VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP966/2015

CATCHWORDS

Retail Tenancies Act 2003 – informal tenancy – no written lease – no disclosure statement – terms agreed in emails – period of 24 months – no right of re-entry reserved – Tenant default in payment of rental and outgoings – Landlord changing locks – no repudiation by Tenant – re-entry unlawful – Tenant accepting tenancy at an end – claim by Landlord for unpaid rental and outgoings – Landlord refusing to allow Tenant to collect goods in premises after re-entry unless arrears paid – no right to do so – Landlord's claim for damages

APPLICANT	Deus Software Pty Ltd
FIRST RESPONDENT	Acumen Auditors Pty Ltd
SECOND RESPONDENT	Constantinos Tsekouras
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	13 October 2015
DATE OF ORDER	15 October 2015
CITATION	Deus Software Pty Ltd v Acumen Auditors Pty Ltd (Building and Property) [2015] VCAT 1667

Order

1. Order The First Respondent to pay to the Applicant $5,025.34.
2. The claim against the Second Respondent is dismissed.
3. No order as to costs.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Miss K.Lin and Mr M. Cropley
For the Respondents	Mr C. Tsekouras

REASONS FOR DECISION

Background

1. The Applicant "the Landlord") is the owner of office premises in High Street, Kew ("the Premises"). The Second Respondent, Mr Tsekouras, is an accountant and auditor and his practice is conducted by the First Respondent ("the Tenant"). The Premises are a very small office and consist of a room, an annexe and a vestibule.

2. In early 2013 Mr Tsekouras approached a director of the Landlord, Mr Cropley, and offered to rent the Premises from the Applicant. At the time of this approach the Premises had been vacant for about 12 months

3. An exchange of emails then followed whereby it was agreed that the Tenant would lease the Premises for two years at a rental of $605 per calendar month inclusive of GST plus outgoings. No detailed terms of the tenancy were discussed or agreed upon apart from the period and payment of the rent and outgoings. The negotiations appear to have occupied only a few days and, apart from the emails, there was nothing in writing prepared or signed by the parties before the Tenant took possession on 9 February 2013.

4. The Premises were leased for use by the Tenant in its business of providing auditing services to members of the public. Since the purpose was for the retail provision of services the transaction was governed by the *Retail Leases Act* 2003 ("the Act").

The agreement

5. Each party blames the other for the absence of a written lease. Some months after the Tenant took possession, the Landlord's other Director, Miss Lin, prepared a written tenancy agreement and sent it to the Respondents for execution. Miss Lin said that, whenever she enquired about the signing of this document, Mr Tsekouras told her that he had not had time to read it. She did not suggest that he ever agreed to its contents.

6. Mr Tsekouras said that the document sent to him by Miss Lin was not in accordance with the Act and claims that he asked for a proper lease to be prepared on a number of occasions. There are some emails bearing that out. There is also an email from Miss Lin referring to the execution of the document that she had prepared. No written lease or agreement was ever signed.

The tenancy

7. The procedure subsequently adopted for the payment of the rent and outgoings was that the Landlord would provide a tax invoice which would then be paid by the Tenant. All rental and outgoings invoiced up to May 2004 were paid in full after which no further payments were made.

8. Email correspondence followed, largely comprising demands for payment by the Landlord and the provision of various excuses by Mr Tsekouras for non-payment accompanied by his expressed desire to remain in the Premises.

9. Finally, on 3 October 2014 the Landlord entered the Premises and changed the locks. Mr Tsekouras then sought access to remove the Tenant's belongings but this was refused until payment of the outstanding amounts was made.

10. The Landlord is still in possession of the Tenant's property. Mr Cropley and Miss Lin said that they did not know what to do with it. I was told that it is now in storage.

This proceeding

11. This proceeding was brought by the Landlord seeking to recover the amounts it is owed. In its application it sought unpaid rent and outgoings up to and including 3 October 2014, the expense of the re-entry and loss of rent and outgoings between that date and 31 July 2015, when a new Tenant was obtained for the Premises.

The hearing

12. The matter came before me for hearing on 13 October 2015. Miss Lin and Mr M. Cropley, the father of the other director, appeared on behalf of the Landlord and Mr Tsekouras appeared on his own behalf and also on behalf of the Tenant.

13. The evidence occupied the whole of the afternoon until 4.30 pm, which did not permit the giving of a considered oral decision. I informed the parties that I would provide a written decision accompanied by short reasons.

Evidence

14. Miss Lin produced receipts for the items of outgoings claimed and a spreadsheet setting out the amounts that she said had been claimed and the payments the Tenant had made.

15. Mr Tsekouras did not appear to dispute the amounts the Tenant was alleged to have paid or the calculation of rental and outgoings claimed, although he said that he had not previously seen these details or the spreadsheet Miss Lin provided.

16. I asked Mr Tsekouras why, when he knew that the claim was for outstanding rental and outgoings, he had not prepared a statement himself of what he considered to be due or the payments that he claimed to have made. It became apparent on further questioning that his real claim was that, since he was given no written lease or disclosure statement in compliance with Act, the Tenant was not liable to pay any outgoings. He also said that the body corporate fees amounted to or included capital expenditure for which the Tenant was not liable.

17. I will deal first with the Tenant's contentions.

The requirements of the Act

18. By s.15 of the Act, a Landlord who offers to enter into a retail Premises lease must, as soon as he enters into negotiations with a person about the lease, give to that person a copy of the proposed lease in writing and a copy of the information brochure about retail leases published by the Small Business Commissioner. That was not done.

19. By s.16 of the Act, the lease must be in writing and signed by all of the parties to it. In default, there is a penalty but the failure to comply with the section does not make the lease illegal, invalid or unenforceable.

20. By s.17 of the Act, the Landlord must give the Tenant a disclosure statement in the form prescribed by the regulations and a copy of the proposed lease in writing at least 7 days before entering into a retail premises lease. That was not done. If a Tenant has not been given a disclosure statement before entering into a retail premises lease, he may give the Landlord a written notice to that effect within a specified period and may then withhold payment of the rent until the day on which the Landlord gives the Tenant the disclosure statement. He may also give the Landlord a written notice of termination at any time before the end of 7 days after the Landlord gives him the disclosure statement or if he is not given a copy of the proposed lease in accordance with subsection (1)(b). No written notice was given to the Landlord by the Tenant pursuant to s.17 of the Act and the Tenant did not purport to determine the lease.

21. By s.22 the Tenant is entitled to be given a copy of the lease. By s.41 of the Act, capital costs are not recoverable and by s.43, a Tenant is not liable to contribute to sinking fund.

Findings

22. Upon perusing the invoices for the body corporate fees I find there is nothing in them to indicate that they include any items of capital expenditure. Upon checking over the spreadsheet prepared by Miss Lin and comparing it with the invoices I am satisfied with the amount claimed for rent up until 3 October 2014, which is $2,311.92. I am also satisfied that body corporate fees, which I have calculated at $1,701.70, and council rates, which I have calculated that $178.32, are due. I accept the figure of $833.40 for outstanding water rates.

23. The remaining items claimed, that is, forgone rent and outgoings between 3 October 2014 and 31 July 2015 and also the cost of changing the locks are dependent upon the lawfulness of the actions of the Landlord in changing the locks and retaking possession of the Premises.

23. There was no provision in the agreement entered into between the parties allowing the Landlord a right of re-entry in the event of default in payment of rent or if there should be any other breach of the Tenant's obligations. It is not possible to spell out from the correspondence a repudiation by the Tenant of its obligations under the lease. The tenancy was also not periodic, terminable by notice to quit.

24. In the case of *WROB Pty Ltd v Hunt & Ors* [2010] VCAT 245 I said (at para 43):

> "At common law a Landlord is entitled to re-enter for non-payment of rent only where the lease is so drafted as to make the obligation to pay rent more than just a covenant to pay but a condition of the grant (see *Re Brain* [1874] L.R.18 Eq.389 per Malins VC; *Brooking & Chernov "Tenancy law & Practice*" 2nd Ed. para. 217). Even then, a common law re-entry was required to be preceded by a common law demand for rent which had elaborate requirements which have certainly not been fulfilled in this case (see *Brooking & Chernov para. 225*). Where the obligation to pay rent is a mere covenant or term of the agreement to lease, as it is in this case, the breach of that term does not entitle the landlord to bring the lease to an end in the absence of a term in the lease giving the Lessor the right to re-enter the land and forfeit the lease for breach of the covenant or term. (see also the recent case of *Natwest Markets Australia Pty Ltd v. Tenth Vandy Pty Ltd* (2009) 19 VR 68 at p.75 per Neave JA)"

25. As a consequence, although changing the locks was no doubt thought by the Landlord's directors to be the only practical course, it had no lawful justification.

26. Despite that, Mr Tsekouras accepted that the tenancy was at an end and sought to remove his belongings from the Premises.

27. The Landlord's director, Mr Cropley, then told Mr Tsekouras that he would not be allowed to remove his possessions until all the outstanding amounts claimed by the Landlord had been paid. As I pointed out in the course of the hearing, the Landlord was not entitled to impose this condition. The Tenant was at all times entitled to remove its property from the Premises and the Landlord was not entitled to prevent that.

28. The claim for the loss of rental between 3 October and 31 July was said to be justified by the assertion that it was not possible to re-let the Premises with the Tenant's property still there. If that were so, that was a situation of the Landlord's own making.

29. In any event, since the tenancy was at an end the covenant to pay rent ceased on 3 October. In the absence of a repudiation of the lease by the Tenant there was no right to claim damages against the Tenant. Further, insofar as the inability to re-let was due to the continued retention of the Tenant's property, there is no right to claim damages. Finally, since the re-entry had no lawful justification, the cost of changing the locks is also not claimable.

30. An order will be made for the other items namely:

Outstanding rent	$2,311.92
Body corporate fees	$1,701.70
Council rates	$ 178.32
Water rates	$ 833.40
Total	$5,025.34

31. In addition, a claim is made for the application fee of $575.30. The Tribunal is empowered by s.115B of the *Victorian Civil and Administrative Tribunal Act* 1998 to order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding. However, by section 92 of the Act, no order for costs can be made unless the Tribunal is satisfied that it is fair to do so because the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding or the party refused to take part in or withdrew from mediation or other form of alternative dispute resolution. In that section, "costs" includes fees, charges and disbursements. Since neither of those conditions applies, I cannot make an order that the Tenant pay the Applicant its application fee.

Orders to be made

32. There will be an order that the First Respondent pay to the Applicant $5,025.34. Since Mr Tsekouras was neither a Tenant nor a guarantor, the claim against him personally is dismissed. There will be no order as to costs.

SENIOR MEMBER R. WALKER