

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1550/2015

CATCHWORDS

LANDLORD AND TENANT-Application for relief from forfeiture-application dismissed.

APPLICANT	Ivy Fashionware Pty Ltd (ACN 169 322 169)
RESPONDENT	Wadren Pty Ltd (ACN 055 537 235)
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Reinstatement application, relief from forfeiture application.
DATE OF HEARING	24 December 2015
DATE OF ORDER	24 December 2015
DATE OF WRITTEN REASONS	15 February 2016
CITATION	Ivy Fashionware Pty Ltd v Wadren Pty Ltd (Building and Property) [2016] VCAT 175

ORDERS

1. The proceeding is reinstated.
2. The application for relief from forfeiture is dismissed.
3. By consent, the respondent must grant the applicant access to the premises for its orderly departure from the premises, and must take no steps to re-take possession until after 29 January 2016.
4. No order as to costs.

MEMBER A KINCAID

APPEARANCES:

For the Applicant	Mr Levine of Counsel
For the Respondent	Mr Giansalvo, Solicitor

REASONS

- 1 I heard an application for relief against forfeiture on 24 December 2015 and made my decision on that day, giving reasons orally. On 15 January 2016, the applicant sought written reasons, and so I publish those reasons. They are essentially a transcript of the oral reasons, with some minor corrections to syntax. Correspondence between the parties, referred to during the giving of oral reasons, has also been set out in chronological order, to assist comprehension.
- 2 Ivy Fashionware Pty Ltd (the “**tenant**”) was until 22 December 2015 a tenant of retail premises at Shop No 292, Pacific Werribee Shopping Centre (previously known as Werribee Plaza), Werribee, Victoria (the “**premises**”).
- 3 The tenant leased the premises pursuant to a lease dated 16 September 2015 (the “**lease**”) for the purposes of operating a retail store, selling women’s clothing under the brand name “Ivy Moda”.
- 4 Ms Tuyet Hong Tran (formerly Tuyet Toa) (“**Ms Tran**”) is a director of the tenant, and also a guarantor under the terms of the lease.
- 5 The landlord is Wadren Pty Ltd (the “**landlord**”).
- 6 By notice of re-entry dated 22 December 2015, the landlord re-entered the premises and forfeited the lease.
- 7 The tenant now seeks relief against forfeiture pursuant to s89 of the *Retail Leases Act 2003*. The Tribunal has the same jurisdiction as the Supreme Court, including equitable jurisdiction, in respect of applications for relief from forfeiture.

Relevant Terms of the Lease

- 8 The Commencement Date of the lease was 27 July 2015. The term of the lease was 5 years, expiring on 26 July 2020.
- 9 The tenant was required under the lease to complete the Fit-out Works (as defined in the lease) by the end of the Fit-out Period (as defined in the lease), which was 31 days after the Commencement Date.
- 10 The tenant was also required to pay for Category 1 Works (as defined) in August 2015.
- 11 Under the terms of the lease, the tenant was not required to pay the Base Rent (as defined), the tenant’s Share of Outgoings (as defined) and the Promotion Levy (as defined) until the earlier of 31 days from the Commencement Date and the day that the tenant commenced trading.
- 12 Payment by the tenant of all rent and other monies under the Lease was to be made by electronic transfer.
- 13 In early December 2015, the landlord alleged that since 28 August 2015 (31 days from the Commencement Date), the tenant has failed to pay all

rent and other monies under the Lease, including the Base Rent, the tenant's Share of Outgoings and the Promotion Levy.¹

14 On 4 December 2015, the tenant owed \$79,328.45 to the landlord.²

Background

15 By letter dated 23 November 2015 the landlord's solicitors informed the tenant that should the tenant not rectify its breaches (including a failure to pay the then outstanding rent in the sum of \$44,550.46 and to complete the Fit-Out Works) by 4 pm on 24 November 2015, the landlord would terminate the lease and re-enter the premises.

16 The matter first came before the Tribunal by way of an injunction application on 24 November 2015, supported by an affidavit of Miss Tran sworn 24 November 2015 (the "**tenant's first affidavit**").

17 The tenant's first affidavit refers to a dispute that she was having with her fit-out contractor, Brizland Constructions. During submissions, Ms Tran said that this had resulted in the Relevant Building Surveyor failing to issue a Final Certificate of Inspection in respect of the premises. As a result, she has been unable to trade.

18 By the tenant's first affidavit, Ms Tran estimated that she had paid \$100,000 or so for the fit-out in relation to the premises and, by her calculation, the premises were "95% complete". There are various affidavits exhibited to her affidavit which show the extent to which the fit-out had been completed. It appears from those photographs that the premises are already stocked, with merchandise hanging on display racks.

Principles

19 Asking for relief against forfeiture involves, at least if that is the only relief sought, an admission that there has been a lawful forfeiture of the lease. This is conceded by Mr Levine, Counsel for the tenant.

20 The onus is on the tenant to demonstrate that relief should be granted. The effect of granting relief from forfeiture is that as if the lease had never been forfeited.

21 In *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd*³ Hollingworth J stated:

The test to be applied is one of unconscionability-that is, whether in the light of the tenant's remedying the breach of covenant, resort by the landlord to strict right of re-entry would be unconscionable.⁴

Therefore, much of the Court's consideration of whether or not to grant relief will focus on the conduct of the tenant. A tenant must, so far as possible, attempt to

¹ See paragraph 18(b) of the affidavit of Christine Ellen Redfern sworn 4 December 2015.

² See paragraph 21 of the affidavit of Christine Ellen Redfern sworn 4 December 2015.

³ [2005] VSC 236

⁴ Ibid at [442].

remedy the breach or breaches alleged in the notice served and pay compensation for the breaches which cannot be remedied.⁵

22 In *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd*⁶ Ormiston J stated:

The tenant offered to pay the rent in arrears, and in those circumstances relief against forfeiture for non-payment of rent should be granted usually as of course, save in exceptional circumstances. This principle, with two variations, has been accepted for many years and is said to flow from the view that the right of re-entry for non-payment of rent is primarily a security for that rent...

...The power to refuse relief is clearly reserved for cases of consistently lengthy defaults which may fairly lead to an inference that, even if relief be given, there is a reasonable likelihood that the rent will not be paid in the future at least for some considerable time after the due date for payment.

The only way in which the landlord could deny the tenant relief in that case was by showing that it was or would soon become insolvent because its business was badly run. I concede that is a possibility on the evidence, but the material falls a long way short of satisfying me of either proposition.

Of course, if the tenant continues then to pay late and the lease has to be forfeited again, that may provide circumstances leading to an opposite conclusion in the future.

23 Ormiston J found in *Jam Factory* that the worst that could be said of the tenant in that case was that its approach to its obligations to pay rent and outgoings was desultory, and in many respects it did not deserve to be relieved against the forfeiture, but he found that the tenant's acts did not display a deliberate denial of the landlord's rights, nor were the earlier breaches of that obligation of a kind that could place that case in the exceptional category.

24 In the *Beamer* decision, to which I have earlier referred, Hollingworth J stated:

The tenant must come to court with clean hands not to be relieved if evincing an intention to continue or to repeat the breach of covenant. Where the conduct of the tenant reveals a clear history of wilful breaches of more than one covenant, a contumacious disregard by the tenant of the landlord's rights over a period of time, and a total lack of evidence of the tenant's ability to speedily and adequately make good the consequences of that default, relief against forfeiture will not be granted.⁷

Hearing of Application Adjourned to 7 December 2015.

25 On 24 November 2015 the Tribunal adjourned hearing of the tenant's application to 7 December 2015, on the undertaking of the landlord not to re-enter until the hearing and determination of the tenant's application.

⁵ Ibid at [443]

⁶ [1989] VR 584

⁷ Ibid at [443]

- 26 Ms Tran swore a further affidavit on 1 December 2015 (the “**tenant’s second affidavit**”). It stated that the tenant had been unable to obtain a Building Permit to commence the fit-out until 18 August 2015. She alleged that the delay in obtaining the Building Permit was because it was a “union site”. She stated that had she known it was a union site, she would never have agreed to a “four week fit-out”. She stated that she knows that work always takes longer on a union site. She exhibited correspondence that demonstrated that she was in the process of applying to the Victorian Building Authority for Consent to Terminate the Building Surveyor. Ms Tran exhibited an email dated 1 December 2015 from her solicitor to the landlord’s solicitors also seeking the landlord’s consent to the proposal, to the extent that it was required. The email opined that the writer had been advised that the obtaining of Victorian Building Authority Consent “will take approximately two weeks”.
- 27 Ms Tran deposed in the tenant’s second affidavit that she was “currently raising funds to pay such amounts of rent to the landlord as [the tenant] is found liable to pay so that the tenant can seek relief from forfeiture of the lease”.
- 28 Ms Redfern, a Senior Lease Administrator employed by the landlord, swore an affidavit on 4 December 2015 (the “**Redfern affidavit**”). She deposed to the obligations of the tenant under the lease,⁸ and to the fact that she had then calculated that the tenant was in arrears to the extent of \$79,328.45.
- 29 In addition, paragraphs 22-27 of the Redfern affidavit set out the repeated failures by the tenant to comply with its obligations.
- 30 Ms Redfern deposed that despite repeated promises by the tenant to the landlord the premises would be open for business on or shortly after 27 August, the applicant has had no time since the commencement date to open the premises for business.
- 31 Paragraphs 28-40 of the Redfern affidavit set out the attempts made by the landlord to secure payment of the obligations owed by the tenant under the lease, including a Notice demanding \$51,190.81 sent to the tenant on 21 October 2015, a Notice to Remedy Breach dated 29 October 2015, an email from the landlord’s solicitors to the tenant dated 23 November 2015 and service of a notice under section 146 of the *Property Law Act 1958*.
- 32 Ms Redfern also stated:
- Detriment to the Landlord**
- 41 The landlord has not received from [the tenant] any monies owing under the lease, including the Base Rent, the [tenant’s] Share of Outgoings or any Promotion Levy under the Lease since the Commencement Date of the lease on 27 July 2015.

⁸ See paragraphs 16-17 of the Redfern affidavit.

42 Further, the [tenant's] repeated failure to complete the Fit-Out Works by the end of the Fit-Out Period or at all, and open the [premises] for business by 27 August 2015, or at all, has meant that there has been nobody trading from the [premises] since 27 August 2015 to the detriment of the Landlord and the other tenants at the Pacific Werribee Shopping Centre.

43. On the basis of the [tenant's]:

- (a) repeated failure to pay any Base Rent, the [tenant's] Share of Outgoings or any Promotional Levy under the [lease] since the Commencement Date;
- (b) repeated failure to pay other monies due to the [landlord] under the lease
- (c) long history of default under the [lease]; and
- (d) admission [in the tenant's second affidavit] that she is currently raising funds to pay rent arrears and obtain relief against forfeiture,

the landlord is concerned that the Applicant will not remedy the abovementioned breaches of the [lease], or otherwise comply with the tenant's ongoing obligations under the lease when they are due and payable..."

33 Ms Redfern also denied the allegation made in the tenant's second affidavit that the cause of the delays to the tenant's Fit-Out were caused by the landlord's alleged failure to inform the tenant that the premises were part of a "union site". She opines that the delays were caused by the tenant's failures to finalise plans and documentation, to appoint a shop-fitting contractor and by disputes among the various shop-fitting project participants.

Terms of Settlement

34 On 7 December 2015, the adjourned return date of the tenant's relief from forfeiture application, the parties entered into Terms of Settlement (the "**Terms**"). The Terms are exhibited to an affidavit of Mr Mark Stanarevic, solicitor for the tenant, sworn 23 December 2015 (the "**Stanarevic affidavit**").

35 The Terms provided:

1. [The tenant] will pay the sum of \$79,328.45, being amounts currently due and payable under the lease [of the premises] commencing 27 July 2015 ('Lease') in accordance with the following schedule:

- (a) \$20,000 by Friday 11 December 2015;
- (b) \$20,000 by Friday 18 December 2015;
- (c) \$15,000 by Thursday 24 December 2015;
- (d) \$15,000 by Thursday 31 December 2015;
- (e) \$9,328.45 by Thursday (sic) 6 January 2016.

All amounts in this clause are GST inclusive.

2. [The tenant] will procure a Certificate of Final Inspection and provide a copy to [the landlord] by 21 December 2015.
3. [The tenant] will open [the premises] on or before 21 December 2015.
4. Subject to [the tenant] complying with clauses 1-3 above, the advertising subsidy under clause 22 of the lease will be paid subject to satisfaction of clause 22.1(a).
5. If there is any default by [the tenant] from the payment schedule referred to in clause 1, then the lease will be terminated and [the landlord] may re-enter.
6. If there is any default by [the tenant] in respect of the obligations in clauses 2 and 3, then the lease will be terminated and [the landlord] may re-enter.
7. [The landlord] undertakes that provided [the tenant] complies with clauses 1-4 of these terms of settlement, then [the landlord] will not act on the section 146 notice served by it on 25 November 2015 or any other notice.
8. The parties agree that the proceeding will be struck out.
9. Other than as stated in these terms of settlement, the terms of settlement do not otherwise affect or vary the operation of the lease.

36 Mr Stanarevic states that at that date, the tenant was incurring delays in respect of the appointment of a new building surveyor.

Subsequent Correspondence

37 Subsequent correspondence between the parties is exhibited to the Stanarevic affidavit, and the affidavit of Mr Giansalvo sworn 24 December 2015.

38 The tenant did not make payment of \$20,000 due on 11 December 2015.

39 By email dated 11 December 2015, the landlord's solicitors wrote:

We refer to the Terms of Settlement...Please arrange for [the tenant] to send a copy of the remittance advice with respect to each of the payments made by your client in accordance with clause 1 of the terms to accounts receivable@pgoc.com.au and copied to CRedfern@pgoc.com.au . We note that the first payment is due today.

40 The tenant's solicitors emailed the landlord's solicitors on 11 December 2015 at 5:20pm, attaching a photograph of a cheque made payable to the landlord in the amount of \$20,000 and a photograph of an envelope addressed to the landlord at 'PO Box 400, South Melbourne'.

41 The landlord's solicitors responded by email dated 14 December 2015, as follows:

The tenant is in default of the terms of settlement as it has failed to pay to the landlord the sum of \$20,000 by Friday 11 December 2015. In that regard, allegedly placing a cheque made payable to the landlord in the amount of \$20,000 in an envelope does not constitute payment to the landlord in the amount of \$20,000 by Friday, 11 December 2015.

The landlord requires the tenant to urgently pay the sum of \$20,000 by electronic transfer of funds to the landlord's bank account (details of which are known to the tenant), failing which, the landlord will exercise rights under the terms of settlement, including its right to terminate the lease and re-enter the premises pursuant to clause 5 of the terms of settlement. Please provide remittance advice with respect to the payment.

If the landlord receives the cheque in the amount of dollars \$20,000, it will bank the cheque and apply the funds in satisfaction of the \$20,000 that the tenant is required to pay to the landlord by 18 December 2015.

42 The tenant's solicitors sent a further email dated 17 December 2015, as follows:

Further to our email below, we are instructed that the landlord has not received the cheque in the amount of \$20,000, which your client alleges it posted to our client on Friday, 11 December 2015. Further, the landlord has not received payment from the tenant in the amount of \$20,000 in accordance with clause 1 of the terms of settlement. Accordingly, the tenant remains in default of the terms of settlement.

The [landlord] gives final notice to the tenant that if the tenant fails to:

- 1 immediately pay the sum of \$20,000 to the landlord, which was due and payable by Friday, 11 December 2015;
- 2 pay the further sum of \$20,000 to the landlord in cleared funds by Friday, 18 December 2015; and
- 3 open the premises for business or before Monday, 21 December 2015, then the lease will be terminated and the landlord will re-enter and take possession of [the premises].

43 The tenant's solicitors emailed the landlord's solicitors on 18 December 2015, as follows:

Can you please confirm that your client received my client's 20,000 cheque into today's mail. If not she will cancel immediately and provide remittance electronically.

44 On 18 December 2015, the tenant's solicitors emailed the landlord's solicitors, by which the tenant sought to renegotiate the payment schedule. The email stated, in part:

I am instructed to propose this counter-offer on an open basis that [the tenant] is obtaining family funds which need several transfers and hence cannot provide a quantum of \$55,000 in one transaction today but is in agreement with the principle of your offer we propose this schedule as a variation to the existing terms of settlement:

1. The tenant pays the sum of \$20,000 electronically today by 21 December 2015 4:00pm and provide Bank Remittance Confirmation electronically by way of email the same time...

2. The tenant pays the sum of \$20,000 electronically by 23 December 4:00pm and provide Bank Remittance Confirmation electronically by email the same time.
3. The tenant pays the sum of \$15,000 electronically by 28 December 2015 4:00pm and provide Bank Remittance Confirmation electronically by email the same time.
4. The tenant opens the premises for business on or before 28 December 2015.

45 The landlord's solicitors responded by email dated 21 December 2015 that the tenant's offer was unacceptable. The email stated:

The tenant has clearly failed to comply with the terms of settlement (a copy of which is attached), in particular, the tenant has failed to pay the sum of \$20,000 by Friday, 11 December 2015, and the sum of dollars \$20,000 by Friday, 18 December 2015. Despite numerous requests by the landlord, the tenant has failed to make those payments by the due date. In that regard, we are instructed that our client received the cheque in the amount of \$20,000 today allegedly on account of the amount owing on Friday, 11 December 2015. Please arrange your client to cancel the cheque in the sum of \$20,000 and instead immediately pay the sum of \$20,000 by electronic transfer of funds if it wishes to rectify the first of its breaches of the terms of settlement.

The landlord entered into the terms of settlement with the tenant on the basis that the terms of settlement would be strictly honoured by the tenant. Any attempt by the tenant to renegotiate the payment schedule under the terms of settlement is unacceptable to the landlord and disingenuous in the circumstances where the landlord has provided the tenant with ample opportunity to make the payments after the due date for payment in the terms of settlement.

46 I find that on 21 December 2015 the landlord received by post⁹ a cheque for \$20,000. Having rejected the attempt by the tenant to reschedule the payment obligations in the Terms of Settlement, the landlord solicitors received it as an attempt by the tenant to make the \$20,000 due on 11 December 2015.

47 Finally, by email dated 21 December 2015, the tenant's solicitors wrote:

[The tenant] will transfer the 20,000 today she has instructed me.

48 There is a debate now as to whether there ever was an electronic transfer of funds, as alleged now by the tenant. The tenant has put in evidence a copy of a remittance slip, but the landlord attests that when the landlord last checked its bank account yesterday evening, it concluded that it had received no monies into its bank account in accordance with the lease or the terms of settlement.

49 The landlord for its part says it now has no confidence in the tenant making payments pursuant to the terms of settlement, given the history of failures by the tenant in the past. The landlord says that the tenant has to

⁹ Addressed to the landlord at PO Box 400.

comply with its obligations to provide a Certificate of Final Inspection to the landlord by 21 December 2015. These breaches of the terms of settlement are causing it loss and damage. It says that it can have no confidence that these breaches will be promptly remedied to its satisfaction.

- 50 Mr Levine says that the expectation is that the obtaining of a Certificate of Final Inspection is in hand. He sensibly concedes, however, that the tenant cannot warrant to the Tribunal when it is that the appointment of a new surveyor, the undertaking of a final inspection and the granting of a Certificate of Final Inspection, will be resolved.
- 51 In my view, there clearly are matters between the tenant and its former builder and, what appears soon to be, its former building surveyor which indicate that the works will be further delayed, and that a Certificate of Final Inspection will not be obtained in a matter of days.
- 52 Having regard to the general principles to which I have referred, I am satisfied that because of the failure by the tenant to comply with the payment terms of the settlement agreement, and the terms requiring the Certificate of Final Inspection to be provided by 21 December, and for the premises to be opened on that date, together with the history of defaults by the tenant set out in the affidavits to which I have referred, the tenant has not persuaded me that relief from forfeiture should be granted.
- 53 In those circumstances I dismiss the tenant's application and am prepared to listen to submissions as to how an orderly departure from the premises can be achieved.

MEMBER A KINCAID