VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1121/2018

CATCHWORDS

Application for review – section 120 of the *Victorian Civil and Administrative Tribunal Act 1998*– no reasonable excuse for not attending the hearing or being represented - no reasonable case to argue - Retail lease dispute – re-entry for arrears of rent – admission of arrears of rent.

APPLICANT	Jan Australia Pty Ltd atf The Zhao and Zhu Family Trust (ACN: 135 086 958)
FIRST RESPONDENT	Jenni International Pty Ltd (ACN: 161 787 140)
SECOND RESPONDENT	Jordan Shan
WHERE HELD	Melbourne
BEFORE	H. Nash, Member
HEARING TYPE	Review Hearing
DATE OF HEARING	3 October 2019
DATE OF ORDER	3 October 2019
DATE OF WRITTEN REASONS	8 November 2019
CITATION	Jan Australia Pty Ltd v Jenni International Pty Ltd (Building and Property) [2019] VCAT 1761

ORDER

1. The application for review is dismissed.
2. The order dated 11 June 2019 is confirmed.

H. Nash
Member

APPEARANCES:

For Applicant	Mr Ray Li, solicitor
For Respondents	Ms Pui San Lee and Mr D Xiao

REASONS

1 The respondents have applied for a review under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) as they were not in attendance at the hearing conducted on 11 June 2019.

2 The matter came before me on 3 October 2019. On that date, I dismissed the application for review as I was not satisfied that the respondents had any case to argue in defence of the claim. I gave oral reasons for my decision. Subsequently, the respondents have requested written reasons. Accordingly, I now provide the requested written reasons to reflect the oral reasons given on 3 October 2019, including the observations and findings I made during the hearing, with some expansion to improve its clarity.

Background

3 The applicant's claim is that the first respondent breached the retail lease it was a party to by being in arrears of rent, arrears of outgoings and failing to operate a business as a going concern from the premises. The second respondent is a guarantor for the first respondent under the lease. The business operated by the first respondent at the premises was a Japanese restaurant.

4 On 1 March 2019, a directions hearing was conducted in the proceeding and the parties were both present at the directions hearing. Mr Shan, who at that time was a director of the First Respondent, appeared by telephone on behalf of both of the respondents. At the directions hearing, the proceeding was listed for a 3-day hearing commencing on 11 June 2019.

5 On 3 June 2019, Mr Shan wrote to the Tribunal requesting an adjournment of the hearing listed for 11 June 2019 on the grounds that he had a medical appointment on 12 June 2019.

6 On 5 June 2019, the applicant wrote to the Tribunal confirming that it did not oppose Mr Shan appearing by telephone at the hearing and should additional days be necessary after 11 June 2019, to continue the hearing on 13 June 2019 to allow for Mr Shan's medical appointment on 12 June 2019.

7 As a consequence of this correspondence, the Tribunal listed the proceeding for an urgent compliance hearing on 7 June 2019. At that hearing, the Tribunal attempted to contact Mr Shan by telephone. Those attempts were unsuccessful.

8 Mr Shan had provided to the Tribunal some medical information in support of the application to adjourn the hearing. He had sent through this information by email to the Tribunal. This medical information included a medical certificate from April 2019 and two letters confirming appointments on 10 and 12 June 2019.

9 The Tribunal refused the respondent's request for an adjournment at the hearing on 7 June 2019 and directed that Mr Shan appear in person, not by telephone, if he intended to give evidence at the hearing.

10 Neither Mr Shan nor a representative of the first respondent attended the hearing on 11 June 2019 and orders were made in favour of the applicant.

11 On 18 June 2019, both respondents applied for a review under section 120 of the Act.

12 Section 120 states that, in order to succeed in a review, a party must address four issues, which are:

a. The application for review must be made within 14 days of the date the party first became aware of the Tribunal's order the subject of the review;

b. Has a reasonable excuse for not attending the hearing; and

c. Has a reasonable case to argue in relation to the claim; and

d. No prejudice will be caused to the other parties, or if there is prejudice, it can be cured with the making of a costs order.

Was the application made within 14 days of the respondents becoming aware of the Tribunal's order?

13 The application was made within 14 days of Mr Shan on behalf of the respondents becoming aware of the order dated 11 June 2019.

Do the respondents have a reasonable excuse for not attending the hearing on 11 June 2019?

14 Neither of the respondents attended the hearing and neither was represented at the hearing on 11 June 2019, despite the Tribunal's order dated 7 June 2019, refusing a request by Mr Shan to appear by telephone. The order was sent by the Tribunal to the parties by email on 7 June 2019.

15 At the hearing on 3 October 2019, Mr Shan again did not attend personally but sent two representatives to speak on his behalf, Ms Pui Shan Lee and Mr Douglas Xiao. I was told that each of the representatives is a shareholder of the first respondent. Ms Lee is now also the director of the first respondent. I therefore accept that each has authority to represent the first respondent and the second respondent.

16 At the hearing on 3 October 2019, Ms Lee confirmed that both she and Mr Shan read the email and the attached orders made by the Tribunal on 7 June 2019. Ms Lee explained that she was Mr Shan's partner (both personal and business). She gave evidence that she was at the hospital with him after he had had a gastroscopy. Her evidence was that they decided to do nothing about the upcoming hearing, notwithstanding the order requiring Mr Shan to attend in person.

17 At this hearing both respondents relied on the same medical information provided to the Tribunal prior to the hearing on 7 June 2019 and which was considered by the Tribunal at that time. The only additional evidence provided to the Tribunal about Mr Shan's absence at the hearing on 7 June 2019 is a handwritten letter on the letterhead of a Medical Clinic in Kuala

Lumpur dated 30 September 2019. The letter stated that Mr Shan suffered some medical episodes "the week before" (which I read as being the week before the letter was written, that is earlier in September 2019). It also stated that "*he needs to stop working under stress or taking long international flights*".

18 The letter did not provide any information or medical diagnosis about why Mr Shan was not able to be present or be represented at the earlier hearing in June 2019. The medical evidence provides evidence that Mr Shan had a gastroscopy and colonoscopy on 8 June 2019, and he had arranged a couple of medical appointments for 12 June 2019. The evidence does not explain why he arranged those appointments in the knowledge of the hearing dates nor why those appointments could not be changed.

19 No new evidence was provided to the Tribunal to explain the absence of Mr Shan and the absence of any representative of either of the two respondents at the hearing on 11 June 2019. Ms Lee stated that she was with Mr Shan when the orders made by the Tribunal on 7 June 2019 were emailed to each of them by the Tribunal. She confirmed that they read the orders. She also stated that Mr Shan took no further steps to attend the hearing nor to arrange for a representative to attend.

20 Accordingly, in the absence of any independent evidence providing any further explanation of Mr Shan's absence or any explanation for the first respondent not being represented at the hearing, I find that the respondents do not have a reasonable excuse for not attending the hearing.

Do the respondents have a reasonable case to argue?

21 The claim made by the applicant landlord is that there were three breaches of the lease by the first respondent triggering a notice under section 146 of the *Property Law Act 1958* (Vic). As a result, the applicant re-entered the premises and has brought these proceedings seeking loss and damage caused by the first respondent's breach of the lease.

22 The applicant alleged the following breaches of the lease: arears of rent; arrears of outgoings and a failure to pay the full amount of the security deposit within 14 days of entering into the lease. The applicant further claimed that the first respondent had failed to continue to operate a business from the premises (as the first respondent closed the business and ceased trading from the premises). The applicant claimed that was a further breach of the lease. Mr Shan is a guarantor of the tenant's obligations under the lease and is personally liable for any damages payable by the tenant.

23 If the applicant is successful in those claims, the only issue for argument by the respondent relates to the amount of loss and damage claimed by the applicant.

24 With respect to the claim for arrears of rent, Mr Xiao on behalf of both of the respondents disputed that there were any arrears of rent because "*the*

rent was always paid by Jordan". He stated that even though the restaurant closed, Jordan kept paying the rent.

25 Mr Xiao provided bank statements available on his phone as evidence of payments made for rent. None of the entries could prove to be payment of rent for the premises the subject of this dispute. The entries were simply described as "Rent" and were for amounts of about $2,000.00 each payment. Mr Xiao confirmed that the first respondent leases other premises. He conceded that it was unclear whether these payments related to the payment of rent for the premises the subject of this dispute.

26 Mr Xiao gave evidence of the amounts paid each month as rent. Mr Xiao stated that for April 2017 there was a shortfall in the rent payment which gave rise to rent arrears.

27 If these payments did relate to the payment of rent for the premises the subject of this dispute, Mr Xiao conceded that the first respondent was in arrears of rent which had not been rectified at the time the landlord served its Notice and re-entered the premises. That in itself would be grounds for a landlord to re-enter the rented premises.

28 Ms Lee and Mr Xiao both conceded that the first respondent was in arrears of payment for the outgoings at the time of the Notice and re-entry. They stated that the landlord did not send statements of the outgoings to the tenant.

29 The final issue to be considered is whether the respondents have a case to argue about the quantum of the claim. Ms Lee stated that the respondents accept the arrears of rent and outgoings. She contested the claim for future losses. She gave no reason for this and raised no argument about why the respondents should not be held liable for those amounts, she simply stated that they would not pay.

30 Mr Xiao and Ms Lee conceded on behalf of the respondents, that the first respondent was in default under the terms of the lease at the time the lease was terminated. The respondents do not have a reasonable case to argue in relation to the subject matter of the proceedings.

Is there any prejudice which would be caused to the applicant? And if so, can it be cured with a costs order?

31 The applicant pointed to the legal costs incurred by it and the delays which have arisen. The applicant argued that it had suffered prejudice but could not provide evidence that it was not something that could not be cured with a costs order.

32 The respondents did not address me on this point.

33 This is a prejudice which could be cured by a costs order. It is, however, not necessary for to me make any findings on costs nor am I required to make any costs order against the respondents as they have failed on the requirements of section 120 to set aside the order dated 11 June 2019.

34 I therefore dismiss the respondents' application under section 120 of the Act and affirm the order made on 11 June 2019.

35 I will make orders accordingly.

H. Nash
Member