VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP395/2016**

CATCHWORDS

Retail Leases Act 2003; termination of tenancy by landlord; whether tenancy repudiated by landlord; reduction of rental for water damage to premises; claims for rent, outgoings and make good costs; section 57(1)(b) of the *Retail Leases Act 2003*

APPLICANT	Innovative Security Group Australia Pty Ltd
RESPONDENT	Clearview Holdings Pty Ltd
SECOND RESPONDENT TO COUNTERCLAIM	Julie Heather McLeish
WHERE HELD	Seymour
BEFORE	R Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	14 July 2016
DATE OF ORDER	14 July 2016
DATE OF REASONS	17 November 2016
CITATION	Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd (Building and Property) [2016] VCAT 1935

ORDER

1. Julie Heather McLeish of 4 Park Street, Killara 3139, is added as the second respondent to counter claim. The Principal Registrar is directed to amend the register accordingly.

2. For the avoidance of doubt, the Tribunal notes that the respondent's Points of Counterclaim gave particulars of a guarantee ("the Guarantee") given by the second respondent to counter claim, Julie Heather McLeish, to the respondent, Clearview Holdings Pty Ltd, for the liabilities of the first respondent to counterclaim, Innovative Security Group Australia Pty Ltd.

3. The Tribunal finds:

   (a) That the respondent's Points of Counterclaim were sufficient to put the second respondent to counterclaim on notice that the respondent

brought a claim under the Guarantee against the second respondent to counterclaim.

(b) That the second respondent to counterclaim suffers no prejudice by reason of the respondent's claim against the second respondent to counterclaim being heard today.

4. The applicant's claim is dismissed.

5. On the respondent's counterclaim, the respondents to counterclaim, Innovative Security Group Australia Pty Ltd and Julie Heather McLeish, must pay $20,737.51 to the respondent and must reimburse to the respondent the Tribunal fee of $575.30 paid by the respondent, making a total payable of $21,312.81.

R Buchanan
Member

APPEARANCES:

For Applicant	Mr R Horne, director
For Respondent	Ms J McLeish, director
For Second Respondent to Counterclaim	Ms J McLeish in person

REASONS

[This matter was heard and determined by me on 14 July 2016. At the time, I gave detailed reasons for my decision. Some time afterwards, the applicant requested written reasons. While that request was not made within 14 days as required by section 117(2) of the *Victorian Civil and Administrative Tribunal Act 1998*, the following written reasons are provided as a matter of courtesy.]

Introduction

(c) This proceeding began on 5 April 2016, when the applicant applied for an injunction to restrain its former landlord from disposing of goods belonging to the applicant.

(d) On 15 April 2016 the Tribunal dealt with the applicant's injunction application and made procedural orders to allow the parties' respective claims against each other to proceed to hearing.

(e) The proceeding involved a claim and a counterclaim arising out of a retail tenancy. The applicant, Innovative Security Group Australia Pty Ltd ("the tenant") claimed damages as a result of losses it suffered by reason of failure by the respondent, Clearview Holdings Pty Ltd ("the landlord"), to maintain the premises and by the landlord's retaking of possession. For its part, the landlord claimed for unpaid rent and outgoings, plus make good costs.

(f) The landlord's claim was made against the tenant and also against a director of the tenant, Julie Heather McLeish, by reason of a guarantee given by Ms McLeish.

Facts

(g) By an undated lease the tenant leased premises in Wodonga from the landlord for a term of five years, beginning on 1 March 2013. The tenant's obligations under the lease were guaranteed by the tenant's directors, Ms McLeish and by Michael John Robert McLeish.

(h) On various occasions during the tenancy water entered the leased premises.

(i) In November 2015 the tenant stopped using the premises and from then on conducted its business from Ms McLeish's home.

(j) The tenant paid rent until 31 December 2015. The relevant monthly rental was $2,246.93, including GST.

(k) On 19 February 2016 the landlord gave the tenant notice of breach for non-payment of rent and outgoings under section 146(1) of the *Property Law Act 1958*.

(l) On 9 March 2016 the landlord terminated the tenancy by re-entry.

(m) On 14 July 2016 the landlord relet the premises.

Claim and counterclaim

(n) By its Points of Claim, the tenant claimed for:

- Rent reduction of 12 percent from November 2015 to February 2016 by virtue of water entry making part of the premises unusable;
- Carpet cleaning; and
- Chattels wrongfully retained by landlord.

It claimed an amount of $10,180.31 by way of damages.

(o) By its counterclaim, the landlord claimed:

- Rent from 1 January 2016 to the end of the tenancy on 9 March 2016;
- Damages by way of rent forgone from 10 March 2016 to 30 June 2016;
- Outgoings to 30 June 2016; and
- Make good costs.

Total claim $29,090.24.

(p) By its counterclaim, the landlord also alleged that the tenant's obligations under the lease were the subject of the guarantee given by two directors of the tenant, Ms McLeish and Mr McLeish. It was not clear from the landlord's counterclaim (which had been prepared by a director of the landlord, not by a lawyer), whether the landlord intended by its counterclaim to make a claim under the guarantee. At the hearing, the landlord clarified that it was making a claim under the guarantee. Only one of the guarantors, Ms McLeish, was present at the hearing and the landlord advised that it would only pursue its claim under the guarantee against Ms McLeish. I was satisfied that Ms McLeish would not suffer any prejudice by reason of the claim against her under the guarantee being heard on that day.

(q) Ms McLeish did not dispute her liability under the guarantee, disputing only the liability of the tenant under the lease.

(r) At the hearing, evidence was given on behalf of the tenant by Ms McLeish and by June Noble and Daniel Hunter, an employee and a former employee, respectively. For the landlord, evidence was given by a director, Rick Horne.

Termination

(s) The landlord's position was clear; it had terminated the tenancy on re-entry on 9 March 2016, after giving notice under section 146(1) of the *Property Law Act 1958*.

(t) The tenant's position was less clear. By its Points of Defence to Counterclaim, the tenant seemed to concede that it was indebted to the landlord for rent and outgoings up to the date of termination on 9 March 2016. By contrast, the tenant's Points of Claim and the evidence from Ms McLeish, asserted that the tenant had vacated the premises because the entry of water had rendered them unfit for occupation. From this I took the tenant's position to be in two parts:

- First, that water entry made the premises unfit for the purpose of the tenancy; the landlord had failed to provide habitable premises; the landlord's failure constituted a repudiation which the tenant had accepted by stopping operations on the premises in November 2015.
- Alternatively, that if the lease had not been so terminated, from the time when the premises were wholly unfit for occupation, in early November 2015, the tenant had been freed from its obligation as to payment of rent and outgoings, by operation of clause 8.1 of the lease and by section 57(1)(b) of the *Retail Leases Act 2003.*
- Secondly, that if that first claim was unsuccessful and the tenancy was found to have stayed on foot until terminated by the landlord on 9 March 2016, the amount of rent which the tenant was obliged to pay should be reduced, to reflect the fact that part of the premises had been unusable from November 2015 to the date of termination.

Termination: How serious was the water problem?

(u) Ms McLeish gave the following evidence. What she described as "flooding" occurred on four occasions:

- 19 September 2014,
- 19 May 2015,
- 28 May 2015 and
- 2 November 2015.

(v) In each of these events, water flowed down the inside of the wall on the garden side of the premises, then spread onto the carpet. Of these events, the one on 28 May 2015 was large, affecting some 25 percent of the premises, the water spreading to the patrol room, the foyer, and the management and administration areas. On each occasion, the tenant reported the water entry to the landlord.

(w) Ms McLeish described the water entry as a constant, yet inconsistent phenomenon; not occurring every time it rained and with no apparent connection to whether the rain was heavy or light.

(x) Ms McLeish estimated that 12 percent of the premises had been rendered unusable by reason of water entry.

(y) The tenant stopped using the premises in November 2015, because of health concerns, but the tenant did not inform the landlord that it had done so. Thereafter, the tenant had conducted its business from Ms McLeish's home.

(z) June Noble, who worked for the tenant as a receptionist and security guard, gave evidence that she had suffered from asthma because of the effect of water entry and that the tenant had moved "because we couldn't use the office".

(aa) Daniel Hunter, a former employee of the tenant, gave evidence that the water entry on 28 May 2015 had caused flooding to the patrol office, manager's office and foyer. The carpet had been visibly wet and he had had to move furniture.

(bb) For the landlord, Mr Horne gave evidence that, other than one occasion when he had been in northern Australia, he had inspected the premises each time that the tenant had notified the landlord of water entry. On each occasion he had observed wet carpet. He estimated that the area of carpet affected was approximately 5 square metres.

(cc) Mr Horne said that the source of the leak had been frustratingly difficult to find. He said that each time the tenant had notified him of water entry, he would send out plumbers to investigate.

(dd) The landlord spent some $16,000 on works to stop the leak, including trenching works along the garden wall and re-roofing. In January 2016 the landlord had found and repaired the source of the leak – a downpipe built inside a cavity wall.

Termination: Tenant's communication with the landlord

(ee) Ms McLeish's evidence, then, was that the tenant had stopped using the premises because water entry made it a danger to health and un-occupiable. On the day of the last water entry, 2 November 2015, Ms McLeish emailed Mr Horne, saying that the management office "is also now becoming a health risk due to mould growth". On 4 November 2015 she emailed to say, "… the issue is now a health concern/WorkCover due to mould growth and water damage to plaster board and carpet".

(ff) The evidence given for the landlord by Mr Horne painted a different picture from the one presented by Ms McLeish. In its Points of Defence, the landlord said as follows:

> In November 2015, when I was undertaking garden maintenance outside the premises, Ms McLeish advised me that the space being rented was no longer required, as a result of the Applicant having disposed of the part of its business that required public premises. She advised that she was intending to conduct the remainder of her business from her residence.
>
> On 14 December I was approached by the Manager of the other tenant at 68 High Street Wodonga (JG King, Home Builders) who advised me that he had been approached by Ms McLeish and asked if JG King would be interested in renting the whole of the lettable space at 68 High Street; including that space which was then the subject of the ISGA lease.
>
> I emailed Ms McLeish on 14 December with my thoughts on the matter …
>
> At a later date (13 January 2016) Ms McLeish asked in an email to me … whether or not the possibility of JG King renting the ISGA premises had progressed. In a telephone call made to me by Ms McLeish; she gave the impression that she felt it was my responsibility to find an alternative tenant and that she had finished with the premises.

(gg) Mr Horne confirmed those claims in his evidence and tendered the emails referred to.

(hh) I note that in the email of 14 December 2015 referred to, Mr Horne said, "Because I know (roughly) your financial position and your stated desire to sell the business…".

(ii) Relevantly, in this correspondence about finding an alternative tenant, the tenant made no reference to the premises being unusable or presenting a health hazard.

Termination: finding

(jj) I find it unlikely that the tenant stopped using the premises because of health concerns. It is more likely that the tenant stopped using the premises for its own reasons, reasons which were unrelated to the water entry problems at the premises. I base that conclusion on the following:

- Apart from Ms McLeish's two emails of complaint on 2 and 4 November 2015, referred to above, there was no evidence of complaints by the tenant about the premises posing a risk to health.
- The tenant did not tell the landlord that it was stopping using the premises.
- The only written complaints about health risks were made immediately after the last water entry on 2 November 2015. The last

water entry before 2 November 2015 had been more than five months previously, on 28 May 2015.

- The tenant only alleged four water entry events, between September 2014 and November 2015. Two of the four occurred within days of each other, in May 2015. Effectively, each of the water events (other than the two events in May 2015) was separated by some six months, during which time plenty of warm, dry weather would have occurred.
- The area affected by water entry was not great. In Ms McLeish's words, on 2 November 2015 the area affected was, " … in the same spot as we have been discussing in the past. This is the patrol room corner and the outer side of the wall/door entry to the management office".
- After the tenant stopped using the premises, it did not rent alternative accommodation, but moved its operations to Ms McLeish's home, tending to confirm the assertion in the landlord's Points of Defence that in November 2015, "Ms McLeish advised me that the space being rented was no longer required, as a result of the Applicant having disposed of the part of its business that required public premises. She advised that she was intending to conduct the remainder of her business from her residence".
- The fact that in December 2015 Ms McLeish had approached JG King to take over the premises.
- The fact that in correspondence between Ms McLeish and Mr Horne, on the subject of JG King, Ms McLeish made no reference to the premises' being unfit for occupation and made no suggestion that the tenant had stopped using the premises because of any health concern.
- The fact that on 13 January 2016, Ms McLeish wrote to Mr Horne in response to an email requesting payment of outstanding invoices:

> Apologises (sic) for the out standings however now working from the office we've fallen behind in our data entry involving accounts. I will have these accounts paid asap.

(kk) Accordingly, I find that the water entry did not render the premises unfit for occupation by the tenant and that the tenant vacated the premises for its own reasons, unrelated to the condition of the premises.

Tenant's claims

(ll) By its Points of Claim the tenant claimed damages as a result of:

- The landlord's wrongful retention of the tenant's chattels;
- Costs caused by water entry; and

- A reduction of rental because part of the premises was unusable as a result of water entry.

Tenant's claims: chattels wrongfully retained

(mm) The tenant claimed damages on account of the wrongful retention of the following chattels by the landlord:

a) RDFI access control system, $1,172.82;

b) Signage bearing the tenant's names and logos, $3,524.40; and

c) Air-conditioning system, $3,079.20.

(nn) Once the tenancy was terminated on 9 March 2016, the tenant had no right of access to the premises. Nevertheless, by the Tribunal's order of 15 April 2016, the tenant was given access to the premises for the removal of chattels. If the tenant subsequently chose to leave chattels in the premises, it can hardly complain. Further, clause 5 of the lease specifically provided that if the tenant left any tenant's installations or other tenant's property on the premises after the end of the lease, all such items would be considered abandoned and become the property of the landlord. Accordingly, this part of the tenant's claim is dismissed.

(oo) For the sake of completeness, I note the landlord's evidence about two of the items which the tenant claimed were wrongfully retained by the landlord. The first was the RDFI access control system. The landlord's evidence was that the system was installed by the tenant within the stud walls "in such a manner that would cause further physical damage to architraves and walls when it was being removed".

(pp) The second item was the air-conditioning system. The landlord's evidence, which the tenant did not seek to rebut, was that:

> The installation of the air-conditioners was a joint project between the Applicant and the Respondent with each party sharing the total costs on a 50/50 basis. The agreement was always that when the Applicant left the premises, regardless of the circumstances, the air-conditioners would be left as fixtures to the building, with the applicant entitled to receive no compensation whatsoever.

Tenant's claims: rent reduction

(qq) The tenant claimed that as a result of water entry, it was entitled to a reduction in rent calculated by reference to the proportion of the premises which were unusable. The tenant calculated this variously to be at between 12 percent and 25 percent. Both the lease (clause 8.1) and the *Retail Leases Act*

2003 (section 57(1)(b)) made provision for such reductions. In its Points of Claim, the tenant claimed that 12 percent of the premises was unusable from early November 2015. The landlord did not dispute that date, though argued that only a small area was effected by water, some 5 square metres. In light of the evidence given on behalf of the tenant, I do not accept the landlord's estimation. Calculating on the basis of the evidence given on behalf of the tenant, I find the water-affected part of the premises to have been approximately 17 percent which, when applied to the rental for the four months from early November 2015 to termination of the tenancy on 9 March 2016, would give a reduction in rental of $1,505.

Tenant's claims: costs caused by water entry

(rr) The tenant gave evidence that after the water entry events on 2 November 2015, it had incurred costs of $385 in carpet drying. That evidence was not contested by the landlord and I will make an allowance of $385 in favour of the tenant.

Rent and reletting upon termination of the lease

(ss) It follows from the above that the tenancy remained on foot until its termination by the landlord on 9 March 2016. Mr Horne gave evidence that the tenant had not paid rent after 31 December 2015. That evidence was not challenged by the tenant.

(tt) Upon termination of the lease, the landlord was obliged to take reasonable steps to secure a new tenant for the premises. The evidence given by Mr Horne was that it had done so. Immediately on termination of the lease it had placed the property in the hands of two estate agents and had undertaken make good works. The property was not relet until 14 July 2016, but the landlord was content to restrict its claim to the period ending on 30 June 2016. No evidence was given by the tenant to suggest that the efforts of the landlord to find a new tenant had been lacking and I therefore find that the landlord did act reasonably to find a new tenant within a reasonable time. The tenant is liable to pay damages equivalent to the rental from termination of the lease on 9 March 2016 to the date claimed by the landlord, 30 June 2016.

Outgoings

(uu) The landlord claimed outgoings up to 30 June 2016. After a reduction to take account of evidence given by Ms McLeish, the total proved by the landlord was $2,130.95.

Make good costs

(vv) In its counterclaim, the landlord set out details of the make good works required to restore the leased premises to their condition before the tenant took possession. The list of works extended over some two pages. The landlord claimed the cost of those works, $13,446 and tendered invoices to support the claim.

(ww) In its Points of Defence the landlord characterised the condition of the premises at the end of the tenancy as follows:

> The whole of the premises were left in an absolutely disgraceful condition – some architraves and some skirting boards missing; many, many holes in the plaster walls; three holes that had been purposefully made through a solid brick wall and its hard plaster covering surface; light fittings broken; blinds on windows damaged to the point of being effectively destroyed; large stains on the carpets in all rooms; interior jerry-built stud walls that were erected without permission; door handles missing; light fittings broken; approximately sixty nails and screws in walls; plaster sheeting missing from one interior wall that was erected without permission; badly smudged and discoloured painted surfaces throughout the whole office area; lettering (name of Applicant) actually glued to walls; both internal and external that left holes in the plaster upon removal; paint on the surface of aluminium windows and glass window surfaces throughout the whole office area.

(xx) The landlord claimed the cost of recarpeting $5,736 because, it said, the carpet had been left stained and dirty. No photographic evidence was provided by the landlord. The tenant's evidence was that any stains on the carpet were the result of water damage as a result of the leak. The landlord's evidence, which I accept, was that the damage and staining complained of were over and above any water staining. I accept the landlord's evidence on this point, but do not accept that the damage described by the landlord justified replacing the entire carpet. I will allow 20 percent of the amount claimed by the landlord on this item.

(yy) The landlord claimed the cost of repainting the premises, $3,000. On the evidence, some painting was required. The tenant left holes in the walls which would necessitate patching and repainting of a number of walls. I will allow $750 for patching and painting.

(zz) By its Defence to Counterclaim, the tenant asserted that:

a) After the termination of the lease by the landlord on 9 March 2016, it had been denied access to make good.

b) Some of the damage alleged by the landlord had been pre-existing.

c) The tenant had made a number of beneficial changes to the premises, including installing a floating wooden floor in the entrance and reception area and re-carpeting the premises.

(aaa) In relation to the denial of access, the tenant had no right of access, once the tenancy was terminated on 9 March 2016. This claim must fail.

(bbb) The pre-existing damage alleged by the tenant was damage to blinds in the front office and holes to mount a projector in the ceiling of the training room. I will make a small allowance for those items.

(ccc) The tenant's installation of a floating wooden floor and other improvements which the landlord chose to retain is not relevant to the question of make good costs. The tenant's obligation under the lease was to return the premises to their condition at the time the tenant took possession. Clause 5 of the lease provided that at the end of the tenancy, the tenant was obliged to remove the tenant's installations and make good any damage caused in installing or removing them.

(ddd) In summary, it was clear on the evidence that the landlord was obliged to carry out make good works. The evidence did not support, however, the landlord's claim that all of the works carried out were referable to acts or omissions by the tenant and I will allow only the following:

- carpentry $3,910,
- painting $750,
- carpet $1,150 and
- blinds $820.

Total $6,630.

Orders

(eee) On the landlord's counterclaim, I find that the claims made out by the landlord are as follows:

- rent unpaid to the date of termination on 9 March 2016, $5,160.51,
- damages for loss of rent from the date of termination to 30 June 2016, $8,321 05,
- outgoings, $2,130.95 and
- make good costs, $6,630.

Total $22,242.51.

(fff) Accordingly, after deducting the amounts allowed to the tenant for rent reduction ($1,505) and carpet drying ($385), a total of $1,890, there is a balance on claim and counterclaim of $20,737.51 payable by the tenant to the landlord. In addition, Ms McLeish is liable to the landlord in the same amount, under the guarantee. I will order accordingly. In addition, as the landlord has been substantially successful in its claim and in the proceeding, I will order that the tenant and Ms McLeish reimburse to the landlord the Tribunal fee paid by the landlord.

R Buchanan
Member