

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP315/2017

CATCHWORDS

Landlord & Tenant ; sections 91, 53 and 54 Retail Leases Act 2003 - Notice of alterations and refurbishments of premises; loss due to landlord substantially inhibiting the tenant's access to the premises; landlord's failure to rectify defect in retail premises.

APPLICANT	Gallery Bar & Grill Pty Ltd
RESPONDENT	Freilich Napean Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member J. Pennell
HEARING TYPE	Hearing
DATE OF HEARING	31 March 2017
DATE OF ORDER	31 March 2017
DATE OF REASONS	23 May 2017
CITATION	Gallery Bar & Grill Pty Ltd v Freilich Napean Pty Ltd (Building and Property) [2017] VCAT 720

ORDERS

1. The respondent, its servants or its agents are restrained from undertaking any building or demolition works at the property known as 1408-1412 Nepean Highway, Mount Eliza as described in the Certificate of Title Volume 09348 Folio 350 (the premises) until 8 May 2017.
2. The respondent, its servants or agents shall allow the applicants, its servants or agents and patrons access to the tea room, kitchen, toilets, balcony and garage of the premises, via all entrances, including the entrance in the courtyard until 8 May 2017.

3. Having considered s.115B of the *Victorian Civil and Administrative Tribunal Act 1998* the respondent shall reimburse the applicant the filing fee of \$947.90.

MEMBER J. PENNELL

APPEARANCES:

For the Applicant Mr R.A. Licciardo & Ms C. Licciardo, Directors of
the Applicant

For the Respondent: Mr A. Rollnik of Counsel

REASONS

- 1 On 1 August 2012 Gallery Bar & Grill Pty Ltd (**‘the tenant’**) leased from Freilich Nepean Pty Ltd (**‘the landlord’**) part of the property known as 1408-1412 Nepean Highway Mt Eliza commonly known as the Manyung Gallery (**‘the property’**). The property consists of two retail premises, the first being an art gallery (**‘the art gallery’**) and the second a restaurant/ tea-room, which is occupied by the tenant (**‘the premises’**).
- 2 The premises is described in the lease as ‘the restaurant/tea rooms, kitchen, toilets (shared use), balcony and part of the garage’ and constitutes a retail premises under section 3 of the *Retail Leases Act 2003* (**‘the Act’**)¹.
- 3 By an application dated 6 March 2017 the tenant sought orders that:
 - (a) in accordance with to section 91 of the Act, the landlord be restrained from conducting any further works at the property until it has complied with section 53 of the Act.
 - (b) in accordance with section 54(2) of the Act, the landlord to compensate the tenant for its loss and damage by reason of the landlord substantially inhibiting the tenant access to the premises;
 - (c) in accordance with section 54(2)(e) of the Act, the landlord repair and rectify all structural damage to the premises.
- 4 The matter came before Member C Edquist on 7 March 2017 to determine whether an interim injunction ought to be made. The landlord provided certain undertakings to the Tribunal in relation to the removal of asbestos and associated works at the premises. The proceeding was listed for a final hearing before me on 31 March 2017 to determine if an injunction restraining the landlord from carrying out any alteration or refurbishment works should be granted in respect of the balance of the 60 day notice period required under section 53 of the Act.
- 5 At the hearing on 31 March 2017 I made orders restraining the landlord from undertaking any building or demolition works at the property until 8 May 2017. These are my reasons for the orders made on 31 March 2017.

¹ *Wellington v The Norwich Union Life Insurance Society Ltd* (1990) V ConvR 54-387 per Nathan J @64,753

RETAIL LEASES ACT 2003

6 Section 91 of the Act enables the Tribunal to make orders requiring a party to do, or not to do, certain acts within the law² and for a party to pay money by way of restitution or compensation³.

7 Section 53 of the Act requires a landlord to provide a tenant at least 60 days written notice of any alteration or refurbishment of the building that is likely to adversely affect the tenant's business. It states:

Landlord to give notice of alterations and refurbishments

A retail premises lease is taken to provide that the landlord must not start to carry out any alteration or refurbishment of the building or retail shopping centre in which the retail premises are located which is likely to affect adversely the business of the tenant unless—

- (a) the landlord has notified the tenant in writing of the proposed alteration or refurbishment at least 60 days before it is started; or
- (b) the alteration or refurbishment is necessary because of an emergency and the landlord has given the tenant the maximum period of notice that is reasonably practicable in the circumstances.

8 Section 54 of the Act provides compensation to a tenant for interference caused by the landlord. It states:

Tenant to be compensated for interference

- (1) A retail premises lease is taken to provide as set out in this section.
- (2) The landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damage) suffered by the tenant because the landlord or a person acting on the landlord's behalf—
 - (a) substantially inhibits the tenant's access to the retail premises; or
 - (b) unreasonably takes action that substantially inhibits or alters the flow of customers to the retail premises; or
 - (c) unreasonably takes action that causes significant disruption to the tenant trading at the retail premises; or
 - (d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or

² Section 91 (a) Retail Leases Act 2003

³ Section 91(b) Retail Leases Act 2003

- (e) fails to rectify as soon as practicable—
 - (i) any breakdown of plant or equipment that is not under the tenant 's care or maintenance; or
 - (ii) any defect in the retail premises or in the building or retail shopping centre in which the retail premises are located, other than a defect due to a condition that would have been reasonably apparent to the tenant when entering into or renewing the lease or when the tenant accepted assignment of the lease; or.....’

- 9 At the time of commencement of the lease in 2012 the tenant performed extensive works on the premises which included the installation of a commercial kitchen and changing the access to the premises from both the carpark and the central courtyard.
- 10 In or about May 2016 the art gallery became vacant and the landlord’s attempts to re-let the premises as an existing gallery were not successful. As a result, the landlord considered alternative uses for the premises. It now proposes to separate the art gallery and the premises with the intention of demolishing the art gallery and building a child care centre in its place.
- 11 On 15 February 2017 a meeting was conducted between the landlord’s director, Mr David Freilich, the landlord’s builder, Mr Sam Pavic and the directors of the tenant, Mr Robert Licciardo and Ms Christine Licciardo. At the meeting the tenant was informed of the landlord’s intention to re-develop the art gallery and that preliminary works were required to remove asbestos from the property. The tenant was not informed as to when these works were to commence.
- 12 At the meeting Mr Licciardo and Ms Licciardo expressed concern as to the effect the re-development works would have on the tenant’s business. In particular, they expressed concern about access to the restaurant via the central courtyard and whether parking would be available for the restaurant. Their evidence was that by blocking the access to the courtyard the works would adversely affect the tenant’s business as a result of customers thinking that it was no longer open for business or that their ability to enjoy the premises will be affected by the works.
- 13 On or about 2 March 2017 the landlord commenced building works at the property. The initial works were for the removal of asbestos at the property and included the erection of hoarding around the art gallery.

- 14 The tenant claims the building works were commenced by the landlord without providing proper notice under section 53 of the Act. The tenant says that the demolition and building works are so substantial that they will adversely affect its business. In particular, the tenant says that the proximity of the works to the premises, the erection of hoarding around the works and the builders occupying the shared car parking space will have an adverse effect on the patronage of the tenant's business as a restaurant and tea rooms.
- 15 On 8 March 2017 the landlord served a notice on the tenant pursuant to section 53 of the Act.

THE LANDLORD'S POSITION

- 16 The landlord says that the tenant will not be adversely affected by the refurbishment works because:
- (a) The builder will be instructed to perform the work on Mondays and Tuesdays, being the days that the tenant does not trade;
 - (b) All work would be undertaken with due care and skill and in accordance with all laws and regulations;
 - (c) The tenant will not be affected due to the fact that the building works will not be conducted on the premises. In particular, under the terms of the lease, the courtyard and carpark are not included in the demised premises.
 - (d) Notwithstanding the fact that the premises does not include the courtyard or the carpark, the landlord has provided the tenant with a licence to share the carpark area together with the overflow parking from which the tenant continues to have access to the front door of the premises.
- 17 The landlord's builder Mr Maddon gave evidence by an affidavit dated 24 March 2017 in which he stated that he would use his 'best endeavours' to perform the building works on a Monday and Tuesday. He gave no details as to how this was going to be achieved.
- 18 Section 53 is enlivened when it is likely that the building works will adversely affect the tenant's business. In this case the building works involve the demolition of part of the building in which the premises is located and the construction of a child care centre in its place. In the unlikely event that all the work can be restricted to

each Monday and Tuesday, in my view the building works are so significant that it is more than likely they will adversely affect the tenant's business.

- 19 Accordingly, I made an order restraining the landlord from commencing all works until 8 May 2017, to give the tenant the balance of the mandatory 60 day notice period required under section 53 of the Act.

TENANT'S CLAIM FOR COMPENSATION

- 20 A central courtyard is located between the art gallery and the premises. Prior to June 2016 the courtyard was shared by the tenant and the art gallery tenant. The tenant had access to it as a result of a license being granted by the art gallery tenant. By letter dated 26 February 2014 to the local council in support of the tenant's application for a liquor licence, the landlord consented to the tenant accessing the courtyard and confirmed that it was available to be used by both the art gallery tenant and the tenant.
- 21 The tenant now claims that landlord has interfered with the tenant's quiet enjoyment of the property by commencing the building works on 7 March 2017. In particular, it claims that the hoarding erected by the landlord inhibits the tenant's access to the courtyard and therefore the premises. It says that the majority of its customers enter the premises via the courtyard. The hoarding now prevents them from accessing the premises through the courtyard. The result is that customers are turned away resulting in a loss of business to the tenant.
- 22 The landlord says that courtyard is not part of the premises leased to the tenant. It states that upon the termination of the art gallery lease any permission granted to the tenant to access the courtyard was also terminated. That is, upon termination of the art gallery lease the interest in the premises reverted to the landlord and the tenant's permission to use the courtyard was terminated.
- 23 By an email dated 21 June 2016 the landlord requested that the tenant's tables and chairs be removed from the courtyard. In addition, on 9 December 2016 and 7 March 2017 the landlord issued the tenant with a default notice under section 146 of the *Property Law Act 1958* requiring it to remove all tables and chairs from the courtyard and to cease using the courtyard.
- 24 The tenant has used the courtyard to its benefit during the period of the lease and, it would appear that the loss of its use will have a detrimental effect on the tenant's business. However, the terms of the lease are clear that the courtyard does not form part of the retail premises occupied by the tenant. The withdrawal of the landlord's

consent means that the tenant does not have the right to occupy or access the premises from the courtyard.

- 25 In any event the tenant has not provided any evidence of loss and damage resulting from the hoarding being erected across the courtyard entrance. While evidence was given by Ms Licciardo that a wedding had been cancelled as a result of the building works, she could not quantify the loss and damage suffered by the tenant.
- 26 As to the car park, it is also clear from the express terms of the tenancy agreement that the car park does not form part of the demised premises. However, from the disclosure statement it does appear that 26 car parks are provided to the property to be shared equally between the tenants of the property. This is not disputed by the landlord. As such the tenant has shared access to the carpark. As a result, the tenant's access to the premises from the carpark was not inhibited.
- 27 Accordingly, the tenant's application for reasonable compensation for loss and damage caused by the landlord inhibiting and altering the flow of customers to the premises is dismissed.

DAMAGE TO THE PREMISES

- 28 The tenant claims more generally that the landlord has failed to repair and rectify all structural damage to the premises resulting in water flowing from the roof onto the decking of the premises and damaging the carpet and chipboard flooring. The landlord's position is that any structural fault in the premises was caused by the tenant at the time of performing renovation works on the premises at the start of the tenancy agreement. As such, it is not liable to rectify the defect, as alleged by the tenant.
- 29 While the tenant provided some photographs of the premises showing some water damage to the carpet, it did not provide any evidence as to the cause of the damage or the cost of rectification. As such, it was not possible to determine if the landlord was liable to the tenant for the water damage under section 52 or section 54(2)(e) of the Act.
- 30 Accordingly, the tenant's application for compensation for loss and damage for the alleged structural defect of the premises was dismissed.

CONCLUSION

- 31 For the reasons provided above, the landlord, its servants or agents are restrained from undertaking any building or demolition works at the property until 8 May 2017 being the balance of the 60 day notice period required under section 53 of the Act.

32 However, the claims made under section 54 of the Act for compensation are to be dismissed.

MEMBER J. PENNELL