

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1066/2018

**CATCHWORDS**

Retail lease, determination of preliminary questions, whether premises abandoned, whether re-entry lawful, whether premises unsafe, s57 Retail Leases Act 2003 (Vic)

<b>APPLICANT</b>	Chantelle Enterprises Aust Pty Ltd (ACN: 612 587 210)
<b>FIRST RESPONDENT</b>	Denise Julie Sangster-Greenwood
<b>SECOND RESPONDENT</b>	Rory Sangster
<b>SECOND RESPONDENT TO COUNTERCLAIM</b>	Chantelle Kostovski
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member L Forde
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 May 2019
<b>DATE OF ORDER</b>	30 May 2019
<b>DATE OF REASONS</b>	2 July 2019
<b>CITATION</b>	Chantelle Enterprises Aust Pty Ltd v Sangster-Greenwood (Building and Property) [2019] VCAT 961

**ORDER**

1. In response to the preliminary questions, for reasons that will be provided separately in writing to the parties, the answers are as follows:

**Question 1** – Does the applicant now hold a lease interest in the demised premises entitling it to re-occupy the demised premises?

**Answer** – No.

**Question 2** – Has the applicant abandoned the goods and installations identified in paragraph 27 of the affidavit of Denise Julie Sangster-Greenwood dated 26 March 2019?

**Answer** - Yes.

L. Forde  
**Senior Member**

**APPEARANCES:**

For Applicant	Ms C Kostovski - Director
For Respondents	Mr B Harding of counsel

## REASONS

### PRELIMINARY QUESTIONS

1 On 5 April 2019 the Tribunal made orders listing the proceeding for a preliminary hearing on 30 May 2019 to consider two preliminary questions.

2 The orders made on that day included the following -

In response to the preliminary questions, for reasons that will be provided separately in writing to the parties, the answers are as follows:

**Question 1** – Does the applicant now hold a lease interest in the demised premises entitling it to re-occupy the demised premises?

**Answer** - No

**Question 2** – Has the applicant abandoned the goods and installations identified in paragraph 27 of the affidavit of Denise Julie Sangster-Greenwood dated 26 March 2019?

**Answer** - Yes

3 I now provide my reasons for the answers to the preliminary questions.

### BACKGROUND

4 On 29 September 2014, the respondents (**Landlords**) became the registered proprietors of the land situated at 64-68 Monbulk Road, Belgrave in the State of Victoria more particularly described in Certificate of Title volume 09480 folio 530 (**the premises**). At the time, the premises were leased to The Sangreen Group No 2 Pty Ltd (**Sangreen**).

5 On 27 May 2016, the lease of the premises was transferred from Sangreen to the applicant (**tenant**). At the same time the tenant purchased the café business operating from the premises.

6 The landlords claim that the tenant abandoned the premises or surrendered the lease. The tenant claims that the premises had become dilapidated by the end of 2017 and unfit for use. As the landlords refused to repair the premises, the tenant was forced to cease trading. The tenant claims the premises were unsafe and the landlords unlawfully terminated the lease on 5 February 2018.

### EVIDENCE

7 The landlords relied upon the affidavits of Denise Julie Sangster-Greenwood sworn 26 March 2019 and Rebekah Whittaker sworn 10 May 2019. Ms Sangster-Greenwood is one of the landlords. Ms Whittaker is a director of O'Brien Real Estate Tecoma, the agency which managed the premises for the landlords.

8 The tenant did not file any affidavit material notwithstanding the Tribunal orders of 5 April 2019 requiring it to do so. During the hearing, at my

suggestion in the interest of justice, Ms Chantelle Kostovski gave oral evidence.

- 9 The landlords' evidence can be summarised as follows: -
- i On 19 November 2017, the tenant vacated the premises without notice to the landlords or the managing agent;
  - ii On or about 1 December 2017, the tenant failed to pay rent for December in the sum of \$4,045.56. That amount remains outstanding;
  - iii On or about 2 December 2017, the landlords issued the tenant with a notice of default under section 146 of the Property Law Act 1958 (Vic) and the lease demanding that it remedy the default within 14 days or the lease may be forfeited;
  - iv On 7 December 2017, the Yarra Ranges Council issued a Minor Works Building Order which required the landlords to undertake certain re-stumping works at the premises. The covering letter to the order read in part *"The order has been issued because of the potential danger to safety of people who occupy or use the building due to the dilapidated condition of the building. The building order basically requires you to obtain a building permit to carry out make safe work."*
  - v The Minor Works Building Order included the following statements:

*"3. This order is being made without first serving a building notice because I am of the opinion that the work required to be carried out under this order is of a minor nature.*

**4. REASON FOR THE ORDER**

*As a result of the inspection, I am of the opinion that the building is a danger to the safety of persons that may attend the property because of the dilapidated condition of the building."*
  - vi By email of 12 December 2017, Mr Slagter advised Ms Sangster-Greenwood that "As discussed, the [Minor Works Building] order did not prohibit occupation or go to the standard of habitation. Functionality or suitability for a business to continue is not a consideration in issue of a notice or order."
  - vii By email sent on 16 January 2018, the landlords' solicitors informed the tenant's solicitors that the re-stumping works at the premises would be completed by 19 January 2018 and it could retake possession on 20 January 2018;
  - viii On or about 19 January 2018, the re-stumping works were completed;
  - ix On 22 January 2018, a Certificate of Final Inspection of the re-stumping works was issued by the BSGM Consulting Building Surveyors;
  - x On 29 January 2018 and 1 February 2018, emails were sent to the tenant's solicitors enquiring why the tenant had not retaken possession

of and commenced its business operations at the premises. The email of 1 February foreshadowed the landlords retaking possession if the tenant did not resume trading. There was no response by the tenant;

- xi On 5 February 2018, the landlords re-entered the premises thereby accepting the tenant's surrender and/or abandonment of the lease. The landlords informed the tenant that they had re-taken possession by letter emailed to the tenant's solicitors on 6 February 2018.
- xii On 23 February 2018, Darren Bailey, Executive Officer Development Compliance and Prosecution at the Yarra Ranges Council advised the landlords as follows

*I've read the attached Minor Works Building Order issued by Council's Deputy Municipal Building Surveyor Laurie Slater on 7 December 2017 and subsequently cancelled on 21 February 2018*

*I confirm that the attached Minor Works Building Order does not and did not prohibit the occupation of the subject building, during the time the order was in place;*

- xiii The tenant left goods and installations in the premises including perishables when it vacated the premises in November 2017;
- xiv Since 5 February 2019, the tenant has collected a cool room from outside the premises but nothing else. The tenant's solicitors contacted the landlords' solicitors in June 2018 requesting access to financial records left at the premises. The landlords boxed up the records and they were made available for collection by the tenant's solicitors;
- xv By email dated 8 June 2018 the tenant's then solicitors Malkin Lawyers wrote to the landlord's solicitors regarding collection of the records and stating, "*Our client is minded to maintain the Lease for the purpose of the sale of the business, but our client requires the documents for the purpose of the s52 for the sale of the business.*"
- xvi By letter dated 16 October 2018 the landlords' solicitors gave the tenant<sup>1</sup> until close of business on 23 October 2018 to collect items from the premises. The letter stated that if the goods were not collected they would be treated as abandoned. The goods were not collected.

10 Ms Kostovski's evidence can be summarised as follows:

- i She is a director of the tenant and she ran the café business;
- ii When she took the assignment of lease in May 2016 there were many structural defects in the café area of the premises;

---

<sup>1</sup> The letter was sent to the tenant's solicitors.

- iii She obtained an investigation report from Houspect Building Inspections dated 28 September 2017 which identified defects in the premises (**Houspect report**);
- iv The Houspect report identified problems including that “the flooring is loose, sloping and bouncing in the café area” and “the garden retaining wall is rotten and the embankment vulnerable to collapse;
- v The Houspect report included the following “Inspector Comments”: -
  - 18 timber stumps under café area are rotten through;
  - areas of the floor are dangerous, and they could collapse;
  - walls are deforming and could also collapse; and
  - It is recommended that the café cease trading immediately before an accident occurs.
- vi She was concerned about her liability and contacted an insurance provider who confirmed that if a member of the public or staff were injured because of known defects the tenant would not have cover;
- vii She tried to get the landlords to take action, but they refused;
- viii By letter dated 2 November 2017, her then solicitors Malkin Lawyers wrote to the landlords expressing the tenant’s concerns and enclosing the Houspect report. It required the landlords to rectify the defects identified by Houspect within 14 days;
- ix On 28 November 2017, she emailed O’Brien Real Estate advising that due to safety issues she had no choice but to close the business and seeking a stay of rent until the premises are safe. She stated that she intended to maintain possession of the property;
- x In November 2017, she asked the Yarra Ranges Council to inspect the property;
- xi The Works order was issued by the Council with the statement “*I am of the opinion that the building is a danger to the safety of persons that may attend the property because of the dilapidated condition of the building;*”
- xii The landlords undertook some repairs and insisted the building was safe;
- xiii She was refused access to the premises and could not make an independent assessment of the premises to prove it was safe;
- xiv She always wanted to continue with the lease;
- xv She was aware that the landlords were removing the tenant’s goods including fittings in the cafe, paintings, equipment, cool room and financial records;
- xvi She denies the tenant abandoned the premises;

- xvii Her lawyers Malkin Lawyers emailed the landlords' lawyers on 9 April 2018 advising that the tenant did not abandon the premises but was forced to cease trading by reason of the premises being untenable.

## **ANALYSIS**

### Question 1

- 11 The tenant will not hold a lease if the landlords' re-entry on 5 February 2019 was lawful. The re-entry will be lawful if the tenant had surrendered or abandoned its lease or if the tenant failed to remedy a default after being served with a default notice.
- 12 On or about 2 December 2017, the landlords issued the tenant with a notice of default under section 146 of the Property Law Act 1958. The default was the non-payment of the December rent.
- 13 It is not in dispute that the notice was issued or that the December rent was not paid. The tenant acknowledged that there was no proof of payment.
- 14 A tenant is not required to pay rent if the premises cannot be used.<sup>2</sup>
- 15 Accordingly, if the premises could not be used in December 2017, the December rent was not payable.
- 16 The tenant says the premises were unsafe and could not be occupied.
- 17 I must consider the evidence before me about the state of the premises and whether the premises could be used in December 2017.
- 18 The tenant relies upon the Houspect report dated 28 September 2017 as proof that the premises could not be used in December 2017. The author of the report was Paul Dee who is identified in the report as an Inspector.
- 19 The landlords dispute that the premises could not be occupied or used. The landlords rely upon the Minor Works Building Order issued by the Yarra Ranges Council's Deputy Municipal Building Surveyor, Laurie Slater on 7 December 2017 (**Works order**).
- 20 The Works order was issued following an inspection of the property on 29 November 2017. The order identifies that there is a present danger to the safety of person's entering the property.
- 21 There was no evidence before the Tribunal about how the works order regime operates or any explanation about the difference between a minor works notice and a major works notice.
- 22 I am satisfied based upon the contents of the Works order and Houspect report that there were safety concerns about the premises in December 2017. The Housepect report raised more issues than the Works order. No

---

<sup>2</sup> S57 Retail Leases Act 2003 (Vic)

evidence was provided by the tenant about the author of the Houspect report or his qualifications. The author of the Minor Works notice was a building surveyor.

- 23 The works required by the Works order were carried out in January 2018 and completed by 19 January 2018. Until those works were completed the tenant was not required to pay rent.<sup>3</sup> Once the works were completed, the tenant was invited by the landlords to recommence its business operations.<sup>4</sup>
- 24 The tenant did not recommence its business operations.
- 25 The landlords could not lawfully have re-entered based upon the tenant's non-compliance with the December 2017 s146 Notice because the tenant was under no obligation to pay rent in December by reason of the premises not being safe.
- 26 The next issue is whether the tenant abandoned the premises.
- 27 I find that on 5 February 2018 the landlords accepted the tenant's surrender and /or abandonment of the lease by retaking possession of the premises.
- 28 I find that the tenant abandoned the premises for the following reasons: -
  - i The tenant did not recommence operation of the café despite being invited to do so, after the minor works had been completed in January 2018 and a certificate of compliance issued on 22 January 2018;
  - ii The issues identified in the Works order as being of concern to the safety of persons coming onto the premises were addressed.
  - iii The landlords' solicitors wrote to the tenant's solicitors by email on 29 January and 1 February 2018 enquiring why the tenant had not retaken possession of and commenced its business operations at the premises. The email of 1 February foreshadowed the landlords retaking possession if the tenant did not resume trading;
  - iv The tenant did not respond to the landlords' emails and did not resume trading;
  - v The tenant has provided no valid reason satisfactory to the Tribunal for not re-entering possession after the works were completed in January 2018;
  - vi The tenant's action of not resuming operating the cafe is consistent with the tenant having abandoned or surrendered its lease.
- 29 The leaving of property at the premises might be seen to indicate that a tenant has not abandoned premises. The tenant's action must be viewed objectively.<sup>5</sup> In the circumstances of this case, that indication does not apply. The tenant should have reoccupied the premises in January 2018. It

---

<sup>3</sup> *ibid*

<sup>4</sup> By email sent on 16 January 2018 from the landlords' solicitors to the tenant's solicitors.

<sup>5</sup> See *Parsons v Payne* {1945} VLR 34



did not do so and did not respond to the landlords' request that it explain its position.

- 30 A lease comes to an end by surrender which can be express or implied. Implied surrender is when one party to the lease does something inconsistent with the continued existence of the lease. The tenant walked away from the lease in November 2017 and ceased engaging with the landlord.
- 31 The tenant's actions since 5 February 2018 are inconsistent with a tenant claiming to have a lease. The tenant's application to the Tribunal was filed on 21 June 2018. The application was prepared by the tenant's solicitor. The original application did not include a claim for possession of the premises.
- 32 At no time did the tenant seek relief against forfeiture of the lease or any injunctive relief to protect any right to possession. The tenant's inaction is consistent with the actions of a tenant who has abandoned its lease.
- 33 The landlords were entitled to re-enter possession on 5 February 2018 having accepted the tenant's surrender of the lease.
- 34 For the reasons stated in answer to Question 1, I found that the tenant does not hold a lease interest in the premises entitling it to re-occupy the demised premises.

## Question 2

- 35 The tenant did not dispute that it vacated the premises on 19 November 2017.
- 36 For the reasons stated above, the tenant was obligated under the lease to occupy the premises once the minor works were completed.
- 37 The uncontradicted evidence is that when the tenant left the premises on 19 November 2019, it left perishable goods in the premises as well as the items identified in paragraph 27 of the affidavit of Denise Julie Sangster-Greenwood dated 26 March 2019.
- 38 Leaving perishable items in the premises is consistent with the actions of a tenant who has abandoned its property in the premises.
- 39 The first contact the tenant had with the landlords seeking access to the premises was, based on the evidence presented to me, in about June 2018 when the tenant requested access to the premises to obtain financial records. This lack of contact by the tenant is consistent with the actions of a tenant having abandoned its goods after re-entry by the landlord.
- 40 Clause 5.1 of the lease provides that, unless the landlords and tenant agree otherwise, all items of the tenant's installations and property left at the end of the lease will be considered abandoned.
- 41 The lease ended on 5 February 2018.

- 42 The landlords gave clear notice to the tenant by its solicitor's emails of 29 January 2018 and 1 February 2018 to the tenant's solicitors that the tenants refusal to recommence trading was not acceptable and questioning whether the tenant had abandoned the lease.
- 43 The tenant did not respond to these emails.
- 44 The tenant took no action following the landlords' taking of possession to re-enter the premises or otherwise enforce its lease. This lack of action during a period when the tenant was legally represented is consistent with a tenant having abandoned its lease and its property in the premises.
- 45 There is no evidence that the tenant visited the premises to check on its property. The tenant voluntarily left the premises in November 2017. The tenant did not reoccupy the premises when invited to do so after repair works were carries out. The tenant has provided no valid reason for not re-entering possession after the works were completed in January 2018.
- 46 One of the letters exhibited to the landlords' affidavit material is a letter from the landlords' solicitor to Malkin Lawyers dated 16 October 2018. The letter references a directions hearing in these proceedings and states "At the directions hearing your clients<sup>6</sup> expressed their desire to collect items they have left" at the premises. We would submit that, as the relevant lease of Real Estate ("the Lease") is at an end and as your clients vacated the premises almost one year ago, they have abandoned the items in question pursuant to clause 5.1.3 of the Lease." Notwithstanding the abandonment the landlords invited the tenant to collect items by 23 October 2018. The goods were not collected by the tenant. The failure to collect the goods is an action consistent with the tenant having abandoned its property.
- 47 For the reasons stated in answer to Question 2, I found that the tenant abandoned its property in the premises.

L. Forde  
**Senior Member**

---

<sup>6</sup> Clients being the tenat and its director Ms Kostovski