

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP667/2015

### CATCHWORDS

*Retail Leases Act 2003* – recovery of outgoings from tenant - commission paid by the Landlord to its agent not outgoings – voluntary payment by Landlord for repairs to tenant's fixture without tenant's consent not recoverable

<b>APPLICANT</b>	Anchong Nominees Pty Ltd
<b>RESPONDENT</b>	Mr Khaled El Rafei
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	17 July 2015 and 3 August 2015
<b>DATE OF ORDER</b>	18 August 2015
<b>CITATION</b>	Anchong Nominees Pty Ltd v Rafei (Building and Property) [2015] VCAT 1313

### ORDER

1. Order on the Applicant's claim that the Respondent pay to the Applicant \$20,820.02.
2. **The Respondent's counterclaim is fixed for hearing at 10am on 4 November 2015 at 55 King Street, Melbourne with one day allocated.**
3. By 5 October 2015 the Respondent must provide a detailed statement setting out in numbered paragraphs all of the details of his claim, including all breaches by the Landlord that he alleges, details of any losses claimed to have been suffered, dates upon which the alleged leaks in the roof occurred, what the Landlord did or failed to do about each such leak and the damages that he claims.
4. The Respondent must serve upon the Applicant together with the statement referred to in paragraph 3 a copy of any account, repair invoice, photograph or other document that he intends to rely upon at the hearing in support of his counterclaim.

5. By 26 October 2015, the Applicant must file and serve upon the Respondent a document responding in detail to each of the allegations made.

## **SENIOR MEMBER R. WALKER**

### **APPEARANCES:**

For the Applicant                      Ms L. Chong in person  
For the Respondent                      Mr Khaled El Rafei in person

### **REASONS**

#### **Background**

- 1 The Applicant (“the Landlord”) is the owner of premises situated at 319-321 Sydney Road Coburg (“the Premises”).
- 2 By a lease dated 26 June 2011 the Landlord leased the Premises to Shimla Ventures Pty Ltd (“the Former Tenant”) for a period of 2 years from 11 April 2011.
- 3 By a further lease (“the Renewed Lease”) which is undated, the Landlord further leased the Premises to the Former Tenant for a further period of 3 years from 10 April 2013.
- 4 By a transfer of lease document (undated) entered into between the Landlord, the Former Tenant and the Respondent (“the Tenant”), the former Tenant transferred to the Tenant the term created by the Renewed lease as from 10 July 2013.
- 5 From 10 July 2013 until he returned the keys on 23 March 2015, the Tenant conducted a restaurant business in the Premises.
- 6 Although various amounts were paid by the Tenant throughout his occupancy of the Premises for rental and outgoings, the Landlord claims that there were arrears at the time that he left and, on 20 May 2015, the Landlord brought this proceeding seeking recovery of arrears which were said to be \$31,228.00.

#### **Hearing**

- 7 The matter came before me as a small claim on 17 July 2015 and, after hearing evidence I found the following facts:
  - (a) The total paid by the Tenant during his occupancy that was directly attributable to rent (including GST) was \$108,650.00.
  - (b) The total paid by the Tenant during his occupancy that was directly referable to outgoings was \$12,528.58.

- (c) In addition, the Tenant paid a further amount of \$12,440.00 on 16 December 2014.

Altogether, the Tenant has paid \$133,618.58.

- 8 At the first hearing, I calculated the rental for the period of the Tenant's occupation as being \$129,954.00 but I was unable to calculate the outgoings because no records of these were produced by the Landlord, apart from some secondary records that had been prepared by the agent from information obtained from a previous agent.
- 9 The proceeding was therefore adjourned until 3 August 2015 to enable the Landlord to provide evidence of the outstanding outgoings. Directions were also given for the filing of any counterclaim by the Tenant by 28 July 2015 and for him to serve upon the Landlord by 30 July 2015, copies of any documents intended to be relied upon in support of his counterclaim.

### **The counterclaim**

- 10 A counterclaim was filed on 17 July 2015 but it is bereft of any details. An amount of \$50,000.00 is claimed but the grounds for the claim are simply stated as follows:

“I was ripped off – we had a big leaking from the roof to the function room – affected the business. I have lost my business.

I have lost everything because the damage was effected my business (sic.)”

- 11 Despite the directions that had been given, no supporting documentation was served upon the Landlord by the Tenant and so when the matter came back before me for hearing on 3 August 2015 the Landlord objected to having the counterclaim heard at the same time. I upheld that objection and adjourned the hearing of the counterclaim to 4 November 2015 and gave directions concerning the preparation for that hearing.

### **The Landlord's claims for outgoings and damages**

- 12 I then proceeded to hear the evidence of the Landlord. The Landlord's witness, Miss Chong, had prepared a careful summary which she supported by receipts. I checked the calculations and found them generally to be correct.
- 13 I am satisfied as to the claims for Council rates, electricity, water and insurance.
- 14 There was a claim for agent's fees and for various items of maintenance. Since I was unable to reach a conclusion on these I informed the parties that I would consider the evidence and submissions they had made in regard to them and provide a short written decision setting out my conclusions and that is the purpose of these reasons.

## Agent's Fees

- 15 When I asked Miss Chong how she could claim that fees paid by the Landlord to its agent were recoverable as outgoings, she referred me to item 10 of the schedule to the lease which provides as follows:

“Building outgoings which the Tenant must pay or reimburse:

The Tenant’s proportion of building outgoings is –

- (a) in relation to building outgoings (excluding administration costs) that benefit all of the Premises in the building – the proportion that the lettable area of the Premises bears to the total lettable area of the building, which at present is 31%;
- (b) in relation to building outgoings (excluding administration costs) that benefit the Premises and other Premises but not all of the Premises in the building – the proportion that the lettable area of the Premises bears to the total lettable area of all Premises (including the Premises) that benefit from the outgoing;
- (c) in relation to administration costs– 100%; and
- (d) in relation to building outgoings that benefit only the Premises – 100%.

If the Act applies, building outgoings for the first accounting period will include the sum of \$2,706 for management fees. Of this sum, the Tenant’s proportion is 100%. In subsequent accounting periods, the amount payable for management fees will be calculated in accordance with s49(2), (3) and (6) (unless s49(2) does not apply by reason of s49(4).”

- 16 In condition 1.1 of the Lease, the term building outgoings is defined to include accountancy and audit fees and costs of whatever description, reasonably incurred by the Landlord in the administration, management or operation of the building and the land.
- 17 Commission paid by the Landlord to its agent seems to me to relate to the management of the tenancy, not to the administration, management or operation of the building or the land.
- 18 In s.3 of the *Retail Leases Act 2003*, the term “outgoings” is defined as follows:

““outgoings” means a landlord's outgoings on account of any of the following—

- (a) the expenses directly attributable to the operation, maintenance or repair of—
  - (i) the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or

(ii) in the case of retail premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;

(b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is—

(i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or

(ii) the supplier of a taxable supply, within the meaning of the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth, in respect of any such building or land;”

As will be apparent, commission paid by the Landlord to its letting agent does not fit within this definition.

19. Recovery of outgoings from the Tenant is regulated by Part 5 Division 4 of the Act, which includes the following:

“39 Recovery of outgoings from the Tenant

(1) The Tenant under a retail Premises lease is not liable to pay an amount to the Landlord in respect of outgoings except in accordance with provisions of the lease that specify—

(a) the outgoings that are to be regarded as recoverable; and

(b) in a manner consistent with the regulations, how the amount of those outgoings will be determined and how they will be apportioned to the Tenant; and

(c) how those outgoings or any part of them may be recovered by the Landlord from the Tenant.”

.....

“49 Limitation on recovery of management fees

(1) A provision of a retail Premises lease is void to the extent that it makes the Tenant liable to pay an amount for management fees unless—

(a) the management fees relate to the management of the building in which the retail Premises are located or, if the retail Premises are located in a retail shopping centre, that centre; and

.....”

20. Miss Chong acknowledged that the amounts sought for “agent’s fees” were the amounts charged to the Landlord by the Agent for collecting the rent. It seems to me that these are not management fees related to the management of the building in which the retail premises are located but rather, are fees charged by the Agent for collecting the rent, that is, for representing the Landlord in its dealings with the Tenant. By s.49(1), if the Lease properly construed, requires the

Tenant to pay these commissions to the Landlord, then the provision requiring him to do so is void and the amounts are not recoverable.

### **Additional claims**

21. The following further claims were made by the Landlord:

(a) Unblock grease traps \$297.00

I am satisfied that this is payable by the Tenant.

(b) Storm damage excess

This related to an insurance claim for water penetration into the building. The excess on the policy payable was \$250.00, of which 31% was claimed against the Tenant. This falls within the definition of building outgoings and since 31% is the appropriate percentage, the amount sought will be allowed. With GST it is \$85.25.

(c) Replace ceiling tiles.

This was said to relate to the water ingress and I think that it ought to have been included in the previous item.

(d) Replace kitchen hood duct work

The duct work and extracting fan were tenant's fixtures and were, according to the evidence led, in poor repair and in need of extensive work. There was a dispute as to responsibility but I prefer the evidence of Miss Chong to the effect that there was an agreement that the parties would share the cost equally. The amount claimed, which is \$2,619.37, being the Tenant's one half share, will therefore be allowed.

(e) Commercial kitchen sink removed by the Tenant

The Tenant acknowledged having removed the sink but said that it was a tenant's fixture. His basis for saying so was that he believed he had purchased it with the business from the vendor. However in the disclosure statement of the original lease a sink is listed as a landlord's fixture. I asked the Tenant whether there was any other sink in the Premises that might answer that description and he acknowledged that there was not. I am satisfied that this was a landlord's fixture and the amount sought by the Landlord of \$1,425.60 will be allowed.

(f) Remote control to the basement

It was acknowledged that this was not returned and the amount claimed of \$88.00 for its replacement will be allowed.

(g) Removal of rubbish and cleaning

Miss Chong said that the Landlord paid cash to a couple who, she said, spent two days cleaning the Premises after the Tenant

left. Photographs that she produced showed the Premises to be in a dirty and untidy state. Miss Chong said that she paid the two persons \$1,500.00 but had no receipt for that or any other sum. In the absence of a receipt or some expert evidence as to what a reasonable cost for cleaning the Premises would have been, I will allow \$750.00. Since no GST is said to have been paid by the Landlord to the persons who did the cleaning none will be added for this item.

(h) Replace kitchen hood fan

The Landlord paid \$3,359.35 to replace the exhaust fan in March 2015. It is not known whether this was before, at the time or after the Tenant left the Premises. It has not been demonstrated that the Tenant agreed to this expenditure and since it is a tenant's fixture the landlord is not entitled to recover the cost of repairing it.

22. Apart from these matters I accept that the calculations by Miss Chong are accurate which will result in an amount of \$24,484.60 for outgoings and other substantiated claims payable by the Tenant to the Landlord during the period of the tenancy. When that amount is added to the rent that fell due and the amounts that the Tenant has paid for rental and outgoings are deducted, the result is a balance of \$20,820.02 payable by the Tenant to the Landlord, calculated as follows:

Rental for the period of tenancy	\$129,954.00	
Outgoings and other claims	<u>\$ 24,484.60</u>	\$154,438.60
Paid by Tenant attributable to rent	\$108,650.00	
Paid by Tenant attributable to outgoings	\$ 12,528.58.	
Additional payment by Tenant	<u>\$ 12,440.00.</u>	<u>\$133,618.58</u>
Balance due from Tenant	.	<u>\$ 20,820.02</u>

**Order**

23. There will be an order that the Tenant pay to the Landlord \$20,820.02.
24. In making this order I have not taken into account any bond or security deposit that might be held by the landlord because no evidence was given about that. Any such claim can be taken up in the Tenant's counterclaim.

**SENIOR MEMBER R. WALKER**