VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R286/2013

APPLICANT	Jim Lazogas and Company Pty Ltd (ACN: 005 501 655)
RESPONDENT	Nyle Pty Ltd (ACN: 059 446 427) t/as White Dove Funeral Care
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	17 June 2014
DATE OF ORDER	17 June 2014
DATE OF WRITTEN REASONS	15 July 2014
CITATION	Jim Lazogas and Company Pty Ltd v Nyle Pty Ltd trading as White Dove Funeral Care (Building and Property) [2014] VCAT 840

ORDER

The Respondent must pay the Applicant $4,695.26.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr Lazogas, Director, in person
For the Respondent	Mr Gibson, Director, in person

REASONS

1 At the conclusion of the hearing of this matter on 17 June 2014, I made an order that the Respondent pay the Applicant $4,695.26, and I gave oral reasons for the order. On 1 July 2014, the Tribunal received a request from the Applicant for the provision of written reasons for the decision. These written reasons are provided in response to that request.

2 The Applicant owns commercial premises in Dandenong ("the premises"). On 28 October 2009 the Respondent (landlord) and the Applicant (tenant) executed a lease in respect of the premises ("the lease"). The lease provided for a 2 year term commencing on 2 November 2009, with further optional terms. The lease also provided that if, at the end of the term, the Respondent remained in occupation of the premises without objection from the Applicant, the Respondent would be deemed to be a tenant on a month to month basis, on the same terms as provided in the lease in so far as they were applicable to a monthly tenancy, and that either party would be entitled to terminate the tenancy by providing one month's written notice to the other party.

3 The Respondent conducted its funeral parlour business from the premises.

4 There is no dispute that, at the commencement of the tenancy in November 2009, the Respondent paid to the Applicant a security deposit bond of $1,375, and that the security deposit has been retained by the Applicant. There is also no dispute that the Respondent did not exercise the option for a further term and, as a consequence, from 2 November 2011 until 10 February 2012, the Respondent occupied the premises as a tenant on a month to month basis.

5 On 10 February 2012, the Applicant re-took possession of the premises and locked the Respondent out. The Applicant says it did so following the Respondent's abandonment of the premises.

6 The Respondent says that on 3 February 2012 it provided to the Applicant one month's written notice of its intention to vacate the premises and bring the tenancy to an end. The Respondent had found new premises from which to operate its business and says that, as at 10 February 2012 when the Applicant locked it out of the premises, the Respondent had almost completed its move to the new premises and that it was in the process of completing its obligation under the lease to leave the [Applicant's] premises clean and in the same condition as they were at the commencement of the Respondent's occupancy in November 2009.

7 In this proceeding, the Applicant claims:

- Rent unpaid up to the date the Respondent retook possession of the premises, 10 February 2012.
- Damages equal to 1 month's rent, claimed by reason of the Respondent's alleged failure to provide 1 month's written notice

of the termination of the tenancy.

- Outgoings and expenses for which the Respondent is liable under the lease.
- Costs associated with cleaning and reinstating the premises to the condition they were in at the commencement of the Respondent's occupancy in November 2009.
- Interest.
- Legal costs and expenses associated with the proceeding.

8 The proceeding was commenced in this Tribunal when the Applicant filed its application on 28 December 2012. On 1 October 2013, when the matter was first listed for hearing, the Tribunal Member, instead of hearing the matter, recommended that it be transferred from the Tribunal's *"civil claims"* list to its *"retail tenancies"* list. The matter was subsequently heard and determined, in the absence of the Respondent, on 10 December 2013. That determination, however, was set aside by further order made 16 May 2014 following the successful application by the Respondent for a review (of the determination) pursuant to section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998.

9 The Respondent accepts that it is responsible for unpaid rent and outgoings, save for land tax, for the period of its occupation of the premises. However, it says that it is unsure of the actual sums owing because the Applicant failed to clearly identify, and provide satisfactory documentary evidence of, such sums. The Respondent disputes the Applicant's claim in respect of cleaning and reinstatement costs, partly on the basis that the Respondent was wrongfully locked out of the premises on 10 February 2012 before it had completed cleaning the premises, and partly on the basis that the costs claimed are otherwise not justified.

10 The Respondent also says that, because it provided one month's written notice of the termination of its tenancy, and was locked out on 10 February 2012, just one week after giving such notice, it has no liability for the extra month's rent claimed by the Applicant.

11 Mr Lazogas, director of the Applicant, and his daughter Ms Eva Lazogas gave evidence for the Applicant. Mr Gibson, director of the Respondent, gave evidence for the Respondent.

DID THE RESPONDENT ABANDON THE PREMISES?

12 It is common ground that, on around 3 February 2012, Mr Lazogas and Mr Gibson had a heated discussion at the premises. During that discussion, Mr Lazogas asked Mr Gibson when the Respondent would pay rent then outstanding and Mr Gibson informed Mr Lazogas that the Respondent would shortly be vacating the premises.

13 Mr Gibson says that, midway through the discussion, he returned to his office and prepared a formal written notification from the Respondent to the Applicant, advising of the Respondent's intention to vacate the premises and terminate the tenancy in one month's time. He says he handed the notice to Mr Lazogas and told Mr Lazogas that the notice provided one month's notice of the termination of the tenancy. He says that Mr Lazogas walked off, looked at the notice and then screwed the notice up and threw it away.

14 Mr Lazogas agrees that Mr Gibson returned from his office with a piece of paper and that Mr Gibson told Mr Lazogas that the Respondent was giving one month's notice of termination of the tenancy. Mr Lazogas says, however, that the piece of paper was "shoved in my face" and that he did not read it. Mr Lazogas says that he then told Mr Gibson that the Respondent would need to send "official notice" of its intention to terminate the tenancy.

15 I prefer the evidence of Mr Gibson. I found him to be a credible witness who endeavoured to provide honest testimony, to the best of his recollection. In contrast, I found that much of Mr Lazogas' testimony was confusing and irrelevant, with Mr Lazogas frequently straying to extraneous and negative commentary about Mr Gibson's character.

16 Further, it is apparent from Mr Lazogas' own evidence that on 3 February 2012, Mr Gibson produced, in Mr Lazogas' presence, a document purporting to be one month's notice of the termination of the tenancy, and advised Mr Lazogas that the Respondent was providing one month's notice of termination of the tenancy. The lease allows for personal delivery of notices and, in my view, the notice could be validly served by Mr Gibson, as representative of the Respondent, by handing it to the Applicant's director, Mr Lazogas. That Mr Lazogas may have refused to read the notice does not mean that the notice was not validly served on the Applicant. In any event, I accept Mr Gibson's evidence that Mr Lazogas read the notice before throwing it away.

17 On all the evidence, I am satisfied that on 3 February 2012 the Respondent provided to the Applicant one month's written notification of the termination of the tenancy.

18 I also accept Mr Gibson's evidence that, on 10 February 2012 when the Applicant took possession of the premises, the Respondent had not abandoned the premises but was in the process of finalising its move to new premises and cleaning the [Applicant's] premises. I accept Mr Gibson's evidence that the Respondent had hired an industrial waste bin for the purpose of removing rubbish from the premises, and that the bin was sitting at the premises on 10 February 2012. It is not disputed by the Applicant that a waste bin was, in fact, sitting at the premises on 10 February 2012 when it took possession of the premises.

19 As I find that on 3 February 2012 the Respondent provided one month's notice of the termination of the tenancy, and that it had not abandoned the premises as alleged by the Applicant, I find that the Applicant was not entitled to take possession of the premises and lock the Respondent out on 10 February 2012. I find that the Respondent was, by the Applicant's conduct, denied the opportunity to complete the task of cleaning the premises and, for this reason, the Applicant has no entitlement to the compensation it now claims for the costs it incurred in cleaning the premises, including the cost of hiring a waste bin.

20 For the above reasons, I also find that the Applicant has no entitlement to the extra month's rent claimed as damages flowing from the Respondent's alleged failure to give one month's notice of termination of the tenancy. As noted above, I find that the notice was given.

UNPAID RENT

21 After viewing, during the hearing, correspondence between the parties, and in particular his own correspondence to Mr Lazogas dated 22 February 2012, Mr Gibson concedes that the sum of rent unpaid and owing by the Respondent up to10 February 2012 is $3,110.62.

22 I am satisfied that, under the terms of the lease, the Applicant is entitled to interest on unpaid rent to be calculated with reference to the rate prescribed under s2 of the *Penalty Interest Rates Act* 1983. I consider it fair to allow interest at that rate from the date the Applicant re-took possession of the premises, 10 February 2012, to the date the Applicant issued this proceeding, 28 December 2012. I calculate such interest to be $329.

OUTGOINGS

23 As noted above, the Respondent concedes its liability in respect of outgoings, save for land tax, accrued up to 10 February 2012, but says it is unsure of the actual sums owing because the Applicant failed to clearly identify, and provide satisfactory documentary evidence of, such sums.

24 In respect of the outgoings, the Applicant's evidence was given primarily by Ms Lazogas, who appears to have responsibility for the Applicant's financial records. I found Ms Lazogas to be an honest witness, but not well organised. During the hearing, it took Ms Lazogas some time to locate and produce source documentation evidencing the outgoings expenses incurred by the Applicant, and some time more for her to explain how such expenses should be apportioned as between the Applicant and the Respondent. I can well understand the Respondent's confusion, prior to the hearing, in respect of the outgoings expenses and the apportionment of such expenses between the parties. As the various expenses, and apportionment of them, were explained during the course of Ms Lazogas' evidence, Mr Gibson made sensible concessions on behalf of the Respondent. On the evidence provided, I am satisfied that the Respondent bears responsibility for the following outgoings expenses, to be paid to the Applicant:

- Insurance $238.32
- Council rates $605.77
- Water rates $100.42

LAND TAX

25 The lease expressly provides that the Respondent is liable to pay land tax, for the period of its occupancy of the premises, incurred by the Applicant. Having heard evidence from Ms Lazogas, and seen documents produced by Ms Lazogas, I am satisfied that, if the Respondent has liability in respect of land tax, the sum of that liability is $742.13.

26 The Respondent believes that it does not or may not be liable for the land tax because of section 50 the *Retail Leases Act* 2003 which provides:

> A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for tax for which the landlord or head landlord is liable under the Land Tax Act 2005.

27 It is common ground that, if the lease is not a *retail premises* lease within the meaning of the Act, the land tax is payable by the Respondent.

28 As to what constitutes *retail premises*, the relevant part of section 4 of the *Retail Leases Act* provides:

> Meaning of retail premises
>
> (1) In this Act, retail premises means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—
>
> (a) the sale or hire of goods by retail or the retail provision of services; or

29 In determining whether premises are *retail* premises within the meaning of section 4 of the Act, it is the "use" of the premises *under the terms of the lease* that is relevant. A lease, not attracting the operation of the Act at the time the lease was entered, cannot subsequently attract the operation of the Act by reason of the tenant's subsequent use of the premises being something other than the use contemplated under the terms of the lease.

30 Item 13 in the schedule in the lease confirms the permitted "use" of the premises as:

> "(Not retail) – by executing this lease you acknowledge that your use of premises is not predominantly retail and therefore does not invoke the Retail Leases Act (2003)".

31 The premises consist of a warehouse located in an industrial area. I accept Mr Lazogas's evidence that, at the time the lease was entered, he was aware that the business the Respondent intended to conduct from the premises had some connection with the funeral industry, but that he was not aware that the business would or might include the retail provision of funeral services

to members of the public. I accept Mr Lazogas' evidence that, as expressed in the lease, it was the intention of the parties when the lease was entered that the business to be conducted from the premises would not include the provision of retail services or the retail hire or selling of goods.

32 I note also that, in correspondence dated 8 February 2011 from the City of Greater Dandenong to the Applicant, the local Council confirmed that the use of the premises as a funeral parlour was in breach of the Council's Planning Scheme and that the Council had not issued approval for the use of the premises as a funeral parlour.

33 On the evidence before me, I am satisfied that, under the terms of the lease, the premises were not to be used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services. As such, I find that the lease was not a *retail premises* lease governed by the *Retail Leases Act*.

34 Accordingly, I am satisfied that the Respondent is liable for the land tax in the sum of $742.13.

REPAIR/REINSTATEMENT COSTS

35 The Applicant claims $253 as the cost to rectify a roller garage door at the premises. There is no dispute that, at the time the Respondent last occupied the premises, the door did not function properly and needed to be to be refitted into its side guiding tracks. There is no dispute that, after it took possession of the premises on 10 February 2012, the Applicant expended $253 in rectifying the roller door. However, I accept Mr Gibson's evidence that the door was in need of the same repairs at the time the Respondent first entered occupancy of the premises in November 2009. Accordingly, I find that the Respondent bears no responsibility for the rectification cost incurred by the Applicant.

36 There is no dispute that the Respondent removed a lock from an entry door (not the garage door) at the premises. The Respondent says that the lock did not comply with health and safety requirements in that it could only be opened from the inside of the premises by using a key. Mr Gibson says that he replaced the lock with a new lock that met health and safety requirements. As he considered the new lock to be the Respondent's property, he removed the new lock when the Respondent was moving all its property from the premises in February 2012, leaving the door with no lock. Mr Gibson was unable to say what became of the old lock. Presumably it was lost or discarded. In my view, as part of its obligation to reinstate the premises to their original condition, the Respondent was obligated to install a lock in the door, at least similar to the lock it contained at the commencement of the Respondent's occupancy of the premises, before it exited the premises. There being no evidence that, had it not been locked out, the Respondent would have met such obligation, and being satisfied that the cost incurred by the Applicant to install a lock, $143, is reasonable, I allow the Applicant $143 in respect of this claim.

37 The Applicant says that fire extinguishers were removed from the premises by the Respondent when it vacated the premises, and the Applicant now claims $475 as the cost it incurred for the supply and installation of new fire extinguishers. I accept Mr Gibson's evidence that the premises did not, at any time during the Respondent's occupation, contain fire extinguishers and, accordingly, I find that the Respondent has no obligation to meet the cost of the new fire extinguishers.

38 There is no dispute that the Respondent left a large metal cabinet at the premises and that the Applicant engaged a tradesman to cut up and remove the cabinet. Mr Gibson says that the cabinet was a useful piece of furniture and it was his intention to leave it at the premises, believing it to be an improvement that would benefit future tenants. As there was no agreement with the Applicant in respect to the cabinet, I find that the Respondent, as part of its obligation to reinstate the premises to their original condition, ought bear the cost of removal and disposal of the cabinet. I am satisfied that the cost incurred by the Applicant was approximately $200, and I allow that sum as the reasonable cost to dispose of the cabinet.

SUMMARY

39 For the above reasons, I find that the Respondent is indebted to the Applicant in the sum of $4,094.26, calculated as follows:

-	Unpaid rent	$3,110.62
-	Interest on unpaid rent	$329
-	Insurance	$238.32
-	Council rates	$605.77
-	Water rates	$100.42
-	Land tax	$742.13
-	New door lock	$143
-	Cabinet removal	$200
	Sub total	$5,469.26
	Less security deposit retained by the Applicant	$1,375
	Balance	$4,094.26

40 As the landlord has been out of pocket in respect of the above sum for some time, and having regard to the fact that the sum of the unpaid rent was never really in issue, but also having regard to the fact that the Respondent had good reason to question the outgoings expenses claimed by the Applicant and other sums demanded by the Applicant, I consider it fair to award interest on the above sum from the date this proceeding was commenced, 28 December 2012, to the date of the final hearing, 17 June 2014. I think it fair to apply an interest rate akin to the rate prescribed pursuant to section 2

of the *Penalty Interest Rates Act* 1983. Allowing a rate of 10%, I calculate such interest to be $601, bringing the total sum to be paid by the Respondent to the Applicant to $4,695.26.

COSTS

41 The Applicant claims approximately $1,500 in respect of costs associated with the proceeding including legal costs.

42 Section 92 of the *Retail Leases Act* 2003 makes special provision in respect of costs of proceedings. As I find that the lease was not a *retail premises lease* governed by the *Retail Leases Act*, section 92 of that Act has no bearing on the question of costs in this case.

43 The applicable legislation, in respect to costs, is section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides that each party is to bear its own costs in a proceeding, however the Tribunal may, if it is satisfied that it is fair to do so having regard to certain matters, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

44 Although the Applicant has succeeded in obtaining an order in its favour, I am satisfied, having regard to the matters set out in section 109(3) above, that it would *not* be fair to depart from the prima facie rule that each party bear its own costs.

45 I am not satisfied that the Applicant has been unnecessarily disadvantaged, or that it has incurred unnecessary costs, by reason of the conduct of the Respondent in the proceeding.

46 Although it has taken a long time, since the commencement of the proceeding in December 2012, to complete the proceeding, I do not consider that the Respondent is responsible for unreasonably prolonging the time taken to complete the proceeding, such that it would be fair to award costs against it. Much of the delay is attributable to first, the Tribunal by its own motion transferring the proceeding from its "*civil claims*" list to its *"retail tenancies*" list, and second, the review proceeding whereby the original determination made in 10 December 2013 was set aside by orders made on 16 May 2014. The orders made 16 May 2014 make no reference to costs of the parties and there is nothing to suggest that the Respondent set out to delay the hearing of the matter.

47 Nor am I satisfied that the relative strengths of the parties' claims provides reason enough to make a costs order against the Respondent. The Respondent has succeeded in defending one of the Applicant's primary allegations, namely that the Respondent abandoned the premises. The Respondent has also successfully defended claims brought by the Applicant in respect of the dysfunctional garage door at the premises and the replacement fire extinguishers. Although I have found, against the Respondent's submission, that the lease was not a *retail premises lease* governed by the *Retail Leases Act*, it was an issue that was certainly open to argument. And in respect of outgoings expenses, I have found that the Respondent's confusion as to the sums owing was understandable.

48 In all the circumstances, I am satisfied that it would not be fair to depart from the prima facie rule that each party bear their own costs.

CONCLUSION

49 For the above reasons I ordered the Respondent to pay the Applicant $4,695.26.

SENIOR MEMBER M. FARRELLY