

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R227/2013

CATCHWORDS

Retail tenancy – abatement of rental due to defective Premises – terms of settlement that agreed works should be carried out – abatement of rental in the meantime – whether works carried out.

APPLICANT	Fortuna Fountain Pty Ltd (ACN 122 610 879)
RESPONDENT	Dato Lim Jew Siang Investments Pty Ltd (ACN 067 158 203)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Reinstatement Hearing
DATE OF HEARING	7 March 2018
DATE OF ORDER	17 April 2018
CITATION	Fortuna Fountain Pty Ltd v Dato Lim Jew Siang Investments Pty Ltd (Building and Property) [2018] VCAT 587

ORDERS

1. I find that the works ordered to be done by the tribunal's order of 18 March 2018 were completed by 31 December 2017.
2. Liberty to the parties to apply for any further order or directions consequent upon this finding or that remain to be dealt with in this proceeding.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr N. Wallwork of Counsel
For the Respondent	Mr J. Foster of Counsel

REASONS

Background

1. The Respondent (“the Landlord”) is the owner of motel premises in Glen Waverley, comprising 33 rooms in three buildings (“the Premises”). The Premises have been let to the applicant (“the Tenant”) since 1 March 2008 and are operated by it as a motel.
2. This proceeding was commenced by the Tenant in 2013 in order to obtain an abatement of rental and outgoings because of structural and other defects in the Premises.
3. On 28 January 2014 the tribunal ordered that, until further order, the Landlord was restrained from taking any steps against the Tenant in response to the Tenant paying, as from 1 February 2014, only 65.16% of the rental, outgoings and other payments that it would otherwise be liable to pay pursuant to the lease.
4. In the reasons accompanying that decision, the tribunal set out the basis of the calculation of this figure, which related to the extent to which the rooms in the motel were able to be fully or partially let due to the condition of the three buildings. The tribunal concluded that there was a serious question to be tried as to whether 11.5 rooms in the Premises were able to be let to guests.
5. It is important to note that the order was not an order for the abatement of rental but rather, an injunctive order to restrain the Landlord from taking any steps against the Tenant as a consequence of paying a rental that was reduced to the extent the tribunal had determined. In essence, the tribunal had decided that there was an issue to be tried as to whether or not there should be an abatement of rental to that extent. Whether or not an abatement of rental would eventually be ordered was something that would occur, if at all, in the future.

The defects complained of

6. There were many problems with the Premises but the main ones were foundation movement and consequential cracking of the solid plaster walls in the rooms and also lack of waterproof membranes in the bathrooms with resulting dampness.
7. It was apparent that there had been substantial foundation movement of the three buildings and that, since the internal walls of the rooms were hard plastered, any movement would be reflected in cracking of the walls.
8. There were numerous cracks of varying widths about which complaint was made. There was general agreement as to the nature of the defects although there was some disagreement between the experts as to their extent what should be done about them.

9. Following the making of the 28 January order, there were various inspections of the Premises by experts and a number of interlocutory steps were taken in this proceeding. These included a determination as to the renewal of the lease and the fixing of a new rental after the renewal.

Settlement

10. Following a compulsory conference that was conducted on 22 October 2014, the tribunal made an order by consent that the Landlord would, at its own expense, undertake repairs to the Premises that were described in paragraphs 1 and 2 of that order. By paragraph 3, the parties were to commission a further scope of works, to be prepared by their respective experts, following which repairs to the rooms at the Premises would be carried out by the Landlord in blocks of 3 to 5 rooms at time, as determined by the experts. The work was to be completed by no later than 30 June 2015.
11. By paragraph 7 of the Order, the Landlord would continue the abatement of rental "...until such time as the works are completed."
12. The compulsory conference resumed on 31 October 2014 at which time an order was made noting that the proceeding had been settled at the compulsory conference, the claim was struck out with a right reinstatement and no order as to costs, and the counterclaim was also struck out with no order as to costs.

Reinstatement application

13. On 18 December 2015 the tribunal received an application on behalf of the Landlord to reinstate the proceeding. The application was accompanied by affidavits from a building expert, Miss McKay, and the Landlord's solicitor. In essence, the ground of the application was that the Tenant was, allegedly, not cooperating in having the work carried out.

The hearing

14. The matter came before me for hearing on 18 March 2016. The Tenant was represented by its director, Mr Hundt, and the Landlord was represented by Mr J Foster of Counsel.
15. I heard evidence from Miss McKay and also from Mr Hundt, who said that he also sought to have the proceeding reinstated. Mr Hundt did not oppose an order that the Landlord should carry out the work. The only dispute was how long it should take to carry it out and who should be engaged to do it.
16. I ordered that the proceeding be reinstated and that the work be carried out by the Landlord in accordance with the documents which were exhibits GAM6, GAM7, GAM8 and GAM9 to the affidavit of Miss McKay, sworn 17 December 2015 filed herein.
17. I directed that the work be carried out within a reasonable time and in blocks of 3 to 5 rooms at a time. Liberty to apply was reserved.

Application for relisting

18. On 1 December 2017 the tribunal received an application on behalf of the Landlord seeking an order that the matter be reinstated. This was treated by the tribunal as an application for reinstatement but in fact, since the proceeding had not been struck out, the application was really to have the matter relisted.
19. The application came before me for hearing on 17 January 2018. Mr Wallwork of Counsel appeared on behalf of the Tenant and Mr Foster of Counsel appeared on behalf of the Landlord. The Tenant had sought to adjourn the hearing on the basis that it needed to obtain additional expert evidence.
20. The hearing was adjourned part heard to 7 March 2018 with three hours allocated. Directions for the filing and service of further expert evidence were given. I heard from both experts and, in the course of the hearing, I also visited the site together with the parties and their experts.

The evidence

21. The extent of the work carried out by the Landlord was considerable. All of the bathrooms were completely rebuilt with waterproof membranes and new fittings and tiles. Cracks were repaired and the rooms repainted.
22. Miss McKay deposed in her affidavit of 21 September 2017 that she was engaged by the Tenant to carry out the construction management of the rectification works at the Premises.
23. She said that the works described in the order that I made were carried out and that, on Wednesday, 6 September 2017, she attended the Premises to carry out a final inspection. She said that, on that occasion, she handed to the Tenant's staff a signed certification of completion dated 6 September 2017.
24. She said that, on 11 September 2017, she issued a certificate of practical completion to the builder that had been engaged to do the work. Both of these documents were exhibited to her affidavit.
25. In a further affidavit sworn by Miss McKay on 21 December 2017 she said that she carried out a defects inspection at the Premises on 19 December 2017 accompanied by the builder but she was denied access by the Tenant to eight of the rooms. Exhibited to her affidavit was a list of defects that she noted on that occasion that she gave to the builder to attend to. This list sets out what seem to be minor items, including repairs to cracks and paintwork to 7 rooms.
26. In her oral evidence during the hearing Miss McKay confirmed that the work had been carried out, although she acknowledged that some cracks had appeared since, some of which had been further repaired.
27. In an affidavit in response, sworn 15 January 2018, Mr Hundt said that the work had not been completed, that there were cracked walls, a foul smell

and humidity issues in the rooms. He said that the premises remained not presentable for guests with normal expectations of a motel and that there were also possible health issues for guests.

28. In support of his allegations, he exhibited a number of photographs to his affidavit. These photographs show a number of cracks in the wall of varying widths, most of them hairline but some wider, although none appear to be more than about 2 to 3 mm wide.
29. The allegations in Mr Hundt's affidavit were not borne out by what I saw during the inspection. There was some cracking in the walls but it was minor and it did not appear to me to render any of the rooms unusable. Indeed there was evidence of occupation in many of the rooms. There was a collapsed shelf in Room 32 which I was told was accidental damage not attributable to the Landlord. Its repair was not within the required scope of works and, although most unsightly, the Tenant has not repaired it. I did not experience any "foul smell" or humidity issues. There was no evidence of mould or efflorescence pointed out to me which might indicate a dampness problem.
30. An affidavit sworn by a handyman, Mr Fitzgibbon, on 16 January 2018 was relied upon by the Landlord. He swore that he had been engaged by the Landlord to perform maintenance work at the Premises following the carrying out of the rectification work. He said that on 5 December 2017 he requested the Tenant to provide him with access to the rooms to carry out any necessary work but that, up to the time of swearing his affidavit no access had been provided. By the time of the hearing, he had repaired a number of cracks in the rooms and during the site inspection he pointed out what he had done. All of these works had been carried out by him by 27 February 2018.
31. A report was prepared by the Tenant's expert witness, Mr Mladicheck, who inspected the Premises on 6 December 2017. His report consists largely of a number of photographs showing cracks, most of which appear to be hairline but some are more substantial. He also raised in his report concerns as to the moisture content in the walls in the hallways adjacent to the bathrooms of the rooms. He summarised his conclusions as follows:
 - (a) fresh brick wall cracking was found in all units inspected;
 - (b) comparison with old photos indicated that wall cracks are returned in the same location;
 - (c) there was no attempt to reinforce old cracks with metal mesh is required in the scope of works;
 - (d) elevated moisture readings at the base of the brick walls shower enclosures.
32. He said that because the cracks were repaired "without reinforcing", it is not surprising that fresh cracking has appeared in the same locations and that the rectification work was therefore defective and not fit for the

purpose. He said that it was clear from the elevated moisture levels in the walls opposite this shower enclosures that the waterproofing in the shower enclosures had not prevented dampness in the walls and that the building work in the shower enclosures was therefore defective and unfit for the purpose.

33. However he did acknowledge that, given the state of the buildings and that the fact that they are on highly reactive soil, it is not surprising that the walls were badly cracked and that instead of repairing the cracks a better option would have been to reline the internal walls with 6 mm plasterboard. That was not required by the order that I made.
34. As to these issues raised by Mr Mladicheck, Miss McKay said that the cracks had been reinforced although not with metal mesh but with another material that one of the experts have approved of. She said that she was not able to contact the other expert. Although she acknowledged that some cracks had reappeared she said that the repair work to the original cracks had nonetheless been carried out and that the methodology used was appropriate.
35. She disputed that there were elevated moisture levels in the walls or that there was any indication that the waterproofing in any of the bathrooms had failed.
36. During the site visit it was apparent that her moisture metre and Mr Mladicheck's moisture metre recorded very different findings. Miss McKay said that her metre was bought recently from a supplier of scientific instruments. Mr Mladicheck said that he had had his metre for some years and had found it to be reliable.
37. Mr Mladicheck said that he could smell dampness in the rooms but I was unable to do so. I placed my hand on some of the walls opposite the shower recesses and they did not feel damp to me, although I am not an expert.
38. The photographs taken of Mr Mladicheck's measurements show that his metre was set, not on the setting labelled for masonry walls but rather, on the setting labelled for measuring the moisture content in timber. I asked him about this during his evidence and he acknowledged that this was the case but said that the setting that he used was the one that he deemed appropriate. I only noticed this in the photographs after returning to the Tribunal following the on-site inspection and so I had no opportunity to ask him to re-do his measurements on site with the metre set for masonry.
39. I asked Mr Mladicheck how the use of an expanded metal reinforcing material would work to prevent a crack from opening, given that it would be embedded in the plaster base coat and would only support the plaster in that immediate position. I asked him whether that would not simply move the crack to the edge of the reinforcement. He acknowledged that this would occur but said that nonetheless, the scope of works had required that methodology.

40. I note that the scope of works that is Exhibit GAM 1 Ms McKay's affidavit requires the cracked locations to be reinforced "with plaster gauze". Expanded metal mesh is not mentioned.
41. Although Mr Mladicheck had said in his report that fresh brick wall cracking was found in all units inspected that was not my observation on site.

Findings

42. Apart from the above matters raised by Mr Mladicheck, the question of what works were carried out by the Landlord was not directly addressed on behalf of the Tenant.
43. It is clear from the evidence that these buildings have had foundation problems, that they are built on reactive soil with few articulation joints and as a consequence, further movement in the walls in the future and further cracking is likely to occur. However this is not a claim against a builder for defective work but rather, an enquiry as to whether the scope of works that I ordered has been carried out. In that regard, the only issue that I can see that has been raised is the use of what is said to be a different reinforcing material for the crack repairs than the material specified in the joint report. Although the use of this material was approved by one of the two experts it was not approved by the other because, according to Miss McKay, his opinion was not forthcoming.
44. I do not think that it is a reasonable interpretation of the order that was made that the rectifying builder would have no scope at all to adapt the methodology to suit the conditions that he encountered on site. Miss McKay has said that the use of this material was suggested by the builder, that she agreed with it after consulting with the Landlord's expert, Mr Lees, who was one of the authors of the scope of works and who agreed for it to be used.
45. She said that this did not result in any saving for the Landlord and was an appropriate choice of material. Moreover, it seems to be conceded that the use of expanded metal reinforcing would not have produced a better result.
46. I am satisfied from the evidence that:
 - (a) the work required has been carried out in accordance with the order;
 - (b) practical completion of the work required by the order was achieved on 11 September 2017;
 - (c) a final inspection of the work was carried out on 19 December 2017 and there were a number of minor matters to be attended to. They seem to be mainly maintenance issues but I am not able to find on the evidence that I have that none of these items formed part of the scope of works;
 - (d) delay was then experienced in attending to these matters by the refusal of the Tenant to grant access to Mr Fitzgibbon;

- (e) all of the maintenance items had been attended to by mid-February 2018;
- (f) the fact that further cracking has since appeared is not to the point. The issue is simply whether the order was complied with and I am satisfied that it was.

Orders to be made

- 47. It appeared to be conceded by both sides that the Tenant is entitled to an abatement of the rental equivalent to the proportion previously calculated, up to the date upon which the work was completed. Indeed, that appears to be the effect of paragraph 7 of the consent order made 22 October 2014.
- 48. Allowance should be made of a few days to attend to the maintenance items that could have been attended to immediately following the final inspection if access had been provided. Taking that into account, I find that completion occurred by 31 December 2017. Consequently, the Landlord is entitled to full rental as from that date.
- 49. There will be liberty to the parties to apply for any further orders or directions consequential upon these findings.

SENIOR MEMBER R. WALKER