

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1246/2015

CATCHWORDS

Retail Leases Act 2003; undisclosed principals as lessor; equipment lease not part of retail lease; monies paid for lease of equipment found to be key money; landlord to refund key money to tenant; landlord's Default Notice claimed monies tenant not obliged to pay; Default Notice defective; tenant not in breach of lease; tenant found to have abandoned premises; landlord found not to have repudiated lease; landlord entitled to retain part of security deposit for rent lost and outgoings incurred until premises re-let.

APPLICANT	Yew Hui Dang
RESPONDENT	Venatross Nominees Pty Ltd (ACN 007 371 940)
WHERE HELD	Melbourne
BEFORE	Member B Thomas
HEARING TYPE	Hearing
DATE OF HEARING	25 February 2016
DATE OF ORDER	8 June 2016
DATE OF WRITTEN REASONS	8 June 2016
CITATION	Dang v Venatross Nominees Pty Ltd (Building and Property) [2016] VCAT 951

ORDERS

1. Leave is granted to the Applicant to amend the quantum of her claim from \$36,916.56 to \$25,000.00.
2. The Respondent must pay the Applicant the sum of \$8,268.22.
3. Costs reserved.

MEMBER B THOMAS

APPEARANCES:

For Applicant

Ms Y H Dang in person

For Respondent

Mr S Papailiadis, Director

REASONS

BACKGROUND

- 1 **Mr and Mrs Papailiadis** are the owners of a property at 85-87 Peel Street, West Melbourne (**'the premises'**) and are also the directors and shareholders of the Respondent (**'Venatross'**). Venatross does not own any share in the premises.
- 2 On 14 April 2014, the parties entered into a lease by which the Applicant (**Ms Dang**) leased the premises to conduct the business 'Market Star Café' (**'the lease'**). The term was three years commencing on 16 June 2014 at an annual rental of \$32,500 plus GST.
- 3 On 18 September 2014, Mr Papailiadis, on behalf of Venatross, served on Ms Dang a Default Notice (**'the Default Notice'**) dated 17 September 2014 pursuant to s 146 of the *Property Law Act 1958* (**'the PLA'**). The Default Notice demanded payment of the sum of \$5,222.34. On 30 September 2014, the sum of \$1,700.00 was paid to Venatross under cover of an email stating that the payment was 'for the café rent'.
- 4 On 4 October 2014, Mr Papailiadis found the premises to be vacant. The premises were re-let approximately eight months later.
- 5 Ms Dang claims return of \$10,000.00 paid as a security deposit and \$15,000.00 paid for the lease of equipment, and \$11,916.56 in rent paid.
- 6 By way of counterclaim Venatross, in addition to retaining the security deposit, claims the sum of \$7,665.28 being the lost rent and outgoings it incurred until the premises were re-let.

THE CONTENTIONS OF THE PARTIES

- 7 Ms Dang contends that:
 - (a) the payment of the \$15,000.00 was key money contrary to s 23 of the *Retail Leases Act 2003* (the Act);
 - (b) the Default Notice claimed amounts to which Venatross was not entitled;
 - (c) as at the date of the Default Notice the arrears of rent were only \$1,700.00 which was paid to Venatross on 30 September 2014, within the 14 day period stated in the Notice.
- 8 Mr Papailiadis contends that:
 - (a) in failing to pay the amount stated in the Default Notice and in vacating the premises prematurely, Ms Dang breached the lease;

- (b) Venatross was entitled to retain the security deposit in part satisfaction of the loss of rent until the premises were re-let.

ISSUES

- (a) Is there a fixed term lease?
- (b) Who are the parties to the lease?
- (c) What are the terms of the lease?
- (d) Has there been a breach of the lease by either party?
- (e) Has any breach of the lease been remedied?
- (f) Did the tenant abandon the premises?
- (g) Was the lease repudiated by the landlord?

THE LEASE

- 9 The Preamble to the lease states that:

... The Lessor leases to the Lessee the premises described in Item 3 of the Schedule (“the Premises”) together with the Lessor’s fixtures and chattels described in Item 4 of the Schedule (“the Term”) from the date described in Item 6 of the Schedule (“the Commencement Date”) at the rental described in Item 7 of the Schedule.

- 10 In the Lease Schedule:

- (a) the Lessor was referred to as *Venatross Nominees Pty Ltd* (Item 1);
- (b) the Premises was a Shop at 85 Peel Street West Melbourne (Item 3);
- (c) the Fixtures and Chattels (Item 4) were listed in a schedule to the Lease headed *Chattels Schedule*;
- (d) the Commencement Date was 16 June 2014 (Item 6);
- (e) the annual rent was \$32,500 plus GST (Item 7); and
- (f) the Security Deposit was \$10,000.00 (Item 14).

- 11 The relevant clauses for the purpose of this proceeding are:

1(a) (Rental)

To pay the rental in advance on the dates provided in Item 8 of the Schedule to the Lessor ...

...

1(v) (Security Deposit)

On or prior to the Commencement Date, the Lessee must pay the amount specified in Item 14 of the Schedule (‘the Security Deposit’) as security for the performance by the lessee of its obligations under this Lease ... during the period that the lessee occupies the Premises. If in the reasonable opinion of the Lessor ..., the Premises are in a clean and tenantable condition on the date the Lessee vacates the

Premises and the Lessee has fully complied with the Lessee's covenants contained in the Lease, the Security Deposit must be repaid to the Lessee within 14 working days of the date on which the Lessee vacates the Premises, otherwise ... pay to the Lessor such amount as may be necessary to rectify any breach of any covenants or to restore the Premises and account to the Lessee for the balance. If the Security Deposit is in sufficient to rectify the breach or meet the cost of restoration, the Lessee must pay the additional amount to the Lessor on demand.

...

3(d)(i) (Determination)

If:

- A. the Lessee fails to pay the rental or any other moneys payable by the Lessee under this Lease for a period of 14 days after any of the days on which they ought to have been paid, although no formal or legal demand has been made; or
- B. breaches or fails to observe or perform any of the Lessee's covenants contained or implied in this Lease; or ...

then the Lessor, ... may in addition to any other power, re-enter the Premises or any part and occupy or re-let the Premises.

CHRONOLOGY

- 12 Mr Papailiadis and his wife had operated the café for approximately a year and a half. Ms Dang was a regular customer.
- 13 In December 2013, Ms Dang expressed interest in taking over the café for a three year period. In February 2014, she inspected the layout of the café with her brother-in-law, Jong Wei Chew (**'Jong'**), who had managed food businesses in Malaysia.
- 14 A draft lease was drawn up by Mr Papailiadis and submitted to Ms Dang. Two months of discussions took place before a lease was signed by the parties on 14 April 2014, to commence on 16 June 2014.
- 15 On 16 and 18 June 2014, Ms Dang paid the sums of \$9,000 and \$6,000 respectively for the equipment lease.
- 16 Mr and Mrs Papailiadis stayed assisting Jong (at no charge) until mid-August 2014. They payed suppliers and also contributed \$2,500 towards the wages of the employee Carla, who was terminated in that month. They were not reimbursed for this contribution. Ms Dang admitted the contribution but was not sure of the exact amount.
- 17 According to Mr Papailiadis the café business was not being successfully managed and trade began to decline. In an endeavour to cut costs, Jong dramatically changed the operation of the café, but customer service was slow and the quality of the food dropped dramatically. Customers stopped coming.

- 18 Mr Papailiadis said in August 2014 he became aware that the business was being advertised for sale on the ‘Gumtree’ website. On 28 August 2014, at Jong’s request, he attended the café and was introduced to two Malaysian girls who had responded to the advertisement. They were accompanied by a lawyer who told Mr Papailiadis that the advertisement stated that the business was for sale including the equipment and the fit-out.
- 19 On 18 September 2014, Mr Papailiadis served Ms Dang with a Default Notice dated 17 September 2014 demanding payment of the sum of \$5,222.34 within 14 days. On 30 September 2014, the sum of \$1,700.00 was deposited into Venatross’ account. The following day Mr Papailiadis received an email from Jong stating:
- Please take note that \$1,700 has been paid into your bank account for the café rent.
- 20 Ms Dang said that she had two conversations with Mr Papailiadis before he served the Default Notice. The first was in a café in North Melbourne attended by both Mr and Mrs Papailiadis and the second two weeks later at the Pancake Parlour in Doncaster with Mr Papailiadis only. On each occasion, he said she had no right to seek another tenant to take over the lease, but if she walked away from the café she would forfeit her right to the return of the \$15,000 and \$10,000. She said she was not prepared to do so.
- 21 On 4 October 2014, Mr Papailiadis accessed the premises and found them vacant and a build-up of un-opened mail. He said he considered that Ms Dang had abandoned the premises.
- 22 Mr Papailiadis said he made numerous unsuccessful requests of Ms Dang for return of the keys and eventually changed the locks. It was eight months before he was able to re-let the premises.

THE LEGISLATION

The Property Law Act 1958

23 Section 53 states:

- (1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—
 - (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;

Section 146 states:

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease or otherwise arising by operation of law for a breach of any covenant or condition in the lease, including a breach amounting to repudiation, shall not be enforceable, by action or

otherwise, unless and until the lessor serves on the lessee a notice—

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- (c) in any case, requiring the lessee to make compensation in money for the breach—

and the lessee fails, within a reasonable time thereafter, or the time not being less than fourteen days fixed by the lease to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

The Retail Leases Act 2003 ('the RLA')

24 Section 3 defines key-money to mean:

... money that a tenant is to pay, or a benefit that a tenant is to give, that is—

- (a) by way of a premium, or something similar in nature to a premium, in that there is no real consideration or no true consideration given for the payment or benefit (for example, it is so disproportionate to the benefit that it cannot be true consideration); and
- (b) in consideration of—
 - (i) a lease being granted or an agreement being made to grant a lease; or
 - (ii) the variation of a lease; or
 - (iii) the renewal of a lease or the granting of an option for the renewal of a lease; or
 - (iv) consent being given to the assignment of a lease or to the sub-leasing of the premises to which a lease relates.

Section 16 provides:

- (1) A landlord or tenant must not enter into a retail premises lease that is not in writing and signed by all of the parties to it.

Penalty: 10 penalty units.

- (2) A failure to comply with this section does not make the retail premises lease illegal, invalid or unenforceable.

Section 23 provides:

- (1) A landlord must not seek or accept the payment of—
 - (a) key-money; or
 - (b) any consideration for the goodwill of any business carried on at the retail premises.

Penalty: 50 penalty units.

- (2) A provision of a retail premises lease is void to the extent that it requires the payment of key-money or consideration for goodwill or has that effect.
- (3) However, subsections (1) and (2) do not prevent a landlord from—
 - (a) recovering from the tenant costs which the landlord reasonably incurred in investigating a proposed assignee of the lease or sub-tenant of the premises; or
 - (b) recovering from the tenant costs which the landlord reasonably incurred in connection with—
 - (i) an assignment of the lease or a sub-lease; and
 - (ii) obtaining any necessary consents to the assignment or sub-lease; or
 - (c) claiming goodwill from the tenant in relation to the sale of a business that the landlord operated from the retail premises immediately before its sale, if the lease was granted to the tenant in the course of the sale of the business; or
 - (d) receiving payment of rent in advance; or
 - (e) securing the performance of the tenant's obligations under the lease by requiring a bond, security deposit or guarantee to be provided from the tenant or any other person (such as a requirement that the directors of a corporation guarantee performance of the corporation's lease obligations); or
 - (f) seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the landlord to the tenant in connection with the lease being granted; or
 - (g) seeking and accepting payment for the grant of a franchise in connection with the lease being granted.
- (4) Any payment made, or the value of any benefit conferred, by the tenant and received by the landlord contrary to this section may be—
 - (a) recovered by the tenant from the landlord in a court of competent jurisdiction as a debt due; or
 - (b) otherwise recovered by the tenant from the landlord as determined under Part 10 (Dispute Resolution).
- (5) In this section, landlord means—
 - (a) a landlord; or
 - (b) a person acting on behalf of a landlord or prospective landlord; or

(c) a prospective landlord.

Section 24 states:

- (1) A retail premises lease is taken to provide that—
 - (a) money paid by the tenant to the landlord as a security deposit for the performance of the tenant's obligations under the lease must be held by the landlord on behalf of the tenant in an interest-bearing account; and
 - (b) the landlord must account to the tenant for interest earned on the deposit but the landlord is entitled to keep the interest and deal with it as money paid by the tenant to the landlord to form part of the security deposit; and
 - (c)
 - (d) if the tenant performs all of the tenant's obligations under the lease the landlord must return the security deposit to the tenant as soon as practicable after the lease ends.

This section does not affect any lawful entitlement of the landlord to appropriate security deposits.

Is there a fixed term lease?

25 I find that, on 14 August 2014, the parties entered into a fixed term lease of the premises for three years commencing on 16 June 2014 and an annual rental of \$32,500 plus GST.

Who are the parties to the lease?

26 The parties to the lease are Venatross as landlord and Ms Dang as lessee. However, Mr and Mrs Papailiadis are the owners of the premises; not Venatross.

27 Mr Papailiadis admitted that in the negotiations with Ms Dang preceding the lease, he did not disclose that Venatross was not the owner of the premises. His explanation was that she did not request that information. However, he maintained that there was a verbal agreement between he and his wife on the one hand, and Venatross on the other hand, that Venatross was their agent for the purpose of the lease. Ms Dang says that no evidence was provided that Venatross was the authorised agent of Mr Papailiadis and his wife nor was she advised that Venatross was the agent of the owners of the premises.

28 Venatross is not described as the agent of the Lessor in Item I of the lease Schedule. Ms Dang submits that even if there was a verbal agency between Mr and Mrs Papailiadis and Venatross, ss 52-54 of the PLA requires the appointment of an agent dealing with an interest in land to be in writing.

29 Ms Dang submits that as Venatross was not the registered proprietor of the premises, it had no power to grant a lease to her and was therefore not able to fulfil its obligations as lessor of providing exclusive possession of the premises and quiet enjoyment throughout the term of the lease.

- 30 Ms Dang said she entered into the lease and paid rent and outgoings on the basis of representations set out in the lease that Venatross had power and authority to grant quiet enjoyment and exclusive possession of the premises for the term of the lease. The lack of power and authority represents a total failure of consideration on the part of Venatross. She claims that she was a mere tenant at will.
- 31 I find that Mr and Mrs Papailiadis were undisclosed principals and Venatross, in entering into the lease with Ms Dang, purported to act on their behalf. The doctrine of an undisclosed principal allows the agent to sue and be sued.
- 32 I consider that s 53 of the PLA is subject to s 16 of the RLA. The RLA was enacted after the PLA and no doubt Parliament had s 53 in mind when enacting the RLA. Therefore, I find that it does not matter that there was no written authority or agency from Mr and Mrs Papailiadis to Venatross. Based on the doctrine of undisclosed principal, I find that the lease was between Mr and Mrs Papailiadis and Ms Dang, and by virtue of s 16 of the RLA, a leasehold interest was created between those parties.

What are the terms of the lease?

- 33 The Preamble to the Lease provides:

The Lessor leases to the Lessee the premises described in Item 3 of the Schedule (the Premises) **together with the Lessor's fixtures and chattels described in Item 4 of the Schedule ...** (emphasis added)

Item 4 of the Schedule provides for Fixtures and Chattels (if any):-
see attached.

The Chattels Schedule is attached to and forms part of the lease, listing various plant and equipment included as part of the lease.

- 34 The draft lease emailed to Ms Dang on 2 April 2014 referred to the \$15,000.00 as a:

... non-refundable leasing-fee (pro-rata to the extent the landlord initiates early termination)...

- 35 However, there is no reference to the \$15,000.00 in the Schedule to the lease signed by the parties on 14 April 2014. Venatross says that the \$15,000.00 was for the hire of equipment as the premises had been fitted out by Venatross and Ms Dang agreed to the payment, as evidenced by the receipt for \$9,000.00 issued on 16 June 2014. The receipt notes a balance of \$6,000.00 is outstanding. Ms Dang says there is no evidence of a separate equipment lease arrangement, other than a reference to 'equipment lease' in the receipts issued by Venatross dated 16 and 18 June 2014. The description of the payments as 'equipment lease' was a sham to disguise the \$15,000.00 as part of a non-existent 'equipment lease' to avoid the implications of s 23 of the RLA.

- 36 I find that although the lease provides that, in addition to the premises, the Lessor leased the fixtures and chattels described in Item 4 of the Schedule. Item 4 (Fixtures and Chattels) says *see attached*. The *Chattels Schedule* attached to the lease is simply that – a list of chattels. There is no reference to fixtures or fittings and there is no separate list or schedule of equipment forming part of the lease. Therefore, I find that the terms were the lease of the premises together with the chattels listed in Item 4 of the Schedule. There was no lease of equipment either in the lease or separately.
- 37 Ms Dang submits that there was no real consideration or no true consideration given by Venatross for the payment of the \$9,000 and \$6,000, other than as consideration for and a condition of granting the lease. Thus, the payment constituted key-money, within the meaning of that term as defined under the RLA. Therefore:
- the \$15,000.00 is a key-money payment where no real or true consideration has been given other than the granting of the lease;
 - there is no equipment lease;
 - the payment does not fall within any of the exceptions set out in s 23(3) of the RLA; and
 - she is entitled to an order under s 23(4)(a).
- 38 Section 3 of the RLA defines key-money as a payment by the tenant to the landlord by way of a premium for no benefit in consideration of a lease being granted. Section 23(3) lists a number of exceptions to the prohibition to the payment of key-money.
- 39 The Preamble to the lease expressly provides for the equipment to be included as part of the Lessor's fixtures and chattels under the lease, in consideration for the payment of rent. Therefore, as the equipment is included as part of the lease, there cannot be any separate equipment lease.
- 40 I find that the payment by Ms Dang is not supported by consideration from Venatross which does not fall within the exceptions in s 23(3) and was key-money.

Has there been a breach of the lease by either party?

- 41 The Default Notice, dated 17 September 2014, served by Mr Papailiadis on Ms Dang on 18 September alleged that:

... You are in arrears in the sum of \$5,222.34 (plus outgoings).

- 42 According to the attachments to the Default Notice, Ms Dang was required to pay for:

- Stock - \$2,000.75; and
- Hand over bills (paid by lessor) - \$1,542.23.

The lease only required Ms Dang to pay rent and outgoings, therefore leaving a balance of \$1,679.36 in unpaid rent.

43 I find that The Default Notice was defective in that it required Ms Dang to pay for:

- Stock - \$2,000.75; and
- Hand over bills (paid by lessor) - \$1,542.23,

but the lease only required Ms Dang to pay rent and outgoings. She was not obliged to pay for stock and hand over bills.

Has any breach been remedied?

44 On 29 September 2014, \$1,700.00 was paid to Venatross by bank transfer; that is before the 14 days referred to in the Default Notice had elapsed.

45 I therefore find that Ms Dang's breach of the lease was remedied by the payment of \$1,700.00 on 29 September 2014.

Did the tenant abandon the premises?

46 Ms Dang denied that she abandoned the premises, but at the same time she says that she left the premises in a clean and tenantable condition. She did not say when she left the premises and what her intention was. However, she did not pay any rent after the payment made on 29 September 2014, nor did she give any indication to Mr Papailiadis that she wished to terminate the lease.

47 Mr Papailiadis said that, on 30 September 2014, he became aware that Jong and his wife told the tenant at the adjoining property, 87 Peel Street, that they were leaving the shop. Having received only \$1,700.00 in response to the Default Notice, and his telephone and text messages to Jong not having been returned, on 4 October 2014, he called at the premises and found them locked. Using a spare key he accessed the premises to find them vacant with a build-up of mail for the upstairs tenant. All the equipment was still in the premises but nothing belonging to the tenant.

48 Mr Papailiadis said he therefore assumed that Ms Dang had abandoned the premises. As 45,000 cars passed the shop each day, in an endeavour to mitigate his loss, he placed an advertisement in the front window of the premises seeking an experienced café operator to take over the business.

49 I find that in Jong and his wife telling the adjoining tenant they were leaving the premises, Ms Dang and Jong failing to return messages left by Mr Papailiadis and no rent being paid after 29 September 2014, it was Ms Dang's intention to abandon the premises. I also find that this was a reasonable conclusion for Mr Papailiadis to make when he gained access to the premises on 4 October 2014.

Was the lease repudiated by the landlord?

50 I accept the evidence of Mr Papailiadis as to the events that occurred between 29 September and 4 October 2014. Therefore, I do not consider that Venatross, in taking possession of the premises, or Mr Papailiadis placing an advertisement on the front window of the premises, could be said

to be acts evidencing an intention by the landlord to no longer be bound by the lease.

51 In failing to pay the rental and outgoings and abandoning the premises, Ms Dang breached the terms of the lease entitling Venatross to re-enter the premises and take possession.

52 I therefore find that the landlord has not repudiated the lease.

CONCLUSION

53 Having found that the \$15,000.00 payment made by Ms Dang to Venatross was a key-money payment not falling within any of the exceptions in s 23(3) of the Act, I find that Venatross is not entitled to retain this sum.

54 However, the payment of \$10,000.00 was a bond as security for the payment of rent and outgoings by Ms Dang for the three year term of the lease.

55 Having found that Ms Dang abandoned the premises, Venatross is entitled to retain such part of the bond as is sufficient to be compensated for the loss of rent and outgoings sustained until the premises were re-let.

56 Mr Papailiadis said that it took eight months to re-let the premises. However, the date the property was re-let was not stated in the evidence of Venatross. Annexure K to the Respondent's Submission (Detailed summary of claim) provided details of 'outstanding rent and outgoings as at 16 February 2015'. I take that date as the date from which the new tenant was liable for the payment of rent and outgoings. Therefore, I find that the period of loss of rent and outgoings is from 16 September 2014 to 16 February 2015, being five months.

57 In its Counterclaim, Venatross claims the sum of \$17,665.79 for loss of rent and outgoings before deduction of the security bond. This calculation appears to be based on the total rent and outgoings that would have been paid had the lease run its full term, less the total sum actually paid by Ms Dang. I do not accept this calculation as the actual loss sustained by Venatross by reason of Ms Dang's abandonment of the lease.

58 According to the Lease Schedule the annual rental was \$32,500.00, plus GST, a total of \$35,750.00, or \$2,979.16 per month. Annexure K indicates that there was a short payment for the August 2014 rental of \$279.14. Therefore, I calculate the loss of rent sustained by Venatross is:

• Short payment of September 2014 rent	\$ 279.14
• 5 months @ \$2,979.16 per month	<u>\$14,895.80</u>
	\$15,174.94

59 As to the outgoings, Annexure K shows a total of \$2,490.95 '8 mths pro-rata'. Based on my assessment that the loss of rent was for five months, I will allow \$1,556.84.

60 I calculate the total loss Venatross has suffered at \$16,731.78. I therefore order that the Respondent pay to the Applicant the sum of \$8,268.22 calculated as follows:

• Refund of equipment lease payment to Ms Dang	\$15,000.00	
• Less loss of rent and outgoings to Venatross		\$16,731.78
• Less security deposit	<u>\$10,000.00</u>	
		<u>\$ 6,731.78</u>
Balance due to Ms Dang		<u>\$ 8,268.22</u>

MEMBER B THOMAS