

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1312/2017

CATCHWORDS

Injunction application. Sections 46 and 77 of the *Retail Leases Act 2003*. Injunction application dismissed.

APPLICANT	Australian Fearless Sports Pty Ltd
RESPONDENTS	Casey Shopping Centre Pty Ltd (ACN: 615 763 034)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	19 October 2017 and 25 October 2017
DATE OF ORDER	25 October 2017. Written reasons provided.
CITATION	Australian Fearless Sports Pty Ltd v Casey Shopping Centre Pty Ltd (Building and Property) [2017] VCAT 1808

ORDER

1. The applicant's injunction application is dismissed

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Ms R Nida of Counsel
For Respondent	Mr J Wilkinson of Counsel

REASONS

- 1 At the hearing of this matter on 25 October 2017, I ordered that the applicant's injunction application be dismissed and I provided oral reasons for the decision. The applicant has subsequently requested written reasons. I provide these reasons in response to that request and as confirmation of the reasons provided at the hearing.
- 2 At the hearing, the applicant was represented by Ms R Nida of counsel. Ms Nida is the mother of Mr H Fazal, director of the applicant, and Mr M Fazal, the manager of the business operated at the subject premises. Ms Nida's email address is also noted in the subject retail premises lease as the email address contact for the applicant. The respondent was represented by Mr Wilkinson of Counsel.

Background

- 3 By a lease entered around late March/early April 2017, the applicant leased premises, shop 108A at the Casey Central Shopping Centre, from the respondent landlord for a period of 2 years commencing 3 April 2017 ("**the lease**" and "**the premises**"). Under the lease, base rent was set at \$41,006 per annum, and additional turnover rent was payable subject to the level of turnover generated by the applicant's business, that business being the retail sale of sporting apparel and accessories. The first 2 months were rent-free.
- 4 After attending to certain fit out works at the premises, the applicant opened for business in July 2017.
- 5 On 12 September 2017, the respondent served on the applicant a notice of default setting out various alleged breaches of the lease by the applicant and requiring rectification of the breaches within 14 days ("**the default notice**"). The default notice, a copy of which is attached to these reasons, sets out the overdue rent and outgoings, totalling \$13,407.36. The default notice also identifies a further alleged breach of lease by the applicant, namely creating a nuisance and disruption to nearby leased premises.
- 6 I am satisfied, on the affidavit evidence filed by the respondent, that the default notice was sent to the applicant by email on 12 September 2017, that email address being, as noted above, the email address of Ms Nida. I am also satisfied that a further copy of the default notice was handed to Ms Nida and Mr M Fazal on 15 September 2017 at a meeting at the respondent's office at the Casey Shopping Centre.
- 7 On the evening of 12 October 2017, by which date the applicant had failed to pay any of the overdue rent and outgoings as specified in the default notice, the respondent re-entered the premises, boarded them up and affixed a notice of re-entry ("**the notice of re-entry**") to the boarding. A copy of the notice of re-entry is also attached to these reasons.
- 8 On 13 October 2007, the applicant filed at the tribunal an application form together with an affidavit of Mr M Fazal dated 13 October 2017. Although

the application form did not specify the orders or relief being sought, it is apparent from the affidavit that the applicant was seeking an injunction to allow it to re-take possession of the premises.

- 9 Following the applicant's payment of the applicable application fee, such payment having been made on 16 October 2017, the injunction application was listed for hearing on 19 October 2017, and the applicant and the respondent were notified of the hearing date.
- 10 At the hearing the respondent produced an affidavit of Ms K Suhr, sworn 19 October 2017, with a number of exhibits. I considered that the applicant should be given a fair opportunity to:
 - a properly examine the respondent's affidavit material; and
 - b consider whether it wished to bring an application for relief against forfeiture; and
 - c file and serve submissions of its own together with any further affidavit material upon which the applicant intended to rely.
- 11 I considered also that the respondent should be given an opportunity to file and serve any further response affidavit material and submissions.
- 12 Having regard to the above matters, orders were made at the hearing on 19 October 2017 to the effect that:
 - a the injunction application was adjourned part heard to 2:15 PM on 25 October 2017;
 - b by 12 noon on 23 October 2017, the applicant must file and serve any further affidavit material upon which it intended to rely together with any written submissions;
 - c if the applicant intended to apply an order for relief against forfeiture, the applicant must, by 12 noon on 23 October 2017, file and serve notice of such application; and
 - d the respondent must file and serve any further response material and submissions by 12 noon on 25 October 2017;
 - e deponents of affidavits must attend the further hearing on 25 October 2017 to be available for cross-examination.
- 13 The applicant did not file or serve any further affidavit material. The applicant did file written submissions, although they were filed late on 25 October 2017.
- 14 On 25 October 2017, the respondent filed and served a second affidavit of Ms K Suhr sworn 25 October 2017 together with exhibits, and written submissions.
- 15 The applicant gave no notice of any application for relief against forfeiture, and no such application was made during the course of the further hearing on 25 October 2017.

- 16 At the further hearing on 25 October 2017, the parties did not seek to cross examine the deponents of any affidavits.
- 17 The applicant submits there are a number of reasons justifying the granting of an injunction. I turn now to discuss each of those reasons and my relevant findings.

Unconscionable conduct

- 18 Section 77(1) of the *Retail Leases Act 2003* (“**the Act**”) provides that a landlord under a retail premises lease must not engage in conduct that is, in all the circumstances, unconscionable. Section 77(2) sets out numerous matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened section 77(1).
- 19 On 12 September 2017, Ms Nida arranged for a meeting with the respondent’s representatives on 15 September 2017. The purpose of the meeting was to discuss a customer complaint about the conduct of Mr Fazal. Mr Fazal and his mother also intended to discuss the tenancy generally, including the applicant’s difficulty in meeting rent and outgoing payments, and the applicant’s entitlement to a “fitout contribution” under the lease.
- 20 When Ms Nida and Mr Fazal attended the meeting on 15 September 2017, they were given a copy of the default notice. Ms Nida says that this was when the default notice was first served on the applicant. They say that the respondent was, otherwise, not interested in discussing the tenancy.
- 21 The applicant says that the respondent intentionally misled the applicant by agreeing to the meeting when all the respondent intended to do was to serve the default notice at the meeting. The applicant submits that this conduct of the respondent amounts to unconscionable conduct.
- 22 I do not accept the submission.
- 23 First, as noted above, I am satisfied on the affidavit material before me that the default notice was emailed to the applicant on 12 September 2017.
- 24 Second, even if the respondent did not wish to pursue discussions with the applicant at the planned meeting, other than to assert the defaults of the applicant as set out in the default notice, I do not accept that this amounts to unconscionable conduct.
- 25 There is no evidence that the respondent made any promise or representation as to rent reduction or an instalment payment plan for overdue rent and outgoings, or for any other accommodation to benefit the applicant or to restrict the respondent’s entitlements under the lease. The fact that the meeting did not proceed as the applicant hoped it would does not amount to unconscionable conduct on the part of the respondent.

- 26 “Unconscionability” is not akin to “fairness” or “justice” or “good conscience”. It is a concept that requires a high level of moral obloquy.¹ On the material before me, I do not accept that the respondent’s conduct has been unconscionable.

Attempts to pay/part pay overdue rent

- 27 There is no dispute that, after the service of the default notice, the applicant made several apparent attempts to pay or part pay overdue rent.
- 28 On 21 September 2017, the applicant purported to transfer \$5933.90 to the respondent’s bank account. The account number to which the transfer payment was directed was a non-existent account, and the purported transfer was reversed that day. The applicant says this was an honest mistake as it misconstrued the correct bank account number of the respondent as it appeared on the respondent’s invoices/statements.
- 29 On 26 September 2017 the applicant made a similar error in respect of a purported payment of \$3758.89 directed to the same non-existent bank account number.
- 30 On 27 September 2017, and then again on 5 October 2017, the respondent confirmed to the applicant, by email, the respondent’s correct bank account details. On 11 October 2017 the applicant purported to transfer payment of \$6223.81 to the respondent’s account. The transfer was unsuccessful. The purported payment was reversed by the bank. The applicant says that this was some sort of the error on the part of its bank. There is no evidence from the bank to support this.
- 31 It is not clear why the applicant raises these purported attempts to make a payment to the respondent. It might be understandable if they were raised to support an application for relief against forfeiture, however, as noted above, there is no application for relief against forfeiture.
- 32 In my view, what is significant is that the applicant, knowing that purported attempts to make payments for overdue rent were unsuccessful, failed to make any further payment to the respondent.

Fitout contribution

- 33 The lease provides that, subject to fulfilment of certain conditions, the respondent must pay to the applicant a fitout contribution of \$3700 plus GST. The conditions are numerous and include the undertaking of approved fit out works.
- 34 The applicant says it is entitled to the fitout contribution and that the respondent has refused to make the payment. The respondent says that numerous of the conditions for payment of the fit out contribution,

¹ see comments of Spigelman CJ in Attorney General (NSW) v World Best Holdings Ltd (2005) 63 NSW LR 557 AT 583.

including the condition that the applicant not be in breach of the lease, have not been met.

- 35 I need not analyse this issue in detail because I am satisfied that the applicant has failed to meet one of the express conditions for payment of the fitout contribution as set out in clause 8.4 of the lease. That condition is that the applicant must provide the respondent with a valid tax invoice for the fit out contribution. With the applicant being unable to produce a copy of any such invoice at the hearing before me, I accept the evidence of the respondent that no such tax invoice has been provided.
- 36 Accordingly, I find that the applicant has no present entitlement to the fit out contribution.

Outgoings and Section 46 of the Act

- 37 Section 46 of the Act provides:

Estimate of outgoings

- (1) A retail premises lease is taken to provide as set out in this section.
 - (2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.
 - (3) The tenant must be given the estimate of outgoings—
 - (a) before the lease is entered into; and
 - (b) in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that period.
 - (4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.
- 38 The applicant submits that the respondent failed to comply with this section.
- 39 I do not accept the submission.
- 40 Exhibited to the second affidavit of Ms Suhr is a “disclosure statement” which I accept, on the evidence of Ms Suhr as set out in her affidavit, was provided by the respondent to the applicant on 27 June 2017. The disclosure statement sets out detailed estimates of outgoings for the 12 month period commencing 1 July 2016.
- 41 Also exhibited to Ms Suhr’s second affidavit is a letter from the respondent to the applicant dated 31 May 2017 which has attached to it the respondent’s estimate of outgoings for the shopping centre for the year ending 30 June 2018. I accept, on the evidence of Ms Suhr as set out in her affidavit, that this correspondence was sent to the applicant on 31 May 2017.

- 42 In my view, by the information provided to the applicant in the lease, the disclosure statement and the above-mentioned correspondence to the applicant dated 31 May 2017, the respondent has met its obligations under section 46 of the Act.
- 43 I accept that by email from Ms Nida, on behalf of the applicant, to the respondent dated 26 September 2017, the applicant sought clarification in respect of several outgoing charges. The respondent responded that same day, 26 September 2017, with an email advising that the outgoing were payable in accordance with the terms of the lease.
- 44 In my view, the applicant's enquiry in respect of several outgoing, and the brief response of the respondent, does not raise a serious question to be tried as to the respondent's entitlement to re-enter the premises in reliance on the applicant's failure to remedy breaches set out in the default notice.
- 45 In any event, to the extent it might be said that the applicant's enquiry as to some of the outgoing raises a serious question to be tried, I am not satisfied that the balance of convenience weighs in favour of granting the injunction sought.
- 46 As noted above, it is significant that the applicant attempted more than once to make payment to the respondent in respect of overdue rent. As discussed above, the attempts were unsuccessful. In my view, the applicant's knowledge of the unsuccessful payment attempts, coupled with its failure to subsequently make any payment to the respondent, leads to the conclusion that the applicant knowingly remained in breach of its fundamental obligation under the lease to pay rent.

Other alleged breaches

- 47 The respondent's affidavit attests to a number of instances where the applicant's representative has caused a disturbance at or near the premises in the shopping centre. The applicant has filed no response affidavit material in respect of these allegations. I make no determination as to whether the alleged behaviour constitutes a breach of the lease by the applicant, or whether such alleged breach was remedied by a cessation of such behaviour.
- 48 It is not necessary that all defaults specified in a notice of default are able to be substantiated.²In my view, the applicant's breach of its fundamental obligation to pay rent is sufficient reason to refuse the injunction.

Conclusion

- 49 For the reasons set out above, the applicant's injunction application is dismissed.

SENIOR MEMBER M. FARRELLY

² See *Gair v Smith* [1964] VR 814.

Notice under section 146 of the *Property Law Act 1958 (Vic)*

TO: Australian Fearless Sports Pty Ltd
ACN 619 756 697
10 Girvan Circuit, Endeavour Hills, Victoria 3802 (Tenant)

AND TO: Zable Hamad Fazal
10 Girvan Circuit, Endeavour Hills, Victoria 3802 (Guarantor)

1 Lease

- (a) By a lease between Casey Shopping Centre Pty Ltd ACN 615 763 034 as trustee for the Casey Shopping Centre Trust ABN 28 219 899 771 (Landlord), the Tenant and the Guarantor (Lease), the Landlord leased to the Tenant the premises known as Shop 108A, Casey Central Shopping Centre, 400 Cranbourne Road, Narre Warren South, Victoria (Premises) for a term of 2 years commencing on 3 April 2017 and expiring on 2 April 2019.
- (b) The Lease of the Premises to the Tenant was granted in consideration of payments being made by the Tenant and subject to the conditions, covenants and agreements expressly or impliedly agreed in the Lease.

2 Terms

The Lease contains the following terms (among others):

- (a) the Tenant must pay the rent, outgoings (as defined in the Lease) and the marketing levy (as defined in the Lease) by equal monthly instalments in advance, or on a proportional basis if the lease starts on a day other than the first day of the month, without set-off, counterclaim, withholding or deduction;
- (b) the Tenant must pay all accounts, invoices, assessments and charges relating to the supply and consumption of utilities (as defined in the Lease) and other building services (as defined in the Lease), including during the rent free period (as defined in the Lease);
- (c) the Tenant must comply with all legal requirements relating to the use and occupation of the Premises and Casey Central Shopping Centre;
- (d) the Tenant must, at its cost, use the Landlord's cleaning contractor to clean the Premises;
- (e) the Tenant must comply with all legal requirements and directions given by the Landlord regarding fire safety and other emergency systems and procedures;

- (f) the Landlord may enter the Premises, on giving reasonable notice to the Tenant, to inspect the condition of the Premises and to comply with any law or exercise any of its rights under the Lease;
- (g) the Tenant indemnifies the Landlord in connection with any breach of the Lease by the Tenant;
- (h) the Tenant must pay any GST amount payable at the same time and in the same manner as the consideration in respect of which the GST amount is calculated; and
- (i) the Tenant must not use the Premises in a way that does or could create a nuisance or disrupt the peaceful use and enjoyment of any adjacent or neighbouring premises, whether within or outside of Casey Central Shopping Centre;
- (j) the Tenant must use the common areas of Casey Central Shopping Centre in a responsible manner and only for their intended purpose;
- (k) under clause 19, the Guarantor guaranteed the Tenant's performance under the Lease, including but not limited to the payment of rent.

3 Breach

- (a) The Tenant has breached the Lease as follows (**Breaches**):
 - (i) as the Tenant has failed, refused or neglected to pay the following rent, outgoings and marketing levy contributions as follows:

Date	Description	Amount (inc GST)
3 August 2017	Base rent: 3 August 2017 – 31 August 2017	\$3,583.81
3 August 2017	Air-conditioning charge: 3 August 2017 – 31 August 2017	\$86.04
3 August 2017	General charge: 3 August 2017 – 31 August 2017	\$1,387.93
3 August 2017	Council rates: 3 August 2017 – 31 August 2017	\$311.67
3 August 2017	Water rates: 3 August 2017 – 31 August 2017	\$69.71
3 August 2017	Marketing levy: 3 August 2017 – 31 August 2017	\$484.26
1 September 2017	Electricity charges: July 2017	\$157.89
1 September 2017	Base rent for September 2017	\$3,758.89

Date	Description	Amount (inc GST)
1 September 2017	Air-conditioning charges for September 2017	\$90.24
1 September 2017	General charges for September 2017	\$1,455.73
1 September 2017	Council rates for September 2017	\$326.90
1 September 2017	Water rates for September 2017	\$73.12
1 September 2017	Marketing levy for September 2017	\$507.93
6 September 2017	Cleaning charges	\$150.74
6 September 2017	Electricity rectification works	\$962.50
TOTAL		\$13,407.36

- (i) on 4 August 2017, the Tenant created a nuisance and disrupted the peaceful use and enjoyment of any adjacent or neighbouring premises after getting into an altercation with a tradesperson.
- (ii) on 4 August 2017, the Tenant has assaulted a security guard of the Centre;

(b) Clause 13 of the Lease provides that if the Tenant:

- (i) fails to pay Rent on the due date, whether or not any demand has been made for payment; or
- (ii) the Tenant fails to remedy a breach of the lease within 14 days of receiving a breach notice (if it is capable of remedy) and, fails to pay reasonable compensation to the satisfaction of the Landlord for the breach;

the Landlord may terminate the Lease by giving notice, or re-enter and take possession of the Premises upon which the Lease will automatically terminate.

4 Notice

- (a) **TAKE NOTICE** that the Landlord requires the Tenant within 14 days of service of this notice of default:
 - (i) to remedy the Breaches of the Lease as set out in this notice of default so far as such breaches may be capable of remedy; and

- (ii) to make reasonable compensation in money to the Landlord for the Breaches of the Lease as set out in this notice of default.
- (b) **AND FURTHER TAKE NOTICE** that, unless the Tenant remedies the Breaches within 14 days of service of this notice of default, the Landlord may in accordance with the Lease and without any further demand or notice:
- (i) re-enter into and take possession of the Premises or any part of the Premises in the name of the whole (by force if necessary);
 - (ii) eject the Tenant and all other persons from the Premises; and
- when such action is taken by the Landlord, the Lease shall be absolutely determined.

Dated: 12 September 2017



Hall & Wilcox
Solicitors and agents for and on behalf of the Landlord

NOTICE OF RE-ENTRY

TO: Australian Fearless Sports Pty Ltd
ACN 619 756 697
10 Girvan Circuit, Endeavour Hills, Victoria 3802 (Tenant)

1 By a lease between Casey Shopping Centre Pty Ltd ACN 615 763 034 as trustee for the Casey Shopping Centre Trust ABN 28 219 899 771 (Landlord), the Tenant and the Guarantor (Lease), the Landlord leased to the Tenant the premises known as Shop 108A, Casey Central Shopping Centre, 400 Cranbourne Road, Narre Warren South, Victoria (Premises) for a term of 2 years commencing on 3 April 2017 and expiring on 2 April 2019.

2 The Tenant's obligations under the Lease include (among others):

- (a) the Tenant must pay the rent, outgoings (as defined in the Lease) and the marketing levy (as defined in the Lease) by equal monthly instalments in advance, or on a proportional basis if the lease starts on a day other than the first day of the month, without set-off, counterclaim, withholding or deduction;
- (b) the Tenant must pay all accounts, invoices, assessments and charges relating to the supply and consumption of utilities (as defined in the Lease) and other building services (as defined in the Lease), including during the rent free period (as defined in the Lease);
- (c) the Tenant must comply with all legal requirements relating to the use and occupation of the Premises and Casey Central Shopping Centre;
- (d) the Tenant must, at its cost, use the Landlord's cleaning contractor to clean the Premises;
- (e) the Tenant must comply with all legal requirements and directions given by the Landlord regarding fire safety and other emergency systems and procedures;
- (f) the Landlord may enter the Premises, on giving reasonable notice to the Tenant, to inspect the condition of the Premises and to comply with any law or exercise any of its rights under the Lease;
- (g) the Tenant indemnifies the Landlord in connection with any breach of the Lease by the Tenant;
- (h) the Tenant must pay any GST amount payable at the same time and in the same manner as the consideration in respect of which the GST amount is calculated; and
- (i) the Tenant must not use the Premises in a way that does or could create a nuisance or disrupt the peaceful use and enjoyment of any adjacent or neighbouring premises, whether within or outside of Casey Central Shopping Centre;
- (j) the Tenant must use the common areas of Casey Central Shopping Centre in a responsible manner and only for their intended purpose; and
- (k) under clause 19, the Guarantor guaranteed the Tenant's performance under the Lease, including but not limited to the payment of rent.

3 The Tenant has breached the Lease as follows (Breaches):

- (a) as the Tenant has failed, refused or neglected to pay the following rent, outgoings and marketing levy contributions as follows:

Date	Description	Amount (inc GST)
3 August 2017	Base rent: 3 August 2017 – 31 August 2017	\$3,583.81
3 August 2017	Air-conditioning charge: 3 August 2017 – 31 August 2017	\$86.04
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1 September 2017	Marketing levy for September 2017	\$507.93
6 September 2017	Cleaning charges	\$150.74
6 September 2017	Electricity rectification works	\$962.50
TOTAL		\$13,407.36

- (b) on 4 August 2017, the Tenant created a nuisance and disrupted the peaceful use and enjoyment of any adjacent or neighbouring premises after getting into an altercation with a tradesperson.

(c) on 4 August 2017, the Tenant has assaulted a security guard of the Centre.

4 Clause 13 of the Lease provides that if the Tenant:

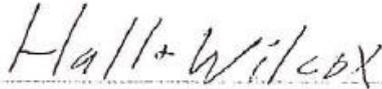
- (a) fails to pay Rent on the due date, whether or not any demand has been made for payment; or
- (b) the Tenant fails to remedy a breach of the lease within 14 days of receiving a breach notice (if it is capable of remedy) and, fails to pay reasonable compensation to the satisfaction of the Landlord for the breach,

the Landlord may terminate the Lease by giving notice, or re-enter and take possession of the Premises upon which the Lease will automatically terminate.

Take notice that

- 5 Pursuant to its powers under the Lease, the Landlord **hereby re-enters** and takes possession of the Premises and thereby terminates the Lease.
- 6 The Landlord requires the Tenant to vacate the Premises and deliver up possession immediately.

Dated: 12 October 2017



Hall & Wilcox
Solicitors and agents for and on behalf of the Landlord