orders, the affidavit of the first applicant, exhibits and submissions. I did not have the opportunity to read the substantial materials before the end of the hearing.

3 Because I was due to go on leave for a week on 22 February 2019 and therefore could not adjourn the proceeding for further hearing before me to a few days hence, I made the following orders, having first determined that the Landlord had not already advertised the premises:

> 1. I reserve my decision concerning the applicants' application for an injunction and relief against forfeiture.
> 2. The respondent is not obliged to allow the applicants to re-enter the premises at 734 Burke Road, Camberwell Victoria 3123 but must not grant possession to any other person until at least 4.00 pm on 6 March 2019 by which time I intend to publish my decision. Should the decision be published earlier, this date and time might be altered.
> 3. Should both parties write jointly to the Tribunal seeking mediation by 12.00 noon on 22 February 2019, I direct the Principal Registrar to refer the file to Senior Member Lothian or in her absence, arrange mediation before an experienced retail tenancy mediator as soon as possible and no later than 5 March 2019.
> 4. Liberty to apply.

REQUIREMENTS FOR AN INTERLOCUTORY INJUNCTION

4 As the High Court said[1] in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, at [65]:

> The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd.* This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued:
>
> > "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief… The second inquiry is… whether the

[1] References deleted

> inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. … With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:
>
> > "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks."

5 I am also satisfied that the Tenants' submission is accurate that the effect of the decision of Gummow J in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission (*1988) 82 ALR 499 is that there is no separate test for the grant of a mandatory injunction.

6 I find that "preservation of the status quo" referred to in *Australian Broadcasting Corporation v O'Neill* is the state of affairs that existed before the Landlord re-entered the premises.

ORDERS SOUGHT

7 The Tenants filed two different sets of proposed orders on 20 February 2019. The first referred to are in a document entitled "Applicant's [sic] Proposed Orders". They are:

(1) By no later than 9 AM, 21 February 2019, the Landlord is to allow the Tenants to retake possession of the property located at 734 Burke Road Camberwell… (Property) pursuant to the lease of the Property dated 1 March 2017;

(2) In relation to the rent arrears stated in the Breach Notice dated 8 February 2019, being $18,205 (including interest, legal costs and GST) (Rent Arrears) the Tenants are to:

  (a) by 22 February 2019, surrender the Security Deposit held pursuant to the Lease, being $16,500, as part payment for the Rent Arrears;

  (b) by 22 February 2019, immediately pay the balance of the Rent Arrears to the Landlord in the sum of $1,705;

  (c) on a weekly basis thereafter, pay an amount of $2,000 in order to "top up" the security deposit, with the first payment of $2,000 to be made on 28 February 2019.

(3) In relation to the outgoings arrears stated in a further breach notice dated 8 February 2019, being $4,205.75, the Tenants agree to pay this amount by no later than 7 March 2019.

(4) The Landlord is to provide consent to the transfer of the Lease to the Tenants as trustees of a new unit trust to be established by the Tenants, subject to:

(a) the Tenants complying with orders 1 – 3 above;

(b) the Tenants providing any further financial or business information reasonably required by the Landlord; and [the orders ceased at this point].

8 The second set of proposed orders was at the commencement of "Tenants Outline of Submissions" and are is as follows:

1. In this proceeding, the Tenants seek the following orders:

(a) a mandatory injunction, pursuant to s123 of the *Victorian Civil and Administrative Tribunal Act 1998*, requiring the Landlord to allow the Tenant to re-take possession of the property located at 734 Burke Road…(Property);

(b) damages in respect of the Landlord's breach of the lease of the Property

(c) alternatively, relief against forfeiture pursuant to s146(2) of the *Property Law Act 1958 (Vic)*; and/or

(d) such further orders as the Tribunal deems fit;

9 The Tenants' Outline of Submissions concluded at paragraph 60 with a request for orders, if the Tribunal were to grant relief against forfeiture, similar to those set out in orders 2, 3, and 4 of the first set of orders.

HISTORY

10 The lease permitted the Tenants to conduct a cafe and wellness centre at the premises. The term of the lease was for five years, commencing on 1 March 2017.

11 The parties agree that the Landlord re-entered the premises on 15 February 2019.

12 The parties agree that on 8 February 2019, the Landlord sent the Tenants two default notices. The first, in respect of unpaid rent, was for $17,380 including interest, plus $825 in legal fees. It gave the Tenants five days to rectify their breach.

13 The second, which is not the subject of the Tenants' application, was for unpaid outgoings of $4,205.75 and was for 14 days.

14 As can be seen from the first proposed orders above, the Tenants admit that both sums sought by the Landlord are payable, although the Tenants also say that money is owned to them by the Landlord.

15 The Tenants' solicitors, Rosendorff Lawyers, wrote to the Landlord's solicitors, Stamford Lawyers, on 15 February 2019, after the Landlord's real estate agents re-entered the premises. The letter referred to clause 7.5 of the lease, which is in the form of the Copyright Law Institute of Victoria

Lease of Real Estate August 2014 Revision. It claimed that the default notice was inadequate, of no legal effect, and therefore the Landlord has committed a material breach of the lease which "likely constitutes repudiation ..."

16 Paragraph 13 of the letter was:

> The Lessees acknowledge that certain rental amounts remain in arrears. In order to address this [in] an expedient manner, the Lessees propose that:
>
> (a) any arrears be taken from the security deposit currentl[ly] held by the Lessor pursuant to the Lease. We note that Clause 13.3 of the Lease specifically provides for such an option; and
>
> (b) in turn, the Lessees are to pay an amount of $2,000 per week to the Lessor, commencing 22 February 2019, in order to 'top up' the security deposit to the required level.

17 In the letter to the Tribunal accompanying their application for an injunction the Tenants also alleged that about two weeks before the Landlord issued the notices of default, the Tenant had filed a claim with the Victorian Small Business Commissioner seeking damages arising from allegedly misleading and deceptive conduct by the Landlord. They alleged that the premises were advertised with "air conditioning, heating, an exhaust fan and grease trap." The letter continued:

> Upon commencement of the lease, the tenant's discovered that the split system heating and cooling were without motors nor was there any grease trap or exhaust fan in the premises as represented by the landlord's agent. The amount sought by the tenant's in their application is $16,996.16, similar to the amount in rental arrears [sic].

18 The Tenants provided no evidence of how they calculated that amount.

Affidavit of the first applicant

19 In her affidavit of 20 February 2019 the first applicant stated, among other things, that:

i the advertisement for the premises included "existing kitchen with grease trap and exhaust" and "heating and cooling throughout";

ii the Tenants were unable to check whether the heating, cooling and exhaust fan were working, because electricity was disconnected from the premises at the time of their inspection;

iii the Landlord's real estate agent did not show them the grease trap because he told the first applicant that he did not have keys to the rear of the premises, but he assured her it was located there;

iv the real estate agent showed the Tenants a large duct upstairs, but in answer to their question, he was unable to confirm whether this was the exhaust fan or something else;

v after the lease commenced the Tenants discovered:

a. two of the three air conditioning/heating units had been stripped of their motors and the third was not working. The Tenants paid to repair the third, but it is insufficient to cool the unit downstairs on hot summer days;
b. there was no grease trap and the Tenants engaged an engineer and plumber to design and install a grease trap at a total cost of $5,512; and
c. there was no exhaust fan in the kitchen.

The Tenants say that they could not afford to install an exhaust fan.

vi the first applicant first requested the Landlord to reinstate functioning air conditioning by an email dated 1 November 2018;

vii on 3 December 2018 the Landlord's lawyers sent the first applicant a letter that said, among other things:

a. the Landlord was only responsible for keeping the air conditioning in the same condition as when the Tenants entered the lease;
b. the lease acknowledged that the Tenants had inspected the premises and accepted them in their current condition;
c. the grease trap, air conditioning unit and cool room "were not marked off on the disclosure statement" and therefore the Landlord was not responsible for installing them or ensuring they were in working order;

viii she sent the Landlord's agent a list of all the items that were advertised but not present or not working on 10 January 2019;

ix the first applicant lodged an application for reimbursement for costs and lack of trade with the Victorian Small Business Commissioner on 30 January 2019;

x "Since the commencement of the Lease, we have always been late in paying rent by one or two weeks. ... In order to juggle cash flow, we often entered payment plans with the Landlord. Prior to December 2018, we had satisfied all our outstanding rent and outgoings.";

xi in late 2018 the Tenants sought the Landlord's consent to transfer the lease from them personally to a unit trust, the performance of which they would guarantee, to enable an additional investor to be introduced to the business;

xii the Tenants had not paid rent for three months at the date of the hearing, in part due to their belief, which the first applicant described as "in hindsight ... wrong" that the Landlord could not evict them as they were "claiming three months rent free via the claim to the Small Business Commissioner";

xiii the Tenants have paid $193,000 of their own, and borrowed, money for fit out; and

xiv the business hires 10 contractors or employees.

Serious issue to be tried

Alleged inadequate notice

20 In their written submission the applicants acknowledge that Appendix 1 (Additional Provisions) 1.5 of the lease provides:

> Clause 7.5 is to be deleted.

21 Item 22 of the Schedule to the lease is "Additional provisions: Refer to Appendix 1 – Additional Provisions".

22 The Tenants' submission also states that no further steps appear to have been taken to delete clause 7.5, either by strike out or other amendment. I made similar remarks when my attention was drawn to it during the hearing.

23 The Landlord submitted that the Law Institute of Victoria requires the lease to be unchanged, except in the manner that has been done. This is consistent with Clause 22 of the Lease:

> **LANDLORD WARRANTY**
>
> The landlord warrants that clauses 1 to 21 appearing in this lease are identical to clauses 1 to 21 of the copyright Law Institute of Victoria Lease of Real Estate August 2014 Revision and that any modifications to them are set out as additional provisions in item 22.

24 This is the way the lease has been prepared. The amendments are set out in the provisions referred to in clause 22.

25 There is a slight possibility that the Tenants could succeed, but I am not satisfied that the possibility is sufficient to amount to a "probability" in accordance with the test in *Australian Broadcasting Corporation v O'Neill.*

Alleged misleading conduct

26 It is possible that the Tenants could prove that they were misled by the Landlord's real estate agent, to the degree that before executing the lease they did not insist on obtaining a supply of power to test electronic equipment and neither did they insist on inspecting the grease trap.

27 However, clause 3 of Appendix 1 (Additional Provisions) provides:

> 3. **CONDITION OF PREMISES**
>
> 3.1 The tenant acknowledges and agrees that it has inspected the premises and will accept them in its current condition.
>
> 3.2 The landlord gives no warranty as to the suitability of the premises for any purpose or the permitted use, including without limitation the suitability of any of the tenant's

property, services and facilities that may be installed by the tenant in the premises for the conduct of its permitted use.

3.3 The tenant will:

(a) be deemed to have accepted this Lease with full knowledge of and subject to any prohibitions or restrictions on the use of the premises under any Law; and

(b) at its expense, comply with Laws and obtain and comply with the consents or approvals of any authority which may be necessary or appropriate to the conduct of its permitted use.

3.4 The tenant shall be responsible to bear all costs associated with any modifications or works by the tenant or the landlord carried out to the building or the premises for the purpose of making it permissible under any law to use the premises for the permitted use.

28 I am not satisfied that the possibility that the Tenants can sustain an action for misleading conduct in the light of clause 3.1 of the Appendix is sufficiently compelling to amount to a probability that they would succeed.

Alleged unconscionable conduct

29 The Tenants also allege that the Landlord has acted unconscionably, but rely mainly upon re-entry and the allegedly misleading conduct regarding the condition of the premises.

30 They also say that the Landlord attempted to coerce them into discontinuing a dispute filed with the Small Business Commissioner. It would be surprising if filing a dispute was sufficient to prevent a landlord exercising rights under s 146(12) of the *Property Law Act.* They have provided no other evidence of coercion.

31 The Tenants also allege that the Landlord "unreasonably refused to consent to the assignment of the Lease". However they provided no evidence of refusal or unreasonable behaviour if there was refusal.

No serious issue to be tried

32 For the above reasons I am not satisfied that thee is a serious issue to be tried.

Damages not an adequate remedy

33 I accept the Tenants' submission that in accordance with the decision in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, a consideration that bears on granting an interlocutory injunction is that damages are not a sufficient remedy.

34 It is not necessary for me to consider this as I am not satisfied that there is a serious issue to be tried.

Balance of convenience

35 I am satisfied that being deprived of possession of the rented premises is extremely inconvenient to the Tenants, but I do not need to consider whether the inconvenience to them is greater than the inconvenience to a landlord who has, in accordance with the first applicant's affidavit, not received rent for three months before the application was heard, and has, since the commencement of the lease, consistently received rent "late ...by one or two weeks." I do not need to consider this, because the Tenants have failed to satisfy me that there is a serious question to be tried.

Relief against forfeiture

36 In the alternative to seeking an injunction, the Tenants seek relief against forfeiture.

37 Ms Hando of Counsel for the Tenants said in the course of the hearing that, leaving aside the amounts that the Tenants might be entitled to recover for the alleged misleading conduct – which seemed to be the basis for the Tenants seeking "rent relief" of approximately 3 months – there was a total unpaid associated with rent of $18,250 and associated with outgoings of $4,205.75, amounting to a grand total of $22,455.75.

38 The Tenants' submissions state at paragraph 59(a) that "The Tenants have offered, and continue to offer full and immediate payment of arrears currently payable pursuant to the Lease". This is a surprising statement that does not appear to be based on fact.

39 The proposal for repayment is set out in the first set of the "Applicant's Proposed Orders".

40 Mr Wirth of Counsel for the Landlord remarked that surrender of the security deposit amounts to a proposal that the Tenants part pay the rent in arrears by going into default with respect to the security deposit.

41 Ms Hando drew my attention to clause 13 of the lease. Clause 13.3 provides:

> The landlord may use the deposit to make good the cost of remedying breaches of the tenant's obligations under this lease (or any of the events specified in clause 7.1) and the tenant must pay whatever further amount is required to bring the deposit back to the required level.

42 However clause 13.1 provides:

> The tenant must pay a security deposit to the landlord of the amount stated in item 20 and must maintain the deposit at that amount. [Underlining added]

43 I accept Mr Wirth's submission that the Tenants' propose to go into one breach to cure another. I am not satisfied that clause 13.3 provides a right to the tenant; rather it seems to me that it exists to enable a landlord to access

the security and allow the tenant to top up the security, if the landlord chooses to do so.

Transfer of the lease to the unit trust

44 The Tenants' scheme for attempting to put their business on a sound financial footing appears to depend on the lease being transferred to Euphoria Unit Trust as the new tenant, albeit after the outstanding amounts had been paid. There are allegations that the Landlord has acted unreasonably, perhaps unconscionably, in failing to consent to the transfer, but this issue has not been addressed by the Tenants in sufficient detail to enable a decision to be made. Further, order 4 sought by the Tenants in the first set of orders cannot be made, because I am not satisfied it is in my power to order them to consent, and proposed order 4(b) contains an imprecise provision regarding further "financial or business information".

ORDERS

45 The Tenants' applications for an interlocutory injunction and for relief against forfeiture are dismissed.

SENIOR MEMBER M. LOTHIAN