

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1082/2016

CATCHWORDS

Contempt – failure to comply with order of Tribunal – order for possession under *Retail Leases Act 2003* (Vic) – failure to vacate premises – order within power – order not invalid – order not vague, ambiguous or incapable or compliance – deliberate disobedience of order – contempt under s 137(1)(f) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) – contemnors fined.

APPLICANT: F.R. Reid Pty Ltd
FIRST RESPONDENT: Jimber Fa'aoso
SECOND RESPONDENT: Skylawn Fa'aoso
WHERE HELD: Melbourne
BEFORE: Vice President Judge Hampel
HEARING TYPE: Section 137 Hearing
DATE OF HEARING: 26 June 2017
DATE OF ORDER: 26 June 2017
CITATION: F R Reid Pty Ltd v Jimber Fa'aoso and Skylawn Fa'aoso (Building and Property) [2017] VCAT 976

ORDER

- 1 I find that each of Jimber and Skylawn Fa'aoso is guilty of contempt under s 137(1)(f) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
- 2 Jimber and Skylawn Fa'aoso are each fined \$1000. A stay of three months for the payment of the fine is granted.

Judge Hampel
Vice President

APPEARANCES:

For the Victorian Civil and Administrative Tribunal Ms R. Ellyard of Counsel
For the Respondents Mr Z. Partos of Counsel

REASONS

- 1 On 6 June 2014 Jimber Fa'aoso and Felicity Reid as Director of F.R. Reid Pty Ltd signed a Workplace Agreement. Mr Fa'aoso was to be paid \$500 per week to manage the Merrigum Café, a business operating out of premises rented by F.R. Reid Pty Ltd. The agreement also provided, subject to the consent of the landlord, for Mr Fa'aoso to sublet the residence at the rear of the café for \$150 per week. The agreement was expressed to run for three years with options for renewal.
- 2 The subtenancy was approved by the landlord and a retail lease between the landlord and F.R. Reid Pty Ltd of the same date acknowledged the subtenancy. Jimber Fa'aoso, his wife Skylawn Fa'aoso and five of their children moved into the residence. They were followed soon after that by their two older children upon their arrival from New Zealand.
- 3 On 24 March 2015, that is, nine months after the agreement was entered into, Ms Reid gave six weeks written notice of termination of Mr Fa'aoso's employment – that is, to be effective from 4 May 2015 – and also gave notice of termination of the sublease of the premises at the rear of the cafe, effective 30 June 2015.
- 4 Ms Reid thereafter employed another manager to run the café, but the Fa'aoso family did not vacate the premises by 30 June 2015. They did however, stop paying rent. They ignored correspondence from her then solicitors in July 2015 to vacate the premises.
- 5 In September 2015, whilst still in occupation of the premises at the rear of the café, Jimber Fa'aoso complained to the Fair Work Ombudsman about the circumstances of the termination of the agreement. In October 2015, the parties agreed, following a resolution of the hearing before the Fair Work Ombudsman, that F.R. Reid Pty Ltd would pay \$3,000 to Mr Fa'aoso by 2 November 2015. It appears from Mr Fa'aoso's evidence that that is in effect a penalty for the early termination of the contract. That sum remains outstanding.
- 6 The Fa'aoso family remained in occupation of the residence at the rear of the cafe. In late 2016 F.R. Reid Pty Ltd issued an application before VCAT seeking an order for arrears of rent and possession. F.R. Reid Pty Ltd had, some months before that, sought to issue proceedings before VCAT under the *Retail Leases Act 2003* (Vic) (the Retail Leases Act). There is correspondence on file from the Registrar indicating that the applicant needed to satisfy the two preconditions for acceptance of the matter into the list, namely certification that F.R. Reid Pty Ltd operated a small business, and that alternative dispute resolution proceedings had been undertaken. Those preconditions were ultimately complied with.
- 7 The application lodged in late 2016 was first listed for hearing on 19 December 2016 and adjourned part heard to 17 January 2017 before SM Walker. On the first return day, F.R. Reid Pty Ltd was represented by its

Director, Ms Felicity Reid. Both Jimber and Skylawn Fa'oso were present, as was one of the landlords of the premises, Mr William Davis.

- 8 After a hearing, SM Walker ordered Jimber and Skylawn Fa'oso vacate the premises, and deliver up vacant possession by 31 January 2017. He also ordered they pay F.R. Reid Pty Ltd 92 weeks arrears of rent, namely \$13,950. Copies of the order were subsequently posted to Jimber and Skylawn Fa'oso.
- 9 By Affidavit sworn 7 March 2017, Ms Reid deposed Jimber and Skylawn Fa'oso and their family remained in occupation of the premises.
- 10 By order dated 16 March 2017 served on Jimber and Skylawn Fa'oso the Tribunal directed the matter be listed for hearing on 24 March 2017 to consider whether any order be made against them under s 133 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the VCAT Act).
- 11 Neither of them appeared and further orders were made on 24 March 2017 directing warrants for the arrest of Jimber Fa'oso and Skylawn Fa'oso pursuant to s 137(2) of the VCAT Act. The order made that day stated that they appeared to be guilty of contempt of the Tribunal under s 137(1)(f) of the VCAT Act by doing any other act, that would, if the Tribunal were the Supreme Court, constitute a contempt of court. The reasons for issue of the warrant indicate that the failure to comply with an order of the Supreme Court can constitute contempt of the Supreme Court.
- 12 Jimber and Skylawn Fa'oso were ultimately arrested under the warrant on 13 April 2017, and bailed to appear before the Tribunal.
- 13 Upon the return of the matter, Mr Partos, who appeared for Jimber and Skylawn Fa'oso, submitted the order of the Tribunal was an invalid order for the purposes of contempt, or alternatively was so vague and ambiguous that it could not constitute contempt.
- 14 So far as the invalidity submission was concerned, Mr Partos submitted that the occupancy by Mr and Mrs Fa'oso of the premises at the rear of the café was a residential tenancy and that the orders made by SM Walker were not orders that fell within the statutory framework for seeking an order for possession under the *Residential Tenancies Act 1997* (Vic) (the Residential Tenancies Act).
- 15 I am satisfied that orders made by SM Walker were not made or purportedly made under Residential Tenancies Act. I am satisfied the application by F.R. Reid Pty Ltd was properly before the Tribunal by reason of F.R. Reid Pty Ltd's interest under the lease of the premises with Mr Davis under the Retail Leases Act, and by reason of the Workplace Agreement signed by F.R. Reid Pty Ltd and Jimber Fa'oso which engaged him as the Manager of the Café the subject of the leased premises and gave him a right with his family to reside in the residence at the rear of the cafe.
- 16 I am satisfied that the orders made were proper orders within VCAT's jurisdiction under the Retail Leases Act and the Workplace Agreement.

- 17 I am not satisfied that the orders made by SM Walker on 17 January 2017 are vague, ambiguous and incapable of compliance.
- 18 In my view, Order 1 that the respondents vacate the premises situated at and known as 121 Waverly Avenue, Merrigum on or before 31 January 2017 and deliver up vacant possession to the applicant are clear and unambiguous.
- 19 I am satisfied having heard the evidence of each of Jimber and Skylawn Fa'oso that they clearly understood from their presence at the hearing before SM Walker that the effect of the order was that they were to vacate the premises on or before 31 January 2017 and that F.R. Reid Pty Ltd was entitled to vacant possession of the premises from 31 January 2017.
- 20 Each of Jimber and Skylawn Fa'oso depose they left the property on 6 January 2017, that is, between the dates of the first and the final hearing before SM Walker, and that is, before the order of SM Walker that they vacate the premises. They depose that they did not get the opportunity to tell the presiding member they had already moved out.
- 21 However, they also depose their two older sons remained in occupancy of the premises after they moved out on 6 January 2017 and remained in occupancy of the premises after the time fixed for giving vacant possession by order of SM Walker, that is, after 31 January 2017. Each of Jimber and Skylawn Fa'oso deposed that after they had left the premises and while their two older sons remained in occupancy of the premises, including after 31 January 2017, they continued 'to come and go from time to time'. Skylawn Fa'oso confirmed in her evidence that they visited the property daily. Each of them deposed they believed the landlord (that is, F.R. Reid Pty Ltd's landlord) had given their sons permission to occupy the premises.
- 22 They also deposed to knowing the landlord terminated F.R. Reid Pty Ltd's lease on 24 March 2017, that is coincidentally also the date of the hearing fixed by VCAT under s 133 of the VCAT Act. It follows each of Jimber and Skylawn Fa'oso knew that up to that time, that is 24 March 2017, F.R. Reid Pty Ltd was and remained the tenant, and that it was for F.R. Reid Pty Ltd, and not the landlord, to offer a subtenancy of part of the leased premises.
- 23 It is in my view not to the point therefore to assert they believed their sons had been given permission to stay in the premises by the landlord. They were clearly aware that it was for F.R. Reid Pty Ltd and not the landlord to give permission for anybody to stay in the premises by reason of their knowledge of the lease granted by the landlord to F.R. Reid Pty Ltd.
- 24 It was their obligation, as each of Jimber and Sylawn Fa'oso acknowledged, to vacate the premises and to deliver up vacant possession. By leaving their sons remaining in occupation of the premises, and continuing to 'come and go from time to time', and indeed to visit the premises daily, I am satisfied that Jimber and Skylawn Fa'oso did not

vacate the premises or give vacant possession to F.R. Reid Pty Ltd by 31 January 2017 as directed by VCAT.

- 25 It is in my view also not to the point that Mr Davis, F.R. Reid Pty Ltd's landlord, gave permission to the sons to remain on the premises, if indeed he did. He did not have the authority to override the orders of the Tribunal. Any asserted belief that he had given permission does not absolve Jimber and Skylawn Fa'aoso of the obligation on them to abide by the orders of the Tribunal. The order of the Tribunal clearly required them, and anyone who by reason of the permission granted to them under the Workplace Agreement which gave them the right to occupy the premises, to vacate the premises pursuant to the order of SM Walker.
- 26 I am not satisfied that either Jimber or Skylawn Fa'aoso took any or any reasonable steps to ensure that people that they had licensed to come onto the premises – pursuant to the permission granted to them by the sublease in the Workplace Agreement – vacated the premises. It was their obligation to do so.
- 27 The evidence that their sons were adults and that they believed their sons had been given permission by William Davis and that they told their sons that they had to get out but did no more is in my view entirely unsatisfactory.
- 28 I am satisfied therefore that neither Jimber or Skylawn Fa'aoso complied with Order 1 of SM Walker's dated 17 January 2017 that they vacate the premises and deliver up vacant possession to the applicant.
- 29 In order to find a contempt established under s 137(1)(f) I must be satisfied of the following matters. Firstly, that there was an order made by the Tribunal. I am satisfied of that. That the terms of the order were capable of enforcement. I am satisfied of that for the reasons I have identified. I am satisfied that each of Jimber and Skylawn Fa'aoso were aware of the terms of the order as they were present at the time it was made and were served with copies of the order within days. I am satisfied that they therefore had knowledge of the terms of the order and what was required of them. I am satisfied that Order 1 was breached by their failure to provide vacant possession, by their continuance to countenance or failing to take any reasonable steps to remove their sons from the premises and by their continued visiting of the premises whilst their sons remained in occupation. I am satisfied therefore that their breaches of the order were voluntary, that is, that they were conscious and deliberate acts on their part.
- 30 I therefore find that each of Jimber and Skylawn Fa'aoso is guilty of contempt under s 137(1)(f).
- 31 I do not consider it appropriate it in the circumstances to find the contempt proven and take no further action. As I said in the course of argument, these were deliberate breaches and the importance of maintaining the integrity of and respect for orders of this Tribunal remains, in my view, the

paramount consideration. In my view, therefore, the deliberate failure to comply with the orders means that orders which impose a penalty on each of Jimber and Skylawn Fa'aoso must be made.

- 32 They are both people of limited means but they are clearly intelligent enough to have properly understood and participated in the Tribunal processes although they were not happy with the outcome of the proceeding before SM Walker. However, as they are people of limited means, the penalty imposed must be one that is reflective of that.
- 33 Having regard to what I was told about their financial circumstances, I consider it appropriate that each of them be fined. I consider there to be no basis for distinguishing their culpability between either of them. Each of them is fined \$1000. It is implicit in what I have said that this is not a contempt that would, in my view, justify a consideration of the imposition of a term of imprisonment.
- 34 A stay of three months on payment of the fines is granted.
- 35 Bail is now discharged.

Judge Hampel
Vice President