VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP1399/2015

CATCHWORDS

Commercial lease; lease conditional on town planning permit; whether tenants used best endeavours; whether the requirement of best endeavours required tenants to take steps with potentially adverse commercial consequences for the tenants.

FIRST APPLICANT	Mr Gerard Anthony Conlan
SECOND APPLICANT	Mr Mark Francis Dohrmann
THIRD APPLICANT	Mrs Elizabeth Majella Dohrmann
FIRST RESPONDENT	Mr Mark Dundon
SECOND RESPONDENT	Ms Bridget Amor
WHERE HELD	Melbourne
BEFORE	R Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	31 March 2016
DATE OF ORDER AND REASONS	10 June 2016
CITATION	Conlan v Dundon (Building and Property) [2016] VCAT 972

ORDERS

1. The applicants' claim is dismissed.

2. On the respondents' counter-claim the applicants must pay $1,706.41 to the respondents.

3. Liberty is reserved to the parties generally and on the question of costs.

R Buchanan
Member

APPEARANCES:

For Applicants	Mr T Snowden of counsel
For Respondents	Mr R Watters of counsel

REASONS

Introduction

1 This case is about a commercial lease. The landlords claim that the tenants wrongfully terminated the lease. The tenants say that they were entitled to terminate, because they could not get necessary planning approval.

Facts

2 The tenants run a coffee roasting and café business, through a company called Seven Seeds Pty Ltd. At one of their sites, in Carlton, they carry out their coffee roasting business and also run a café. They had outgrown their Carlton site and in 2014 were looking to move to larger premises. To that end, they conditionally agreed to lease the landlords' premises, which are in Alphington.

3 On 10 November 2014, the tenants wrote to the landlords' agent saying:

> Therefore we cannot sign an unconditional lease, it would be subject to planning approval, this is why we suggested paying rent initially, so the landlords do not have to be out of pocket. This is really the only sticking point.

4 On 14 November 2014 the landlords' agent wrote to one of the landlords, Gerard Conlan (who is a solicitor and a principal of the firm which acted for the landlords) asking him to prepare a lease for the premises, between the landlords and tenants. The agent's letter of instruction contained a proposed wording for a special condition:

> The Lessor and Lessee acknowledge that the lease is subject to Statutory Planning approval.

5 The draft lease was prepared by the landlords' solicitors and on 18 November 2014 they sent the lease to the tenants. Under the lease the tenants could use the premises for the purposes of a café, coffee roasting and associated administration.

6 The lease contained a number of "additional provisions", including the following:

> 4. The Lease is subject to statutory planning approval and if such approval is not obtained by 1 December 2015 either party may terminate the Lease by notice to the other.

7 The parties executed the lease on 19 December 2014, with additional provision 4 slightly altered; the date was changed from 1 December 2015 to 1 January 2016, but nothing turns on that.

8 The tenants paid a security deposit of $16,500 and took possession of the premises, but took no step to occupy them.

9 On 1 April 2015 the tenants wrote to the landlords' solicitors saying, in effect, that the council, the City of Yarra, had given them the thumbs down:

> Unfortunately City of Yarra have declined our proposed use of the premises. Commercial One use doesn't allow the production of food/beverages which council have defined coffee roasting as.

10 On the same day the landlords' solicitors wrote back to the tenants asking them to clarify:

> … whether the landlords should take your email as notice pursuant to additional provision 4 of the lease … ending the lease.

The solicitors' email went on to deal with the mechanics of things like key return and reimbursement of the tenants' security deposit.

11 On 9 April 2015 the tenants responded to the solicitors, answering their question about whether notice had been given, as follows:

> Unfortunately City of Yarra has deemed our business inappropriate (although we disagree) for this site. The premises has (sic) been untouched by us, can you please provide the managing agent for a key return as we were advised of that relationship ceasing at the time of our lease being signed. April rental can be deducted from our security deposit please. Bank details for remainder below.

12 By 16 April 2015, however, the attitude of the landlords had become less accommodating and their solicitors wrote to the tenants saying, among other things:

> Upon review of the relevant additional provision, it is noted that the tenants' right to terminate the lease does not arise until 1 January 2016. Therefore, the lease will remain on foot and the tenants' obligations will continue.

13 The tenants' solicitors then entered the picture and the next few weeks saw some back and forth between the solicitors until, on 15 May 2015, the tenants returned the keys.

14 The tenants had paid rent up to and including March 2015 and had asked the landlords to deduct the April rent from their security deposit.

15 On 20 May 2015 the landlords served notice of breach for non-payment of the April and May rent.

16 Subsequently, the landlords leased the premises to Goodyear & Dunlop Tyres (Aust) Pty Ltd for five years, commencing on 14 August 2015. That lease provided for a rent-free period of three months.

Claim and counter-claim

17 On 15 October 2015 the landlords issued the present proceeding, alleging that the tenants had wrongfully terminated the lease. The landlords claimed rent and outgoings up to 13 November 2015, the end of their new tenant's rent-free period.

18 By their Points of Defence and Counterclaim the tenants denied that they had repudiated the lease, claimed that they had been entitled to terminate

the lease, and sought an order that the landlords return to them the security deposit which the tenants had paid, less the rent for April 2015.

19 At the hearing, Gerard Conlan, who is the first applicant, gave evidence on behalf of the landlords, while Mark Dundon, the first respondent, gave evidence for the tenants.

Matters for decision

20 The case raised two principal matters for decision. The first was whether the tenants had been entitled to terminate the lease. The second turned on the construction of additional provision 4 – assuming that the tenants had been entitled to terminate the lease, when did that entitlement arise – when they received the council's advice that their application would be rejected, or on 1 January 2016, the date mentioned in the additional provision?

Tenants entitled to terminate?

21 The tenants claimed that they had been entitled to terminate by virtue of additional provision 4, which said:

> 4. The Lease is subject to statutory planning approval and if such approval is not obtained by 1 January 2016 either party may terminate the Lease by notice to the other.

Tenants entitled to terminate? Mr Dundon's evidence

22 Mr Dundon gave the following evidence.

23 The tenants had employed planning consultants, Contour Consultants, who had prepared and lodged with the City of Yarra on 16 February 2015 an application for a planning permit for the purposes of a café and coffee roasting facility. The application was lodged in the name of the tenants' business, Seven Seeds Pty Ltd, but nothing turns on this.[1]

24 On 23 March 2015 Contour Consultants had received an advice from Ian Pitt SC, a solicitor specialising in planning matters. Mr Pitt was clearly of the view that coffee roasting was a use forbidden by the Yarra Planning Scheme. He said:

> The issue is whether "production" requires the product at the end of the process to be food or beverages or whether a major part of the process but not the complete process to create food or beverage is encompassed by the expression. Whilst both interpretations are arguable, having regard to the apparent purpose of clause 52.10, in our opinion, any stage in the production of food or beverages is caught.

[1] A planning permit runs with the land to which it applies. "It is well to remember that the identity of the person who makes a permit application is not critical to the success of its outcome. This is because the permit attaches to the land: it is not personal to the applicant." *Hing v Boroondara* [2015] VCAT 1713 para 23.

> For the foregoing reasons, in our opinion, the proposed activities do comprise "Food or beverage production," for the purposes of clause 52.10.
>
> This is important because even if a permit is purportedly granted and acted on, at any time the permission could be challenged by the Council or any third party and if held the use is prohibited the permit would, in our opinion, be invalid.[2]

25 In addition, Mr Dundon was informed by the Yarra planning officer handling the tenants' application that the council would reject their application. Mr Dundon asked the officer to provide a written advice to that effect.

26 Contour Consultants advised the tenants against pursuing the application further and advised against an application to VCAT to challenge the council's position. They told the tenants that to lose in VCAT could have an adverse impact on the tenants' coffee roasting operation in Carlton, as that business was similar to the operation which they were proposing for the landlords' site in Alphington.[3]

27 The tenants accepted that advice; they considered such a risk to be "untenable". In addition, the tenants were not interested in using the premises only as a café; their main need was premises for coffee roasting and, in any event, the premises were not suitable for use as a stand-alone café.

28 Mr Dundon then wrote his 1 April 2015 email to the landlords quoted above, advising that the tenants had received the thumbs down from council: "Unfortunately City of Yarra have declined our proposed use of the premises."

29 On 15 April 2015 the City of Yarra wrote to Contour Consultants confirming the advice which the council's officer had given to Mr Dundon, saying:

> The site is located within a Commercial 1 Zone. Whilst the use of the site as a café is a permitted use within this zone and does not require a planning permit, the roasting of coffee beans is an industrial use which is classified as "food and beverage production" in Clause 52.10 – Uses with Adverse Amenity Potential of the Yarra Planning Scheme (the Scheme). Clause 34.01-1 of the Scheme prohibits an industrial use of this kind within the Commercial 1 Zone.

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[2] At the hearing, some confusion was caused by the presence of a second, similar letter from Mr Pitt, arguing a contrary position. That letter was clearly referred to in Mr Pitt's letter of advice quoted above as "a letter capable of being provided to the Council, which is as far as we would be prepared to go". Accordingly, nothing turns on the existence of that "second" letter.

[3] Because the Carlton operation and the proposed Alphington operation would have been similar, someone taking objection to the tenants' Carlton operation would be able to rely on any negative ruling by VCAT about the proposed Alphington operation.

> The plans and your application confirm that the two uses will operate independently, with the coffee roasting component incorporating over half of the entire premises.
>
> On this basis, Council would be obliged to refuse the application in its current form. In the event you do not wish us to refuse the application, we respectfully suggest that you withdraw the application. An email advising so would be sufficient.

30 The tenants spent some $42,000 on preparing and pursuing the permit application. The cost included:

- architects' fees,
- survey work,
- traffic consultants,
- planning consultants,
- legal advice, and
- permit application fees.

Tenants entitled to terminate? Best endeavours

31 It is well accepted that parties who are entitled to the benefit of a condition such as the present must use their best, reasonable endeavours to ensure that the condition is satisfied. What constitutes best endeavours will depend on the nature, capacity, qualifications and responsibility of the party concerned, *Transfield Pty Ltd v Arlo International Ltd*.[4] More recently, in *Electricity Generation Corporation v Woodside Energy Ltd* [5] the High Court expressed a similar view:

> … The nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligor's business. This was explained by Mason J in *Hospital Products Ltd v United States Surgical Corporation*,[6] which concerned a sole distributor's obligation to use "best efforts" to promote the sale of a manufacturer's products. His Honour said:
>
> The qualification [of reasonableness] itself is aimed at situations in which there would be a conflict between the obligations to use best efforts and the independent business interests of the distributor and has the object of resolving those conflicts by the standard of reasonableness … It therefore involves a recognition that the interests of [the manufacturer] could not be paramount in every case and that in some cases, the interests of the distributor would prevail.
>
> As Sellers J observed of a corporate obligor *Terrell v Mabie Todd & Co Ltd*,[7] an obligation to use reasonable endeavours would not oblige the achievement of a contractual object "to the certain ruin of the

[4] [1980] HCA 15
[5] [2014] HCA 7
[6] (1980) 144 CLR 41 at 91-92
[7] (1952) 69 RPC 234 at 236

> Company or the utter disregard of the interests of the shareholders". An obligor's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed, or to be sacrificed by, an obligation to use reasonable endeavours to achieve a contractual obligation.[8]

Tenants entitled to terminate? The landlords' arguments

32 The landlords appeared to argue that the tenants had not used their reasonable, best endeavours to obtain the necessary permits. They should not have been content to accept the council's informal advice that it would refuse their application. Rather, they should have applied to VCAT. In the alternative, they should have sought a permit for use as a café only.

33 Neither argument bears examination. There was little point in making an application to VCAT when a specialist planning silk had advised that such an application was doomed to failure, particularly when that failure would create a weapon with which the tenants' coffee roasting operation in Carlton could be attacked. The cases make it clear that the concept of best endeavours does not extend to commercially suicidal behaviour.

34 Nor was there any point in seeking a permit to run a stand-alone café; Mr Dundon's evidence, that the tenants considered the site was unsuitable for such use was not challenged and, in any event, the evidence made it clear that the tenants had sought premises which would allow them to conduct a combined coffee roasting/café business, not just a stand-alone café.

35 Beyond those two arguments, the landlords did not suggest that the efforts of the tenants to secure a permit had not been reasonable. That is not surprising; the tenants had gone to some lengths to get a permit. The tenants had engaged professional planning consultants to advise them and prepare their planning application, they had sought the advice of a specialist planning solicitor and had spent some $42,000 in pursuit of a permit.

36 Accordingly, I am of the view that the tenants were indeed entitled by operation of additional provision 4 to terminate the lease. This then raises the question of when they could do so – when they received the council's advice that their application would be rejected, or on 1 January 2016, the date mentioned in additional provision 4?

When could the tenants terminate?

37 The wording of additional provision 4 was as follows:

> The Lease is subject to statutory planning approval and if such approval is not obtained by 1 January 2016 either party may terminate the Lease by notice to the other.

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8 [2014] 7 HCA, [41] – [42]

38 The tenants said that this meant they had been entitled to terminate the lease when they received the council's advice that their application would be rejected. The landlords argued that special condition 4 meant that the tenants could not terminate until 1 January 2016, the date mentioned in the special provision.

39 In his evidence, Mr Dundon had said that the tenants had been prepared to pay rent while they applied for a permit. Hence his email of 10 November 2014 to the landlords' agent, quoted above:

> Therefore, we cannot sign an unconditional lease, it would be subject to planning approval, this is why we suggested paying rent initially, so the landlords do not have to be out of pocket.

40 By contrast to Mr Dundon's evidence, Mr Conlan said in evidence that it was always his intention that the lease would be for a minimum of 12 months. The documentary record does not contain any support for that assertion. Rather, the correspondence shows that the landlords initially appeared to accept the tenants' termination; it was not until 15 days later, on 16 April 2015, that the landlords asserted that notice could not be given until 1 January 2016. Further, there is no evidence, such as the landlords' spending money to prepare the premises for occupation by the tenants, to suggest why Mr Conlan would have formed that view. In any event, Mr Conlan, as a solicitor and a principal of the firm drawing the lease, could have easily achieved his stated aim by ensuring that the lease provided for a minimum term of 12 months. Yet the lease did not do so.

41 While the evidence of the parties is of interest, in the end the answer to the question: when could the tenants terminate? lies in the words of additional provision 4.

42 I am of the view that the right to terminate accrued to the tenants when the council told them that they would refuse to grant a permit and, on advice, the tenants concluded that it would be unwise to proceed further. In so finding, I am guided by the language of the additional provision 4.

43 The structure of additional provision 4 is no guide; the phrase "by 1 January 2016" could modify either the event – the failure to obtain a permit – or the consequence – the accrual of the right to terminate.

44 The words "not obtained" cover both:

- a refusal of approval; and
- the absence of approval by 1 January 2016.

In either case, the tenants have an immediate right to terminate.

In the case of a refusal of approval, the landlords' argument would require the tenants to wait until 1 January 2016 before they could give notice of termination. Nothing in additional provision 4 supports that argument.

45 Common sense militates in favour of this conclusion. If the landlords' interpretation were correct, it would mean that, notwithstanding the fact that

the tenants could not use the premises for the purpose which they desired, they would nevertheless be obliged to remain in possession until 1 January 2016, paying rent and outgoings.

Findings

46 It follows from the above that the tenants were entitled to give notice to terminate the lease. There remains the question of whether they did so. I am of the view that they did. The lease did not prescribe any form or manner for the giving of notice. The email sent by Mr Dundon on 1 April 2015 was clear enough to provoke the landlords' response, given on the same day as the email, seeking confirmation that Mr Dundon's email was indeed notice of termination. Mr Dundon's response, given on 9 April 2015 and quoted above, put the matter beyond doubt.

47 It is clear that the tenants gave notice of termination, as they were entitled to do. The tenants returned the keys on 15 May 2015 and conceded that they would pay the May rental to the landlords. As the tenants paid a security deposit of $16,500 and have not paid rent for either April or May 2015, it follows that the security deposit should be returned to the tenants, less rent for April and May and outgoings up to the date on which the tenants surrendered the keys, 15 May 2015. Using the figures provided in the landlords' amended particulars of loss, those deductions would be as follows:

April rent including GST	$6,050
May rent, including GST	$6,050
Insurance 1 January 2015 to 15 May 2015	$1,208.50
Rates 1 January 2015 to 31 March 2015	$999.19
Rates 1 April 2015 to 15 May 2015	$485.98
Total to be deducted	**$14,793.59**

48 I will therefore order that the landlords pay the balance of the security deposit, $1,706.41, to the tenants.

49 In the event that my calculations are not correct, I will reserve liberty to apply. I will also reserve liberty to apply on the question of costs, although it may be of assistance to the parties if I comment that, absent any submission from the parties, this appears to me to be a case where it would not be appropriate to award costs.

R Buchanan
Member