

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1687/2018

CATCHWORDS

Retail Lease dispute – Settlement Agreement – Principles of construction of a contract

APPLICANT	Elaeno Investments Pty Ltd (ACN 106 806 973)
FIRST RESPONDENT	Vicinity Funds Management Pty Ltd (ACN 167 606 939)
SECOND RESPONDENT	Reco Moomba Pty Ltd (ACN 126 421 118)
WHERE HELD	Melbourne
BEFORE	H Nash, Member
HEARING TYPE	Hearing
DATE OF HEARING	9 & 10 May 2019
DATE OF ORDER	19 June 2019
CITATION	Elaeno Investments Pty Ltd v Vicinity Funds Management Pty Ltd (Building and Property) [2019] VCAT 910

ORDER

- 1 The Respondent is to allow the Applicant a credit in the sum of \$22,211.00 (inclusive of GST).
- 2 The claim is otherwise dismissed.

H Nash
Member

APPEARANCES:

For Applicant Mr P W Lithgow of Counsel

For Respondents Ms A Hando of Counsel

REASONS

- 1 These proceedings relate to a dispute which has arisen between the respondents and applicant who are parties to a retail lease involving a Medical Centre. The respondents and applicant are also parties to another retail lease involving premises operating as a pharmacy. Both leases were the subject of these proceedings.
- 2 At the conclusion of the hearing on 10 May 2019, I gave my ex tempore decision regarding the disputes before the Tribunal and reserved my decision on a discrete point which involves the proper construction of a clause in a settlement agreement signed between the parties in October 2016.

BACKGROUND

- 3 On or about 19 March 2014 the applicant, as tenant (**Elaeno**) and the respondents, as landlord (**Vicinity**) entered into a lease of premises described as shop 2-051 Emporium Melbourne (the **Premises**) to commence on 16 April 2014 for a period of 12 years (the **Lease**). Elaeno operates a Medical Centre from the premises at the Emporium Shopping Centre in Lonsdale Street Melbourne.
- 4 In particular, this dispute arises as the parties disagree about the interpretation of a clause in a Deed of Settlement entered into on 24 October 2016 between them, after participating in a mediation at the Office of the Small Business Commissioner (the **Settlement Agreement**).
- 5 Elaeno claims that it has not been credited with the amount agreed under the Settlement Agreement and that if it had been credited with that amount, it would be further in advance of the payment of its rent and outgoings.
- 6 The parties entered into the Lease while the Emporium Shopping Centre was under construction. As such the Lease specified a commencement date based on the anticipated construction period.
- 7 It appears from the documents presented to the Tribunal (and, in particular, the Settlement Agreement the subject of this dispute) that there was a delay to the commencement date of the Lease.
- 8 The Lease also contains provisions regarding the allocation of costs between the parties for the fit out of the Premises during the construction.
- 9 In October 2016 Vicinity and Elaeno attended at the Office of the Small Business Commissioner to participate in a mediation to resolve issues that had arisen between the parties relating to delays in the handover date of the Premises, delays to the Commencement Date, the attribution of costs for carrying out of certain works, costs incurred by Elaeno and Vicinity and outstanding rent owing by Elaeno¹.

¹ Clause 1.3 of the Settlement Agreement)

- 10 Of relevance to these proceedings is clause 2 of the Settlement Agreement. That Clause reads as follows

2. Settlement

Without any admission of liability and each for their own reasons the parties agree to settle the Dispute as follows:

- (a) the total amount to be paid by the Tenant for the items highlighted on Schedule 1 is \$45,254.89 plus GST (\$49,780.38 GST inclusive);
- (b) will pay to the Tenant the following amounts:
 - (i) \$14,410 GST inclusive which the Tenant acknowledges was paid by the Landlord to the Tenant's nominated bank account on 19 September 2014;
 - (ii) The amount of \$20,191.81 plus GST (\$22,211 GST inclusive) which will be credited to the Tenant's account;
- (c) the Landlord agrees that the total amount payable by the Tenant for Base Rent, the Variable Contribution, the rates, taxes and assessments referred to in clause 4.6 of the Lease and the Promotion Contribution for the period commencing on 16 April 2014 and ending on 21 May 2014 is \$3071.63 plus GST (\$3378.79 GST inclusive);
- (d) each party will pay its own legal costs relating to the Dispute and this agreement;
- (e) the parties agree that the amount to be paid by the Tenant as at 30 September 2016 is agreed by the parties to be \$63,037.68 plus GST (\$69,341.45 GST inclusive) (the "Arrears");
- (f) the Tenant agrees to pay:
 - (i) the arrears on or before 26 October 2016;
 - (ii) the tenant agrees to pay the amount outstanding for the month of October 2016 on or before 31 October 2016,

("Settlement").

- 11 In September 2017 further issues arose regarding Elaeno being in arrears of rent and outgoings. As part of the discussions between the parties, an employee of Vicinity prepared a spreadsheet setting out the rent and outgoings position of Elaeno's account. This spreadsheet included an allowance for a credit to Elaeno in the sum of \$22,211.00 (inclusive of GST) which is the sum referred to in clause 2(b)(ii) of the Settlement Agreement.
- 12 In late 2017, Elaeno remedied the position regarding rent and outgoings, however it again fell into arrears in 2018.
- 13 Vicinity served a notice under s146 of the *Property Law Act 1958* (Vic) (the Act) requiring the default be remedied within 14 days. The default was not

remedied, and Vicinity re-entered the property by entering the Premises and changing the locks.

- 14 Elaeno applied to this Tribunal in October 2018 for relief from forfeiture pursuant to section 146(2) of the Act. The parties reached a settlement of the issue of relief and Elaeno was permitted to re-enter the Premises and continue trading, upon payment of an agreed amount of arrears of rent and legal costs.
- 15 Elaeno fell into arrears a further time in March 2019 and a further notice under section 146 of the Act was served. However, at this time Elaeno remedied the breach in accordance with the Notice given under section 146 of the Act.
- 16 The dispute that has arisen between the parties regarding this clause is whether the landlord is required to allow a credit in the sum of \$22,211.00 (inclusive of GST) to the tenant's account.

TENANT'S CASE

- 17 Mr O'Neale, the director of the tenant gave evidence that at the time of the Settlement Agreement being executed, he believed that Elaeno was to receive a credit of \$22,211.00.
- 18 On behalf of Elaeno he gave evidence that the credit specified in clause 2(b)(ii) of the Settlement Agreement was a stand-alone credit to be applied to its account with Vicinity as credit towards rent and outgoings.
- 19 He explained that he had not noticed that it hadn't been included in the statements he received from the landlord because the rent payments he made were often not made on the correct day or were for both leases paid together as one and usually paid by cheque rather than electronic funds transfer so often reconciling the payments was difficult or not a process he undertook.
- 20 Further he stated that he considered that the landlord was also in agreement that it was a stand-alone credit because when Elaeno fell into arrears in September 2017 Ms Rooney, an employee of Vicinity, prepared the abovementioned spreadsheet of Elaeno's account showing payments and charges. That spreadsheet includes the credit as a stand-alone sum.

LANDLORD'S CASE

- 21 Ms Rooney, the Centre Manager of the Emporium Shopping Centre for Vicinity gave evidence on behalf of the respondents. Her evidence on this issue was to the effect that the credit identified in clause 2(b)(ii) of the Settlement Agreement was not a stand-alone amount but was incorporated into the final amount payable by the tenant in clause 2(e).
- 22 She stated that the spreadsheet she compiled in September 2017 included the credit to show the amounts that had been paid by both parties but did not indicate that that sum was to be treated as a stand-alone credit to the

tenant's account. It was simply setting out the different amounts in the Settlement Agreement which were to be set off against each other and that it was never intended that the credit be a separate stand-alone amount to be allowed in Elaeno's account.

- 23 Mr Willson, from Vicinity's accounts receivable team also gave evidence to the effect that the credit was not a stand-alone credit to the tenant's account as it had never been recorded that way in Vicinity's accounts and he had not been directed to record it that way.
- 24 In summary, Vicinity's position is that clause 2 of the Settlement Agreement, when read in totality, provides that the credit referred to in clause 2(b)(ii) has already been taken into account in the calculation of what remains owing.
- 25 That is, that the clause is a cascading clause and that Clause 2(e) reflects the financial position between the parties after all the credits referred to in the preceding sub-paragraphs have been accounted for in Elaeno's account and that clause 2(f) reflects the final balances owing after the preceding credits have been set off against each other.
- 26 Therefore, Vicinity says, there is no credit to be given.

THE LAW

- 27 The dispute between the parties is a question of construction of the Settlement Agreement which is a question of law.
- 28 A contract is to be construed objectively², and while evidence of the surrounding circumstances of the origin of the contract is admissible to assist in construing a contract, the inquiry is an objective one not to be influenced by the parties' subjective intentions³.
- 29 Clause 2 of the Settlement Agreement sets out in each sub-clause which party is to pay what amount. There are no words in the clause which indicate that the amounts referred to in sub-clauses (b), (c) or (e) are to be set off against each other the result of which is the amounts in sub-clause (f).
- 30 Further, the sums referred to in each sub-clause do not mathematically result in a sum reflective of the amount referred to in sub-clause (e) when calculated in the manner asserted by Vicinity.
- 31 The evidence in the case indicates that the parties' position as to the interpretation of the clause is conflicting, which is to be expected given this is the substance of the dispute between the parties.
- 32 The September 2017 spreadsheet is the only document, other than the Settlement Agreement, that could be considered to be reflective of the

² See *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165

³ *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 and *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151

parties' intentions. While not contemporaneous it does accord with Elaeno's position regarding the interpretation of the clause. Ms Rooney's explanation of why the credit was recorded in the spreadsheet was unsatisfactory given the spreadsheet omitted to record every amount referred to in each subsection of clause 2.

- 33 Accordingly, I find that each sub-clause refers to separate and independent amounts payable by each party for different items each of which is to be paid by the relevant party. There is no set off between the items.
- 34 Accordingly, I find for Elaeno as to the construction of the Settlement Agreement.
- 35 I will therefore order that Vicinity allow Elaeno a credit in the sum of \$22,211.00 (inclusive of GST), in accordance with clause 2(b)(ii) of the Settlement Agreement.
- 36 Pursuant to my decision handed down on 10 May 2019, I will order that the Applicant's claim is otherwise dismissed.

H Nash
Member