

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1877/2018

CATCHWORDS

Retail lease, tenant default, claim for damages for breach of lease, premises re-let at higher rent but for shorter period than original lease, quantum of bargain loss.

APPLICANT	Italian Stuff Pty Ltd
RESPONDENT	K & N Company Pty Ltd
FIRST JOINED PARTY	Seconda Pty Ltd (ACN: 157 939 056)
SECOND JOINED PARTY	Stefano Rassu
WHERE HELD	Melbourne
BEFORE	Senior Member L Forde
HEARING TYPE	Hearing
DATE OF HEARING	2 October 2019
DATE OF ORDER AND REASONS	12 November 2019
CITATION	Italian Stuff Pty Ltd v K & N Company Pty Ltd (Building and Property) [2019] VCAT 1783

ORDER

1. I assess the loss payable by the applicant, first joined party and second joined party to the respondent as \$202,950.09.
2. The applicant, first joined party and second joined party must pay the sum of \$202,950.09 to the respondent.

L. Forde
Senior Member

APPEARANCES:

For Applicant	Mr S Rassu - Director
For Respondent	Mr S Hopper of Counsel
For First Joined Party	Mr S Rassu – Director
For Second Joined Party	In person

REASONS

- 1 The landlord, K & N Company Pty Ltd, claims damages in excess of \$440,000 against its former tenant, Italian Stuff Pty Ltd for breach of lease. The claim was by way of counterclaim to a claim filed and subsequently abandoned by Italian Stuff against its landlord.
- 2 Italian Stuff operated a restaurant in the leased premises in the Melbourne CBD. It obtained an interlocutory injunction in these proceedings against the landlord restraining re-entry. Orders were made on 11 April 2019 that the injunction would dissolve automatically if certain payments were not made. The payments were not made, and the landlord took possession of the premises on 17 April 2019.
- 3 The only matter before me today is a determination of the landlord's counterclaim. Italian Stuff did not comply with Tribunal orders after 11 April 2019 such as delivery of points of claim, witness statements and discovery.
- 4 It is common ground that the first and second joined party are liable to the landlord for any liability of Italian Stuff. The first joined party is liable under a Transfer of Lease dated 7 December 2015 as guarantor for the obligation of Italian Stuff. Mr Stefano Rasso, the second joined party, is a director of both the tenant and the first joined party. He guaranteed Italian Stuff's obligation under its lease with the landlord.
- 5 Contrary to earlier Tribunal orders, the tenant and joined parties did not file a defence to the counterclaim. Mr Rasso gave evidence at the start of the hearing that the proceeding and history of the tenancy had caused him considerable financial and personal difficulty and that he was only now able to participate in the proceedings. He said he returned to Italy following the termination of the lease. He said he was unable to afford ongoing legal representation.

Grounds of defence

- 6 In discussions with the Tribunal and in the absence of objection by the landlord, Mr Rasso was able to articulate the tenant's and first and second joined parties' defence to the landlord's claims as follows:
 - a no monies were owing to the landlord when the landlord re-entered possession;
 - b the landlord is prevented from bringing its claim by reason of a release contained in terms of settlement entered into in 2016; and
 - c the quantum of the claim is excessive.
- 7 Italian Stuff did not seek to pursue any claim against the landlord.
- 8 Mr Rasso relies upon terms of settlement dated 28 November 2016 between the landlord, Italian Stuff and first joined party¹ as a bar to the landlord's

¹ TB60-61

claims. The terms resolved VCAT proceedings BP1111/2016 and BP1115/2016.

9 Clause 6 of the terms of settlement provides: -

In consideration of entering into these terms of settlement and subject to the parties rights to enforce these terms of settlement in the event that another party fails to pay the settlement sum or part thereof; the parties hereby release and discharge each other from liability for the claims made in the proceeding (inclusive of costs) and for any further claims of whatsoever nature arising out of or in connection with the Dispute and/or the Proceeding including the expert reports...

10 Italian Stuff's former solicitors, Slater and Gordon set out its position in a letter dated 7 August 2017 to the landlord's solicitors². It was submitted that because of the release in the terms of settlement the landlord was prevented from issuing the notices of default which preceded its re-entry.

11 The terms of settlement define *Dispute* as being the dispute between the parties in proceedings BP1111/2016 and BP1115/2016. It was common ground that proceedings BP1111/2016 were unrelated to the current matter. Mr Rassu was able to locate the points of claim in proceedings BP1115/2016 on his laptop during the hearing.

12 Counsel for the landlord reviewed the points of claim located by Mr Rassu and summarised the claims as follows:

- a claim for damages under s52 and 54 of the *Retail Leases Act 2003* (Vic);
- b claim for damages for derogation from grant;
- c a claim under the *Water Act 1958* (Vic);
- d a claim for abatement of rent from 12 March 2016 for a period of 12 weeks; and
- e a general repair and maintenance claim.

13 Mr Rassu submitted that the rent claimed by the landlord in the notices of default issued by it, preceding re-entry, fell within the abatement period which was part of the Dispute in proceedings BP1115/2016. As such he submits the landlord cannot claim those amounts and there was no default at the time of re-entry.

14 The landlord's evidence is that its ledger for the premises starts from 27 June 2016 being the date when the ledger had a nil balance. This was not disputed. Defaults in rent claimed in the notices of default were for dates after 27 June 2016. The abatement period referenced in the terms of settlement ran from 12 March 2016 for 12 weeks which makes the last date in the abatement period 3 June 2016. The landlord is not claiming arrears of rent falling in the abatement period.

² TB62-63

- 15 It is clear on the face of the ledger that the landlord is not claiming rent falling due in the abatement period. Accordingly, this ground of defence must fail.
- 16 The second ground of the defence relied upon is that the release in the terms of settlement prevents the landlord from bringing this proceeding. This ground is ill-conceived. The release is limited to the claims set out in paragraph 12 above.
- 17 The matters raised in the current proceeding are not matters within the definition of *Dispute* in the terms of settlement. They are not matters covered by the claims in the earlier proceedings. In other words, the matters raised in this proceeding are outside the scope of the release. The release is not a bar to the landlord bringing this claim.
- 18 The first two grounds of defence having failed and in the absence of any evidence to the contrary, I find that the landlord's re-entry was lawful and based upon the default of the tenant.

What damages should the landlord be awarded?

- 19 The final objection against the landlord's claim is in relation to quantum. The amount claimed by the landlord is \$444,331.94 made up as follows:

a	Arrears on re-entry -	\$62,311.33
b	Locksmith costs	\$459.75
c	Re-letting costs	\$28,232.05
d	Make good costs	\$1,912.50
e	Rental shortfall on new lease	\$351,416.31
- 20 The rental shortfall claim was subsequently discounted during the hearing to take into consideration future contingencies.
- 21 The unchallenged evidence given by Mr Lu, a director of the landlord is that
 - a Italian Stuff sought to assign its lease to Free Pizza in early 2019 but the proposed new tenant was rejected by the landlord for financial reasons;
 - b on or about 17 April 2019 the landlord terminated the lease and retook possession;
 - c the premises were listed with Mulcahy Butera on about 1 May 2019 to relet;
 - d the landlord entered into a new lease for an initial term of 5 years with Australia Yuanchang Pty Ltd commencing 1 August 2019 for an annual rent of \$218,000;
 - e Clause 7.2 of Italian Stuff's lease provided:

Termination by the landlord ends this lease, but the landlord retains the right to sue the tenant for unpaid money or damages (including damages for the loss of the benefits that the landlord would have received if the lease had continued for the full term) for breaches of its obligations under this lease.; and

f Italian Stuff's lease provided that breaches of the rental covenant and outgoings covenant is a breach of an essential term and constitutes repudiation.³

- 22 The defence to the claim for arrears on re-entry has failed for the reasons set out above. The landlord's arrears are set out in a ledger maintained by the landlord.⁴ Other than the defence set out in paragraph 4 above, no challenge was made to the contents of the ledger. In the circumstances I am satisfied on the evidence of Mr Lu set out in his witness statement and adopted by him at the hearing that the arrears owing on re-entry were \$62,311.33.
- 23 The locksmith's costs were not challenged. They are supported by an invoice dated 17 April 2019.⁵ I allow this claim.
- 24 The re-letting costs are set out in the witness statement of Mr Lu which was adopted by him at the hearing. His evidence was unchallenged. The amount of \$28,232.05 is said to comprise the commission payable to the letting agent for the new lease (\$19,184)⁶, advertising expenses of \$8,278.05⁷ supported by an invoice for that amount from Mulcahy Butera and the cost of a plan of premises for advertising (\$770).⁸
- 25 I accept the re-letting costs as claimed in the sum of \$28,232.05 are a loss sustained by the landlord because of the tenant's breach of lease.
- 26 Makegood costs of \$1,912.50 are claimed for the removal and clean-up of the premises.⁹
- 27 Mr Rassu sought to challenge this claim on the basis that when Italian Stuff went into the premises, the premises were used as an old duty-free store and the tenant undertook works to the premises. He accepted in cross-examination that Italian Stuff had reached agreement with the previous tenant to gain access early before its lease commenced.
- 28 Mr Rassu then raised a number of issues unrelated to the makegood claim to suggest that the landlord was liable to Italian Stuff. For example, that some of the works he had undertaken at the premises were for the benefit of the landlord. These claims may be legitimate, but unrelated to the

³ Clauses 7.5, 2.1 and 5.4

⁴ TB 156 - 160

⁵ TB 234

⁶ TB 88

⁷ TB 228

⁸ TB 230 Realserve quotation 1 May 2019

⁹ TB 88 and invoices at TB 236 & 238

makegood claim and not claims brought against the landlord in the proceedings.

- 29 Mr Lu's evidence was that certain items were not removed from the premises and a clean-up was required. Photographs were produced showing the premises in disarray.
- 30 Based on the invoices for the works, the photographic evidence and the reasonableness of the amount claimed, I allow this cost as part of the landlord's damages claim.
- 31 The final claim is for rental shortfall on the new lease or loss of bargain. The rent payable under the new lease to Yuanchang is higher than the rent paid by Italian Stuff but the first term of the Yuanchang lease ends on 31 July 2024. The Italian Stuff lease was to end on 31 December 2025.¹⁰ Accordingly while the new lease rent is higher, its term is shorter.
- 32 Mr Rasse submitted that the landlord wrongly refused to assign the Italian Stuff lease to Free Pizza in March 2019. He submitted that Yuanchang had less experience than Free Pizza. He did not take these allegations any further than submissions or relate them to the loss claimed.
- 33 Mr Lu's evidence was that the landlord did not consider Free Pizza to have sufficient financial resources or business experience to meet its obligation under the lease. In the absence of further material, I accept the position of the landlord was reasonable.
- 34 It was submitted by counsel for the landlord that the loss of bargain claim covers three time periods. First, the period between Italian Stuff vacating and the new tenancy beginning. Second, the three-month rent-free period of the new tenancy. Third, the period after the three-month rent-free period and date when the Italian Stuff lease would have come to an end. The first two periods were described as front-end shortfalls and the third as a back-end shortfall.
- 35 The landlord claimed the loss during the hiatus period after it re-entered was "about \$12,000" and the rent-free period of 3 months loss was \$54,500. The landlord claims in its revised calculation of loss and bargain damages *front-end* shortfall of \$12,513.00. It is unclear how this figure is calculated.
- 36 Based upon 4% rental increments the landlord claims that under the Italian Stuff lease the tenant would have paid \$1,454,307.02 to the end of the lease. Under the Yuanchang lease, the landlord will receive \$1,102,891.61. There is a shortfall of 17 months between the terms of the two leases. The difference between the rent received under the two leases is \$351,415.41.
- 37 Counsel for the landlord addressed how the shortfall period of 17 months should be considered depending upon whether Yuanchang exercises its lease option.

¹⁰ TB 17-45

- 38 The landlord submits that the Tribunal should assume that Yuanchang does not exercise its option for a further term and calculate the tenant's losses. I should then discount those losses by 50% for the possibility that Yuanchang exercises its option.
- 39 If the option is not exercised the landlord will re-let to another tenant and incur letting fees. The cost of re-letting to Yuanchang was \$19,184 so the landlord expects to pay the same fee again. It is submitted that it will take 4 months to locate a new tenant (a loss of \$77,552.25 in rent) and the new tenant will receive a rent-free period of 3 months (a loss of \$58,165 in rent.) The total of these losses if Yuanchang does not exercise its option is claimed to be \$163,948.49.
- 40 The landlord submitted that the losses should be discounted to take into account the possibility that Yuanchang will exercise its option. Given the restaurant business is speculative, it submits there is a 50/50 chance that the option will be exercised. Assuming the possibility is 50/50 it claims 50% of \$163,948.49 which is \$81,974.25 as its losses for the back-end period.
- 41 The landlord says the 50% discount allows for the risk that the new tenant will exercise its option, the value of money now, uncertainties over what the rent for a new lease would be on a re-letting and uncertainty over what the current market rent would be if the tenant exercised its option.
- 42 The landlord added the \$81,974.25 to the front-end loss to arrive at a figure of \$94,487.25. It is unclear how this figure is to then be applied to the landlord's loss of bargain claim.
- 43 Based on this same hypothesis, one could consider the scenario that the option will be exercised. Assuming the rent was based on a 3% increase from the previous year appreciating we do not know what the market rent will be, the rental received would be \$252,721.72 for the first 12 months and applying a further 3% increase the rent for the remaining five months based on an annual rent of \$260,302.77 would be \$108,459.49. Accordingly, if the option is exercised by Yuanchang, the landlord will receive a further \$368,762.26 in rent until the end of the Italian Stuff original term. Receipt of this amount would extinguish any loss of bargain claim and put the landlord in a better position. This scenario was not raised by the parties. I set it out simply to demonstrate the speculative nature of trying to assess the loss of bargain in this case.
- 44 It is well accepted law that "where a lessor terminates the lease agreement for breach of an essential term or repudiation, it may claim arrears of rent in respect of the period before termination, in addition to damages for loss of the benefit of the lessee's covenant to pay future rent, outgoings and other amounts in respect of the period after termination."¹¹

¹¹ Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 per Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) at [260].

- 45 It is also trite law that the landlord bears the onus of proof of establishing both the fact and the amount of loss and that loss of bargain damages are diminished by value of any benefits received.
- 46 The landlord has not satisfied me that it will suffer a loss of bargain loss for the period after the Yuanchang lease first term expires for the following reasons:
- a the loss is too uncertain or speculative;
 - b the rent under the Yuanchang lease is higher than the rent under the Italian Stuff lease;
 - c there is a chance Yuanchang will exercise its option and no loss will arise;
 - d if Yuanchang exercises its option, there will be a substantial profit to the landlord;
 - e there is no evidence as to the likelihood of Yuanchang exercising an option in 2024; and
 - f there are many variables that could occur before 31 December 2025 which could impact on bargain loss.
- 47 The landlord is entitled as part of its bargain loss to be compensated for the period after the Italian Stuff lease terminated and before Yuanchang started to pay rent. This is a period of 106 days when the premises were not let and 3 months for the rent-free period under the Yuanchang lease.
- 48 For the reasons provided I assess the landlord's loss for breach of lease by Italian Stuff at \$202,950.09 which is calculated as follows:

Arrears on re-entry	\$62,311.33
Locksmith costs	\$459.75
Re-letting costs	\$28,232.05
Make good costs	\$1,912.50
Loss of rent between termination of Italian Stuff lease and commencement of Yuanchang lease ¹²	\$55,534.46
Rent free period of Yuanchang lease	\$54,500
<i>Back-end</i> shortfall	nil
TOTAL	\$202,950.09

- 49 I assess the loss payable by Italian Stuff and the first and second joined parties to the landlord as \$202,950.09.

L. Forde
Senior Member

¹² 17/4/19 – 1/8/19 being 106 days at \$523.91 per day-TB 241