VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1452/2015

CATCHWORDS

Deed of Settlement of a proceeding; Applicant alleged Respondent breached the Deed by failing to comply with its obligations under the Deed; Applicant applied to have proceeding reinstated; Respondent found not to have failed to comply with its obligation sunder the Deed; Respondent found not to have breached the Deed; Applicant's claim for reinstatement of the proceeding dismissed.

APPLICANT	AJ Moussi Pty Ltd (ACN 151 243 613)
RESPONDENT	Luxor Corporation Pty Ltd (ACN 098 235 566)
WHERE HELD	Melbourne
BEFORE	B Thomas, Member
HEARING TYPE	Reinstatement Hearing
DATE OF HEARING	4 April 2017
DATE OF ORDER	22 June 2017
CITATION	AJ Moussi Pty Ltd v Luxor Corporation Pty Ltd (Building and Property) [2017] VCAT 863

ORDER

1 The application made by the applicant, AJ Moussi Pty Ltd, to reinstate the proceeding is dismissed.

2 Costs are reserved with liberty to apply having regard to section 109 of the *Victorian Civil and Administrative Act 1998.*

3 If a party does not file an application for costs by **30 June 2017**, there will be no order as to costs.

4 Any application for costs must be supported by submissions in writing to be determined in chambers by Member B Thomas.

B Thomas
Member

APPEARANCES:

For the Applicant	Mr S. Del Monaco, Solicitor
For the Respondent	Mr M. Dean of Counsel

REASONS

BACKGROUND

1 The Respondent (Luxor) is the owner of a property in Melton Highway, Sydenham (the property). On 2 August 2011 the Applicant (Moussi) leased the property from Luxor in which it conducts the business of a function centre, for a period of 5 years. Disagreements arose between the parties and between 14 August 2012 and 20 October 2014 Luxor served 5 Notices of Default on Moussi.

2 Moussi alleged Luxor had engaged in unconscionable conduct contrary to section 77 of the *Retail Leases Act 2003* and sought orders that, inter alia, Luxor withdraw the Notices of Default, replace the carpet throughout the property and rectify defective roof canopies. By way of counterclaim Luxor claimed damages totalling $11,451.70.

3 On 30 August 2016 the parties executed a Deed of Settlement (the Deed) and on 31 August 2016 and Moussi's claim and Luxor's counterclaim were struck out with no order as to costs.

4 Moussi alleged that Luxor failed to comply with the Deed and applied for the proceeding to be reinstated. Moussi filed and served an Outline of Submissions dated 23 March 2017. I heard Moussi's application on 4 April 2017 and ordered Luxor to file and serve any submissions in reply by 27 April 2017. Luxor did so on 10 April 2017.

5 In addition, although not referred to in the Deed, Moussi sought to have the defective air conditioning unit at the property included in its reinstatement application.

THE DEED OF SETTLEMENT

6 Moussi alleges that, in particular, Luxor failed to comply with clauses 3 and 8 of the Deed.

7 Clause 3 provides –

> Upon being provided with a tax invoice from a carpet supplier addressed to the respondent for the installation of carpet in the area of the premises known as the "Ball Room", the respondent must pay the carpet supplier within 7 days of receipt of the invoice for the carpet. The respondent's liability under this clause is limited to $60,000.

Moussi alleged that Luxor has refused to make payment for the carpet to Coveney Interlay, the supplier chosen by Moussi, and requests that Luxor be ordered to pay $60,000 to Coveney Interlay.

8 Clause 8 provides –

> The respondent must at its cost within 30 days repair the external canopies at the premises.

Moussi alleges that Luxor has failed to complete the repair of the canopies and requests that Pulis Professional Plumbing be engaged to fix the external canopy to be paid by Luxor.

THE SUBMISSIONS

The Carpet

9 Clause 3 of the Deed requires Moussi to provide Luxor with a tax invoice

> "**for the installation** of carpet in the area of the premises known as the 'Ball Room" (emphasis added).

10 Moussi initially provided a quotation from Coveney Interlay dated 3 November 2016 addressed to Luxor stating –

> To supply and install Brintons Custom Axminster carpet, laid over newly supplied underlay installed by the double bond installation method.
>
> FOUR [sic] THE SUM OF: $80,000.00 (+ GST)

The Notes to the quotation require –

- 30% Deposit on order placement, balance 14 days after installation.

11 Subsequently, under the cover of an email dated 10 February 2017, Moussi's solicitors provided to Luxor's solicitors a document from Coveney Interlay headed "TAX INVOICE" and dated 21 November 2006 stating –

> Landlord installation of carpet in area known as the "Ballroom" $54,545.45

Moussi says that pursuant to Clause 7 of the Deed, Luxor was obliged to pay invoice within 7 days of receipt, but has failed to do so.

12 In its verbal submissions made at the conclusion of the hearing, in saying that Luxor is obliged to pay the invoice within 7 days of receipt and before the carpet was installed, Moussi relies on *Tax Ruling GSTR 2000/34* at paragraph 26 which states –

> The existence of an obligation to pay will depend on the terms of the contract which govern the supply. In some circumstances, an obligation to pay may arise at a point in time preceding the time of supply, however, this will depend on the intention of the parties (*McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457* at 476). A supplier who has completed all that is required under the contract to demand payment of some or all of the contract price may issue a document notifying the recipient of an obligation to pay that part of the supply consideration. A document of this nature is an invoice for the purposes of the GST Act.

13 Luxor relies on the principles for the interpretation of written documents, including Deeds of Settlement, listed by Santow J in *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290 and in particular the following at [4] –

> *The language of a term is generally assigned* ***its natural and ordinary meaning****, read in the light of the contract as a whole, but where it is ambiguous surrounding circumstances may be taken into account in assigning the presumed meaning* (emphasis added)

14 Luxor submits that the natural and ordinary meaning of Clause 3 –

- requires a carpet supplier to provide a tax invoice to Luxor;
- requires that tax invoice be for the "installation of carpet';
- does not require Luxor to pay a "deposit" to a carpet supplier;
- does not require Luxor to pay for the carpet before it is ordered; and
- does not require Luxor to pay for the carpet before it is installed.

15 Furthermore, the expression "tax invoice" in Clause 3 as the meaning attributed by section 29 – 70(1) of *A New Tax System (Goods and Services Tax) 1999 (Cth)*, being a document provided by a supplier which states the item supplied.

16 Clause 4 of the Deed requires Moussi to order and install the carpet. However, the carpet has not yet been ordered, let alone supplied or installed. Therefore, Luxor says it does not yet have an obligation to make any payment under Clause 3.

17 A plain reading of clause 3 of the Deed does not impose any obligation on Luxor until it has been provided with a tax invoice. Clause 3 does not require Luxor to make any payment, for example a deposit, "preceding the time of supply." I consider that Luxor is not obliged to make payment under Clause 3 before the carpet is ordered and paid for, let alone installed. Luxor says that the tax invoice has been submitted by the supplier prematurely because Moussi cannot afford to pay the 30% deposit required. I accept that submission, but in any event, in the context of Clause 3, I find that that the carpet supplier is unable to submit a tax invoice until it has provided the goods, the subject of the invoice.

18 I therefore find that Luxor's obligation under Clause 3 of the Deed has not yet arisen.

The external canopies

19 Clause 8 of the Deed requires Luxor to repair the external canopies of the property at its cost within 30 days.

20 It is not clear from Clause 8 what repairs are necessary to the canopies. Moussi's Outline of Submissions of 23 March 2017 at paragraph 4 simply states that Luxor has "failed to complete the works to complete the works to the external canopy". Exhibited to the affidavit of Jessica Hudson is a Tax Invoice addressed to Luxor from Do-it-Right Plumbing Pty Ltd dated 1 February 2017, recording that the plumber was called out to investigate and repair various roof leaks which were located above front entrance/canopy area. The charge was $480.00. Exhibited to the affidavit of Stefano Del

Monaco is a quotation of Pulis Professional Plumbing dated 2 February 2017 for $3,960.00. The proposed works are described as –

> Remove section of roof sheets to access affected box gutter.
>
> Remove and discard of 8m of rusted box gutter above front patio.
>
> Supply and install new box gutter and re-seal
>
> Re-install roof sheets.
>
> Above reception there is several weeks that cannot be identified the best cause (sic) of action is to remove several roof sheets and flashings to inspect and test

21 The Pulis quotation does not use or refer to the word "canopies"; nor does it identify where leaks are located. There is no reference to leaks in the canopy. Clause 8 simply refers to repair of the external canopies. There is no reference to roof sheets, the box gutter or the need to inspect the roof. Moussi failed to provide any evidence of the canopy continuing to leak after 1 February 2017. I therefore do not accept that Luxor is not complied with its obligation under Clause 8.

The Air Conditioning Unit

22 Moussi says that it became aware of problems with the air conditioner on 31 August 2016, the day after the Deed was executed by the parties. By an email dated 13 November 2016, Moussi notified Luxor that the unit was in need of repair. Moussi has since incurred $8,593.00 in having the unit repaired and seeks reimbursement from Luxor on the basis that Luxor has a statutory obligation under section 52 of the *Retail Leases Act 2003* to repair capital items of which the air conditioning unit is one.

23 The Deed does not refer to the air conditioning unit and Moussi does not allege that there has been a breach of the Deed in respect to the unit. Therefore no obligation is imposed by the Deed on Luxor to repair the unit or reimburse Moussi for the expenses it has incurred in repairing the unit.

24 In any event, the quotation of F.K. Air Conditioning & Refrigeration Pty Ltd dated 30 August 2016 refers a "recent inspection" of the unit and that the "compressor has failed mechanically and was not pumping at all". I find that Moussi was aware that the unit was at least not functioning satisfactorily, when it executed the Deed on 30 August.

25 Clause 12 of the Deed states –

> **The parties release each other from** all claims made in the Proceeding and **any claim that but for this deed of settlement could have been made in the Proceeding.** (emphasis added)

26 It could be argued that a claim for the defective air conditioning unit could have been made by Moussi in the proceeding. If so, by virtue of Clause12, it has released Luxor from liability for such a claim. However, as I have found that the Deed does not impose any obligation on Luxor for the air conditioning unit, it is not necessary for this point to be decided.

27 I will order that Moussi's application for reinstatement be dismissed.

B Thomas
Member