VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1063/2016

CATCHWORDS

RETAIL TENANCY – Self-executing order – *Res judicata* – whether a claim for rental arrears up to a specified point in time prevents another claim for rental arrears being made for a subsequent period of time – *Limitation of Actions Act 1958* – whether debts incurred more than six years prior to the issuing of proceedings are capable of being claimed.

APPLICANT	Kameel Pty Ltd (ACN 006 636 442)
FIRST RESPONDENT	Antongtai Pty Ltd (ACN 133 542 328) (in liquidation)
SECOND RESPONDENT	Yinai Song
THIRD RESPONDENT	Minhui Ye
FOURTH RESPONDENT	Gu Feng Lin
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	31 March 2017
DATE OF ORDER	4 April 2017
CITATION	Kameel Pty Ltd v Antongtai Pty Ltd (in liquidation) (Building and Property) [2017] VCAT 469

ORDER

1. Order 2 of the Tribunal's orders dated 10 January 2017 is revoked.
2. The Fourth Respondent must pay the Applicant $115,558.68.
3. The Applicant's application against the First, Second and Third Respondents is struck out with a right to apply for reinstatement.
4. No order as to costs as between the Applicant and the Fourth Respondent.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J Korman of Counsel
For the First, Second and Third Respondents	No appearance
For the Fourth Respondent	Mr A Purton of Counsel

REASONS

INTRODUCTION

1. On 10 January 2017, orders were made by the Tribunal, which provided:

> 1. The date by which the respondents must file and serve *Points of Defence* to the Applicants *Amended Points of Claim* dated 2 December 2016 is extended to **1 February 2017**.
>
> 2. **In the event that any of the respondents fail to comply with Order 1 of these orders, then pursuant to s 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* orders will be made against that defaulting respondent or respondents without further notice that the proceeding is summarily determined in favour of the Applicants** [sic] **as against that respondent or respondents in the amount of $179,077.08 with interest and costs to be determined**.

2. No defence or any correspondence was filed or served by any of the Respondents on or before 1 February 2017. As a consequence, solicitors acting on behalf of the Applicant wrote to the Tribunal by letter dated 1 February 2017, stating:

> …
>
> If we understand the intention of those Orders correctly then we believe the Order should be as follows:
>
> 1. That the proceeding is summarily determined in favour of the Applicant as against the Second and Third Respondents in the sum of $179,077.08 with interest and costs to be determined;
> 2. That the proceeding is summarily determined in favour of the Applicant as against the Fourth Respondent in the sum of $56,759.06 with interest and costs to be determined; and
> 3. That the proceeding as against the First Respondent be stayed as a consequence of section 471B of the *Corporations Act 2001 (Cth).*
>
> …
>
> The Applicant also requests that the matter be listed in order to deal with the issue of interest and costs as soon as possible.

3. The orders sought by the Applicant were inconsistent with the self-executing order dated 10 January 2017, in that, it appeared as though the Applicant was apportioning quantum as between the Respondents, rather than seeking an order where all Respondents were jointly and severally liable for the full amount claimed.

4. As a result, the Tribunal advised the Applicant that the self-executing orders would not be executed until further submissions or evidence was given as to why the form of the orders sought differed from the form of the self-executing order. Consequently, by order dated 3 February 2017, the Tribunal ordered:

> 1. This proceeding is listed for hearing at 12.00 pm on 31 March 2017 at 55 King Street, Melbourne, before Senior Member E Riegler (if available), at which time the Tribunal will determine:
>
> (a) whether the self-executing order made on 10 January 2017 is to be executed and if so, whether the summary judgment amount is to be apportioned as between the First, Second, Third and Fourth Respondents; and
>
> (b) whether interest and costs are to be ordered in the proceeding.

5. On 30 March 2017, *Points of Defence* were filed by the Fourth Respondent.

6. At the hearing on 31 March 2017, Mr Korman of Counsel appeared on behalf of the Applicant. Mr Purton of Counsel appeared on behalf of the Fourth Respondent. There was no appearance on behalf of the First, Second or Third Respondents. In relation to the First Respondent, that was to be expected given that a *Winding up Order* was made by the Supreme Court of Victoria on 14 December 2016. Pursuant to that *Winding up Order*, it has been placed into liquidation.

THE APPLICANT'S CLAIM

7. On 29 March 2017, the Applicant's solicitor, David Rewell, swore an affidavit, which helpfully summarised the relevant background facts and explained how different amounts were being sought against the Fourth Respondent, as opposed to the other Respondents. The relevant parts of that affidavit are set out as follows:

> …
>
> **Background**
>
> 4. The Applicant being Kameel Pty Ltd is the owner of Shop 10, 248-296 Clyde Road, Berwick (**the premises**).
>
> 5. The First Respondent being Antongtai Pty Ltd (now in liquidation) as transferee leased the premises from the Applicant from late 2008 until late 2016.
>
> 6. The Second Respondent being Yinai Song, Third Respondent being Mighui Ye and Fourth Respondent being Gu Feng Lin also known as Qing Song Lin are guarantors.
>
> …

Rent and outgoings

8. The Amended Points of Claim filed herein and dated 2 December 2016 (**the Amended Points of Claim**) pleads that the following amounts are owed to the Applicant for rent and outgoings in respect of the premises:

    a. Rent owed up to and including 19 March 2015 in the sum of $122,318.02

    b. Rent owed for the period 20 March 2015 to 20 September 2016 in the sum of $40,444.77

    c. Outgoings to 20 September 2016 in the sum of $16,314.29

…

11. In the Prayer for Relief, the Applicant claims as against the First and Fourth Respondents the matters in paragraph 5(b) and 5(c) above which total $56,759.06 plus interest plus costs.

12. Also, in the Prayer for Relief, the Applicant claims as against the Second and Third Respondents the amounts in paragraph 5(a), 5(b) and 5(c) above which total $179,077.08 plus interest plus costs.

13. The reason that the Prayer for Relief does not include a claim against the First and Fourth Respondents in respect of the amount in paragraph 5(a) above is that the Applicant has already obtained judgment in the County Court of Victoria against the First and Fourth Respondents for this amount.

14. As deposed to at paragraph 6 in my Affidavit sworn 12 August 2016 and filed herein (**my 12 August 2016 Affidavit**), the Applicant herein issued proceedings in the County Court of Victoria seeking rent owed to and including 19 March 2015 in the sum of $122,318.02.

…

17. As deposed to at paragraph 8 in my 12 August 2016 Affidavit, the Applicant herein was unable to serve the County Court of Victoria Proceedings on the Second and Third Respondents herein.

Interest and costs

18. The Amended Points of Claim plead that the following amounts owed to the Applicant for rent and outgoings in respect of the premises:

    a. Interest to 19 October 2016 in the sum of $120,044.74

    b. Costs to 19 October 2016 in the sum of $40,929.29

19. The calculation of these amounts is set out in the documents prepared on behalf of the Applicant which are annexed to the Amended Points of Claim.

20. As deposed to at paragraph 32 in my 12 August 2016 Affidavit, the County Court proceedings did not concern unpaid rental since 19 March 2015, unpaid outgoings, and interest accruing pursuant to the terms of the lease.

21. The lease provides at clause 2.1.7 that the Tenant must pay interest on overdue money at the rate in Item 14 being 2% per annum more than the rate from the time fixed by the Penalty Interest Rate Act (Vic) [sic].

22. The amount of interest owed to 19 October 2016 is $120,044.75 according to the Amended Points of Claim. However, in preparing this affidavit I have noticed the formulas used contained an error in that the interest is calculated using the amount received on a discrete basis rather than the amount received on a cumulative basis which produces a revised interest amount meaning the correct interest owed to 19 October 2016 is $60,888.56. Attached hereto and marked with the letters "**DAR-19**" is a true copy of the revised interest calculation.

…

8. Mr Korman conceded, correctly, that no order can be made against the First Respondent (**'the Tenant'**), having regard to s 471B of the *Corporations Act 2001* (Cth).

9. Insofar as any orders are to be made against the Second and Third Respondents, Mr Korman said that he did not believe those persons were still domiciled in Australia or that they had been served with the self-executing order or notice of this hearing. In those circumstances, he did not press for any default judgment order being made against those two parties in this hearing.

10. However, Mr Korman submitted that the following orders should be made as against the Fourth Respondent:

    (a) $40,444.77, representing rent in arrears for the period 20 March 2015 to 20 September 2016;

    (b) $16,314.29, representing outgoings in arrears;

    (c) $60,888.56, representing interest pursuant to the relevant clauses of the lease; and

    (d) $40,929.29, representing legal costs.

THE FOURTH RESPONDENT'S POSITION

11. Mr Purton conceded that the Fourth Respondent was liable to the Applicant in respect of arrears in rent and outgoings but disputed the

quantum claimed. Moreover, he submitted that costs should not be awarded against the Fourth Respondent, having regard to s 92 of the *Retail Leases Act 2003*. Therefore, apart from correctly assessing quantum (and interest), the Fourth Respondent did not oppose summary judgment being entered against him.

12. Having regard to the Applicant's submissions and the position adopted by the Respondent, it is appropriate that the Applicant's application for summary judgment be assessed afresh and that Order 2 dated 10 January 2017 be set aside in lieu of substituted orders made in accordance with these Reasons.

RENT IN ARREARS

13. Mr Purton submitted that part of the Applicant's claim for rent has already been determined in an earlier County Court proceeding. He argued that, as judgment in the County Court proceeding was entered on 29 October 2015, any claim for arrears of rent prior to that date have merged into that judgment. Therefore, arrears of rent should only be counted over the period 30 October 2015 until 20 September 2016,[1] as the Applicant is estopped from seeking to recover arrears of rent prior to that date.

14. It is trite that the defence of *res judicata* needs to establish not only that the cause of action was the same but also that the plaintiff had the opportunity of recovering and, but for his own fault, might have recovered in the first action that which he seeks to recover in the second.[2]

15. It appears that the County Court proceeding was commenced in mid-2015. In particular, the *Writ* and *Statement of Claim* are dated July 2015. However, arrears of rent were only claimed up until the end of February 2015. Mr Korman submitted that this lapse in time was not usual, given that the *Statement of Claim* may have been drafted some months before the *Writ* was finalised and filed.

16. He argued that the County Court proceeding restricts any claim for rent in arrears to the end of February 2015. In those circumstances, he submitted that any rent that fell due after February 2015 had not merged into the judgment dated 21 September 2015.

17. In my view, that analysis is correct, when applied to the present case. In particular, if rent in arrears is claimed up to a particular point in time, and judgment is entered in respect of those arrears, any rent beyond that period would still be due if the obligation to pay rent continued. It could not be said that a judgment in respect of a specified period where rent was in arrears, of itself, extinguished any future obligation to pay rent beyond that period. Of course, the situation may be different if the

[1] The date when the periodic month-to-month tenancy is assumed to have expired.
[2] *Halsbury's Laws of England* (4th Ed) and [975].

pleading was expressed in such a way where all outstanding and future rent due under the lease was being claimed, such as in a situation where the lease had come to an end and future rent foregone was also being claimed. In that scenario, it would not be open to re-litigate in respect of rent arrears merely because the landlord had underestimated how much future rent was foregone.

18. In the present case, however, the *Amended Points of Claim* allege that the lease continued until re-entry and forfeiture occurred on 11 November 2016. The Fourth Respondent's *Points of Defence* admit that allegation. Accordingly, I find that it is open for the Applicant to claim rent in arrears from March 2015. That being the case, it is uncontested that the arrears in rent from 20 March 2015 to 20 September 2016 amount to $40,444.77.[3]

IS THE CLAIM TIME-BARRED?

19. Mr Purton submitted that some of the rent and outgoings in arrears represent debts which are more than six years old and therefore time-barred. In particular, he argued that debts incurred before 12 August 2010, being six years prior to the date that this proceeding was issued, cannot now be claimed.

20. Mr Purton referred to the schedule attached to Mr Rewell's second affidavit, which lists a running total arrears of rent and interest, against payments received. As at 20 July 2010, it records the arrears of rent and interest totalling $15,272.75. According to Mr Purton, that amount cannot be claimed in this proceeding because it relates to a debt which is now more than six years old.

21. Mr Korman submitted that the debt of $15,272.75 was extinguished by subsequent payments made during the remainder of the lease period. He submitted that as none of those payments were quarantined as a payment for a specific rent month or outgoing, it was open for the Applicant to apply those payments in satisfaction of older debts, which is what occurred.

22. In my view, that analysis is correct. Where a payment is made in part satisfaction of a running account, it is open for the creditor to apply the payment to the oldest debt. According to the spreadsheet exhibited to Mr Rewell's second affidavit, payments well in excess of $15,272.75 were made during the period 20 December 2010 until the last payment was received on 20 April 2016. Therefore, if those amounts were first applied in satisfaction of old debts, no rent debts older than six years were owed at the time when this proceeding was issued.

[3] The Respondent admits that as at 11 November 2016, the Respondent was occupying the demised premises under a periodic, month-to-month tenancy. Consequently, the rent claimed in respect of the period 12 November 2016 until 20 September 2016 represents rent forgone rather than rent in arrears.

23. Mr Purton further submitted that some of the outgoings claimed in this proceeding were also more than six years old. He pointed to two of the tax invoices, annexed to the *Amended Points of Claim*, in support of that contention. In particular, the tax invoice for Year 1 states:

Outgoings due 20.2 .09	$301.40
Plus Outgoings – 2008 – 2009	$203.12

24. The tax invoice for Year 2 states:

Plus Outgoings – 2009 – 2010	$229.71
Plus Insurance – 2009 – 2010	$1327.43

25. Therefore, Mr Purton submitted that $2,088.94 represents outgoings which were incurred and invoiced more than six years from the date that this proceeding was issued.

26. It would appear that all payments made by the Tenant have been applied towards rent in arrears. There is no evidence of any of the payments, which are documented in the schedule attached to Mr Rewell's second affidavit, being applied towards the payment of outgoings. Therefore, if one assumes that the reference to the year 2009 – 2010 is a reference to that financial year, $2,088.94 constitutes a debt that was incurred more than six years prior to this proceeding being issued. In those circumstances, I find that this claim is time-barred, by virtue of the *Limitation of Actions Act 1958*.

27. Accordingly, I find that only $14,225.35 in respect of outgoings are capable of being claimed in this proceeding.

LEGAL COSTS

28. Clause 2.1 of the lease provides:

> The **tenant** must –
>
> …
>
> 2.1.8 pay within 7 days of a request the **landlord's** reasonable expenses and legal costs in respect of –
>
> …
>
> (f) any breach of this lease by the **tenant**, or
>
> (g) the exercise or attempted exercise by the **landlord** of any right or remedy against the **tenant**,
>
> but, if the **Act** applies, only to the extent to which the **Act** permits recovery.

29. Mr Korman conceded that s 92 of the *Retail Leases Act 2003* applies to restrict the Applicant's ability to claim costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* or under the lease. That section provides that each party to a proceeding before the Tribunal

under Part 10 of the *Retail Leases Act 2003* must bear their own costs in the proceeding unless the Tribunal is satisfied that it is fair to order costs because:

> …
>
> … the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding, …

30. Mr Korman submitted that the Fourth Respondent has conducted the proceeding in a vexatious way because he failed to take any action in any part of the proceeding and only filed a defence one day before the return date of this hearing.

31. Mr Purton submitted that costs should not be ordered in this proceeding. He argued that s 92 of the *Retail Leases Act 2003* applied which prohibited costs being ordered against his client. He further argued that, even if that were not the case, part of the Applicant's claim for costs relate to costs of the County Court proceeding, which have already been determined in that jurisdiction. In that regard, Mr Purton referred to a number of invoices attached to the Applicant's *Amended Points of Claim*, which clearly indicate that the work described therein relates to the County Court proceeding.

32. In particular, the tax invoice dated 30 September 2015 describes the disbursements as being the filing fee on the *Writ* and the filing fee on the application for an order. Mr Purton submits that the invoice amount of $3,966.61 could only relate to work and expenses incurred in respect of the County Court proceeding. Similarly, he submitted that the Applicant's solicitors invoice dated 24 May 2016, in the amount of $7,667.89, also refers to work in connection with the County Court proceeding.

33. Moreover, the subsequent invoice, dated 26 August 2016 in the amount of $26,787.60 (which includes the previous invoice of $7,667.89), also refers, in part, to work done in the County Court proceeding.

34. I accept that the costs associated with the County Court proceeding cannot be claimed in this proceeding as judgment has already been entered in respect of those costs. In particular, the orders of the County Court dated 21 September 2015 were that costs in the amount of $2,736 be awarded to the Applicant.

35. In any event, I am not persuaded that the exception to s 92 of the *Retail Leases Act 2003* operates in the present case. The mere fact that the Fourth Respondent did not participate in the proceeding until this hearing, does not, of itself, mean that it has conducted the proceeding vexatiously. Indeed, on one view, it might be said that his absence has made the Applicant's path easier.

36. Further, I am not persuaded that the late filing of *Points of Defence* constitutes conducting the proceeding vexatiously. The orders made by the Tribunal on 3 February 2017 listed the proceeding for hearing to determine how quantum was to be apportioned between the Respondents, together with assessing interest and costs. Quantum was put into issue after the Applicant's solicitors wrote to the Tribunal requesting that judgment be entered in a manner different to what was contemplated by the self-executing order dated 10 January 2017.

37. It should be noted, however, that the Applicant should not be criticised in taking that approach, given that the self-executing orders, had they been executed in the form originally contemplated, would have resulted in double recovery. Therefore, it was entirely appropriate and indeed, incumbent, on the Applicant to press for orders which were different to that contemplated by the self-executing order.

38. Nevertheless, it is difficult to see how those circumstances amount to the Fourth Respondent conducting the proceeding vexatiously. More to the point, I do not consider that the First Respondent conducted the proceeding vexatiously in circumstances where he conceded that there should be summary judgment against him, save that he wished to be heard on quantum, costs and interest. Further, the Fourth Respondent was partially successful, in that he successfully argued that the claim for outgoings in arrears should be reduced.

39. Consequently, I do not find that the Fourth Respondent conducted the proceeding vexatiously. Accordingly, the claim for costs is dismissed.

INTEREST

40. As indicated above, the Applicant claims interest in the amount of $60,888.56. The calculation of that amount is set out in the spreadsheet attached to Mr Rewell's second affidavit. It relates to interest on rental arrears only. No interest has been charged on outgoings in arrears.

41. That calculation of interest is not disputed. However, Mr Purton submits that the interest claimed is not totally recoverable. In particular, as of 20 July 2010, the running balance of interest is recorded as totalling $1,703.32. Mr Purton submitted that this component of interest constitutes a debt that is more than six years old and, therefore, should be deducted from the total amount of interest claimed.

42. For the reasons which I have already outlined above, subsequent payments made by the Tenant well exceed both the amount of rent in arrears as at 20 July 2010 and interest which had compounded as of that date. Accordingly, those payments have been applied to clear those debts and in those circumstances, have no net impact on what is now being claimed.

43. Mr Purton further submitted that interest was awarded in the County Court proceeding. In particular, the orders made by the County Court awarded interest from 6 August 2015 to 18 September 2015 at 9.5%, which totalled $1,400.79. Therefore, Mr Purton submitted that any claim for interest prior to judgment merged into that judgment.

44. Mr Korman submitted that the interest awarded in the County Court judgment related to judgment interest only. No claim was ever made in the County Court for interest on arrears of rent. Mr Korman submitted that it was not open for the Applicant to make such a claim in the County Court proceeding because that Court did not have jurisdiction to determine such a claim. This was because its jurisdiction was limited solely to the recovery of rental arrears, given that such a claim fell outside the definition of a *retail tenancy dispute* under s 81 of the *Retail Leases Act 2003*. In other words, the claim for recovery of rental arrears was not subject to the exclusive jurisdiction of the Tribunal under s 89(4) of the *Retail Leases Act 2003*.

45. In those circumstances, I find that it was reasonable for the Applicant to exclude any claim for interest on rental arrears from what was prosecuted in the County Court proceeding.

46. Given the above, and having regard to the form of the orders made by the County Court, I find that the interest awarded constituted judgment interest and that no claim was ever made in that proceeding for interest under the lease – in respect of rental arrears.

47. As the Respondent does not contest the mathematical calculation of interest, I will order that interest in the amount of $60,888.56, being interest pursuant to clause 2.1.7 of the lease, be paid by the Fourth Respondent under the guarantee given by him of the Tenant's obligations under the lease.

CONCLUSION

48. Having regard to my findings set out above, I will order that the Fourth Respondent pay $115,558.68 to the Applicant, made up as follows

    (a) $40,444.77, being rent in arrears;

    (b) $14,225.35, being outgoings;

    (c) $60,888.56 being interest.

49. Given that the Second and Third Respondents may not be aware of the self-executing order made against them or of this hearing, the claims against them will be struck out but with a right given to the Applicant to pursue those claims at some future time, should their whereabouts becomes known. I will also strike out the application as against the First Respondent, given that proceedings are unable to be continued against

that entity, without leave of the Supreme Court of Victoria or Federal Court of Australia.

SENIOR MEMBER E. RIEGLER