

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP537/2014

CATCHWORDS

Retail Tenancies Act 2003; sections 61 and 62; assignment of lease by tenant; failure of tenant to give landlord and assignee a disclosure statement; effect of failure to do so on tenant's liability to landlord for assignee's failure to pay rent and building outgoings

APPLICANT	HJ Corporation Pty Ltd
RESPONDENTS	Ms Thanh Van Nguyen Ms Thi Thanh Nguyen
WHERE HELD	Melbourne
BEFORE	Member B Thomas
HEARING TYPE	Hearing
DATE OF HEARING	4 March 2015
DATE OF ORDER	13 August 2015
DATE OF REASONS	13 August 2015
CITATION	HJ Corporation Pty Ltd v Nguyen (Building and Property) [2015] VCAT 1300

ORDER

1. The Respondents must pay to the Landlord the sum of \$77,880.08.

Member B Thomas

APPEARANCES:

For Landlord	Mr D Cole, barrister
For Respondents	Mr P Lithgow, barrister

WRITTEN REASONS

Background

1. The landlord, HJ Corporation Pty Ltd, is the owner of a shop in Springvale Road, Springvale (the premises)
2. By a lease dated 22 November 2011, the landlord leased the premises to the Ms Thanh Van Nguyen (the tenant) for a period of three years commencing on 1 October 2011(the lease). In addition to the monthly rental, the tenant was responsible for the payment of outgoings.
3. With the consent of the landlord, the tenant transferred the lease to Ms Thi Thanh Nguyen (the assignee), who is her mother, effective from 10 October 2012.
4. No rent or outgoings have been paid by the assignee since 1 November 2015.
5. The landlord claims from both the tenant and the assignee the sum of \$76,150.86, being rent and outgoings not paid by the assignee between 1 December 2012 and 1 September 2014.
6. The hearing took place on 4 March 2015 and counsel for both parties made oral submissions. The Tribunal reserved its decision but ordered that by 16 April 2015 either party could file written submissions as to whether s 62 of the *Retail Tenancies Act 2003* (the Act) is relevant to any issue raised in the proceeding.
7. Due to an administrative oversight, this Order was not sent to the parties until 21 April 2015. On 5 May, the date for filing of submissions was extended to 22 May 2015.
8. Submissions have been received from the landlord only.

The Legislation

9. Part 7 of the Act (*Assignment of a Retail Premises Lease*) sets out the procedure to be followed by a tenant in order to obtain the landlord's consent to the assignment of a lease.
10. Section 61(3) provides –

Before requesting the landlord's consent, the tenant must give the proposed assignee—

- (a) *a copy of any disclosure statement given to the tenant concerning the lease; and*
- (b) *details of any changes of which the tenant is aware, or could reasonably be expected to be aware, that have affected the*

information in the disclosure statement since it was given to the tenant.

Penalty: 10 penalty units.

11. Therefore, the tenant was required to provide the assignee with a copy of the disclosure statement she received from the landlord and any additional relevant information she had become aware of since receiving it.

12. Section 61(5) of the Act provides -

For the purpose of complying with subsection (3), the tenant may ask the landlord to give the tenant a disclosure statement that is current from a specified date that is within 3 months before the statement is given and, if the landlord does not give the tenant such a statement within 14 days—

(a) the tenant is not required to comply with that subsection; and

(b) the landlord is guilty of an offence and liable to a fine not exceeding 10 penalty units.

13. The tenant did not make any request of the landlord under s 61(5) of the Act.

14. Section 61(5A) of the Act provides -

If the assignment is in connection with the lease of retail premises that will continue to be used for the carrying on of an ongoing business, the tenant must give the landlord and the proposed assignee a disclosure statement in the form prescribed by the regulations (but the layout of the statement need not be the same as the prescribed disclosure statement).

15. As the assignee was to continue the business being conducted by the tenant (sale of clothes, shoes and accessories), s 61(5A) required the tenant to provide a disclosure statement to the landlord and the assignee.

16. Section 62 of the Act provides -

(1) This section applies if—

(a) a tenant gives a landlord and proposed assignee a copy of a disclosure statement in accordance with section 61(5A); and

(b) *the disclosure statement does not contain any information that is false, misleading or materially incomplete.*

(2) *None of the following persons are liable to perform any obligations under the lease or to pay to the landlord any money in respect of amounts payable by the proposed assignee—*

(a) *the tenant;*

(b) *....*

The Evidence

Ms Huan Luo

17. Ms Huan Luo, a director of the landlord, gave evidence on its behalf.
18. Ms Luo said that in October 2012 the tenant requested the landlord to consent to a transfer of the lease to the assignee. The landlord consented to the transfer and, on the instructions of the assignee, a transfer of lease was prepared by Mr Hao Huynh, solicitor. The transfer of lease was signed by the tenant and the assignee in Mr Huynh's presence. Mr Huynh then forwarded the document to the landlord under cover of a letter dated 18 October 2012. The transfer of lease was subsequently signed on behalf of the landlord.
19. A disclosure statement as required by s 61(5) of the Act was not provided by the tenant to either the landlord or the assignee.
20. On 11 November 2012. Ms Luo became aware that the assignee had abandoned the premises.
21. On 13 December 2012 a Notice of Unpaid Rent was sent by post to the tenant and the assignee. Neither replied to the Notice.
22. On 16 January 2013 the landlord took possession of the premises and changed the locks. On 17 January 2013 a written demand was made of the tenant for unpaid rent and outgoings.
23. In late January 2013, the prospect of the tenant and the assignee returning to the premises at a reduced rental was discussed with Ms Luo. A fresh lease was prepared and sent to the tenant and the assignee, but they demanded a greater discount on the rent.
24. By late February 2013 Ms Luo concluded that the tenant and the assignee were not prepared to return to the premises, and engaged an agent to re-let the premises. The premises were re-let on 20 May 2013, but with a three month rent free period commencing

on 1 July 2013, so the commencement date for payment of rent under the new lease was 1 October 2013.

25. At the conclusion of the hearing, Ms Luo tendered a schedule setting out the quantum of the landlord's claim as follows –

• Rent (1/12/12 – 1/09/14)	\$96,685.52
• Owners Corporation fees (Sep 2012 – June 2013)	\$9,298.88
• Council Rates (1/07/12 – 30/06/13)	\$2,139.00
• South East Water (1/07/12 – 30/06/13)	\$585.60
• Locksmiths (to unlock the premises)	\$140.00
• Interest (@ 12.5%)	<u>\$19,839.86</u>
	\$128,688.86
Less rent received from new tenant (01/10/13-01/09/14)	<u>\$47,654.68</u>
	\$81,034.18

Ms Thang Van Nguyen, the Tenant

26. Ms Nguyen gave evidence on her own behalf and on behalf of the assignee, who, as noted above, is her mother.
27. Ms Nguyen said that in October 2012, the business being conducted in the premises was not going well. Her mother told her that if she could not handle the situation, she should transfer the lease to her. Ms Nguyen contacted Joe, Ms Luo's husband, and he agreed to the transfer. The transfer was organised by her mother as assignee. The rent was paid up to the date of the transfer of the lease, being 10 October 2012.
28. It was not until December 2012 that Ms Nguyen realised that the assignee was not at the premises. She contacted Joe who was overseas and he told her that the assignee had not paid any rent.
29. On his return from overseas in January 2013, Joe met Ms Nguyen to discuss the situation. She told Joe that she would take the shop back if the landlord was prepared to help her out by reducing the rent. Joe said he would discuss the matter with Ms Luo.
30. Joe advised Ms Nguyen that Ms Luo was prepared to give a 2% reduction in the rent and no CPI increase. Ms Nguyen asked if the rent could be kept to \$4,000 per month including GST.
31. A few days later, Joe produced a new lease with rent at \$4,100 per month including GST. Ms Nguyen replied that she could not afford that rental. This was her last conversation with Joe.

32. In cross examination by the landlord's counsel, Ms Nguyen said that it was not until May 2013 that she realised that she was liable for the rent not paid by the assignee. She also said she did not know why the assignee had just closed the shop and walked out without telling her.

Documentation

The Lease

33. The term of the lease was for three years commencing on 1 October 2011 (Item 8).
34. The rent was \$44,925.11 per annum plus GST of \$4,492.51 per annum (Item 5) payable by monthly instalments of \$4,118.10 on the first day of each month (Item 9).
35. In addition the tenant was liable for all building outgoings being *Council rates and levies, water rates and service charges and including water usage, building and public liability and glass fire and water damage insurance, Owners Corporation, Essential Fire maintenance and audits, cleaning and maintenance of the property and air-conditioning and other mechanical services toilets and plumbing and facilities and trade wastage and garbage disposal* (Item 10).
36. The interest rate on overdue money was *2% per annum more than the rate from time to time fixed by the Penalty Interest Rates Act 1983 (Vic)* (Item 14).
37. From 1 October 2012 the annual rental was to increase to \$47,171.37 plus GST of \$4,324.04 and from 1 October 2013 to \$49,529.93 per annum plus GST of \$4,540.24 (Item 16).
38. The security deposit was one month's rent plus GST (Item 20) Clause 13.3 of the Lease provides that –
- The landlord may use the deposit to make good the cost of remedying breaches of the tenant's obligations under this lease (or any of the events specified in clause 7.1)*
39. Clause 7 (Events of Default and Landlord's Rights) provides that an event of default by the tenant is a failure to pay rent for 14 days after it becomes due.

....

The Transfer of Lease

40. Under clause 2 of the Transfer of Lease the new tenant agrees to accept the obligations of the old tenant under the lease (Clause 2).

41. Clause 5 of the Transfer of Lease provides that unless s62 of the Act requires otherwise, the transfer does not end the obligations of the old tenant under the lease which continue until the end of the lease

Discussion

42. I find that the tenant did not comply with ss61(3), (5) or (5A) and 62 of the Act in that she failed to provide a disclosure statement to the landlord or the assignee. .
43. The remaining issue for my determination, therefore, is whether the tenant's failure to comply with ss61(3), (5) or (5A) and 62 of the Act affects the validity of the transfer of the lease to the assignee, and in particular, her liability and the separate liability of the assignee to the landlord for the unpaid rent and outgoings.
44. By an order of the Tribunal of 5 May 2015, the parties were invited to provide submissions as to whether s62 of the Act is relevant to any issue raised in the proceeding.
45. Only the Landlord elected to provide a submission. The thrust of this submission is that s62 has no relevance to the proceeding because –
- “ evidence of both the Landlord and the First (sic) Respondent was that there had been no disclosure statement provided by the tenant to the landlord as provided for in s61(5A) of the Act.*
- Accordingly s62, which might have had the effect of relieving the original tenant of her obligations under the lease, has no application.*
- The original tenant is therefore liable under the lease in the event, as was the case, of the new tenant defaulting under the lease.*
- As the Respondents did not seek to rely on s 62 of the Act, it was considered there was no need for submissions on the part of the Landlord with regard to this issue at the hearing.*
46. I accept the submission of the landlord regarding the operation of s62 of the Act and its inapplicability to this proceeding. Although there was an assignment of the lease from the tenant to the assignee, the tenant failed to provide a disclosure statement to either the landlord or the assignee in accordance with s 61(5A) of the Act.
47. Therefore, the relief that would otherwise be afforded to Ms Thanh Van Nguyen as the tenant by s 62(2) (a) of the Act is not available.
48. Therefore the transfer of lease must operate in accordance with its terms, without being affected by the Act.

49. As s 62 does not operate in the present case to assist the tenant, Ms Thanh Van Nguyen remains bound by the lease under clause 5 of the Transfer of Lease
50. Accordingly, I find Ms Thanh Van Nguyen as the former tenant is liable for the rent and outgoings not paid by Ms Thi Thanh Nguyen as assignee of the lease
51. I further find that Ms Thi Thanh Nguyen as assignee is separately liable to the landlord under clauses 2 of the transfer of lease.

The Landlord's quantification of loss

52. I do not accept that the quantum of the landlord's claim is \$81,034.18 for the following reasons –

- (a) The landlord has not given credit for the security deposit paid by the tenant; and
- (b) I am not persuaded that the Respondents should be penalised by the landlord's election to give the incoming tenant a three month rent free period. There was no evidence presented by the landlord that it was obliged to offer this incentive in order to re-let the premises
- (c) The landlord has applied interest to its total losses before giving a credit for rent received:

Amount claimed (1/12/12 – 1/09/14)	\$108,849.00
Interest (@ 12.5%)	<u>\$19,839.86</u>
	\$128,688.86
Less rent received from new tenant (01/10/13-01/09/14)	<u>\$47,654.68</u>
	\$81,034.18

53. In my view, the credit for rent received (\$47,654.68) should be set off against the total losses (\$108,849.00) and interest applied in accordance with the lease only on the balance from time to time.
54. I accept that the applicable rate of interest is, as noted in paragraph 36 above, is *2% per annum more than the rate from time to time fixed by the Penalty Interest Rates Act 1983 (Vic)*.
55. As the amount due increased from month to month beginning on 1 December 2012, I direct the landlord to file and serve any submission as to interest payable by the tenant and the assignee by 4 pm 11 August 2015. In the absence of the landlord filing any submission as to interest payable by the Respondents, my preliminary findings as to the amount due from the Respondents is as follows -

Net amount due (as per paragraph 25 above) \$81,034.18

Less –

Security deposit \$4,324.04

3 months rent free
period to incoming

tenant \$11,824.98

\$16,149.02

Balance due to Landlord \$64,885.16

Interest pursuant to Item 14 of the Lease \$12,994.92

\$77,880.08

56. I reserve the question of costs but in doing so, I draw the parties' attention to s 92 of the Act.

Member B Thomas