

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP772/2016

CATCHWORDS

Retail lease: landlord's claim for damages for rent and outgoings, and make good expenses.

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| LANDLORD | Koroit Nominees Pty Ltd |
| RESPONDENT | SPEC Property Development Pty Ltd |
| WHERE HELD | Melbourne |
| BEFORE | Member C Edquist |
| HEARING TYPE | Hearing |
| DATES OF HEARING | 1 March 2017 and 19 May 2017 |
| DATE OF ORDER | 19 May 2017 |
| DATE OF REASONS | 18 July 2017 |
| CITATION | Koroit Nominees Pty Ltd v SPEC Property Development Pty Ltd (Building and Property) [2017] VCAT 1063 |

REASONS

INTRODUCTION

1 The hearing in this matter took place on 1 March 2017 and 19 May 2017. At the conclusion of the hearing on 19 May 2017 I made the following orders:

1. The respondent, SPEC Property Development Pty Ltd, must pay to the applicant, Koroit Nominees Pty Ltd, the sum of \$38,244.87, for the reasons given at the hearing.
2. Under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* the respondent must reimburse to the applicant the filing fee of \$575.30 and the hearing fee paid by the applicant of \$487.90, a total of \$1063.20.
3. The total amount to be paid by the respondent to the applicant under these orders is \$39,308.07.

- 2 On 31 May 2017, the Tribunal received correspondence from the solicitors acting for the respondent seeking written reasons for the decision.
- 3 I now set out my reasons for the decision made on 19 May 2017. The opening paragraphs are drawn from the summary of the proceeding which I read out at the start of the second day of the hearing. The balance of the reasons are based on the transcript of the oral reasons I delivered at the end of the hearing. They have been edited in the interests of readability, but not substantively. The contents of some exhibits, which were only briefly referred to at the hearing because the parties were familiar with them, are expanded upon in order to provide context for these written reasons.

BACKGROUND TO THE PROCEEDING

- 5 The applicant landlord has come to the Tribunal seeking damages in respect of alleged breaches of the respective leases made with the respondent tenant in respect of four suites in a building owned by the landlord situated at 87-89 Flemington Road, North Melbourne, Victoria. The suites concerned are numbered 2, 3, 7 and 8. Suites 2 and 3 were used as a display suite in relation to a project being developed by the tenant next door. Suites 7 and 8 were used as a site office for the respondent for its project.
- 6 The landlord did not file points of claim in the usual form when it issued its application in the Tribunal in June 2016, but articulated its claims in a series of emails beginning on 9 February 2016 and finishing on 24 March 2016. The landlord summarised its claims in the letter sent on the letterhead of The Moloney Group dated 19 April 2016.
- 7 The tenant initially articulated its defence in points of defence filed on 1 February 2017. It is convenient to refer to the defences raised on a suite by suite basis below, rather than attempt to summarise them globally here.
- 8 The tenant was represented by its director Mr Frank Moloney. The landlord was represented by Mr Stuart Miller, a solicitor, who acts as in-house general counsel. Mr Moloney and a Mr Di Protero gave evidence for the landlord. Witnesses including Mr Simon Lloyd gave evidence on behalf of the tenant.

The leases

- 9 To give some context to the landlord's claims and the tenant's responses, it is necessary to set out some basic information in relation to the four leases.

Suite 2

- 10 Suite 2 had a lease with a term of one year commencing on 14 October 2013. On expiry, the tenancy continued as a tenancy from month-to-month. The annual rental was \$21,000 plus GST. Importantly, the lease was subject to a special condition under which the tenant was permitted to put signs on the façade of the premises, but had to remove them and make good prior to

the expiration of the lease. Notice of termination was given on 31 August 2015.

Suite 3

- 11 The lease for this suite had a term of one year commencing 14 November 2013 and an annual rental of \$15,000 plus GST. Notice of termination was given on 31 August 2015.

Suite 7

- 12 Suite 7's lease was for one year commencing 14 October 2013, and reverted to a tenancy from month-to-month on expiry. The rental was \$15,000 per annum plus GST. Notice of termination was given on 1 December 2015.

Suite 8

- 13 Suite 8 was subject to a one year lease commencing 7 August 2014. It reverted to a tenancy from month-to-month on its anniversary. It was terminated on 1 December 2015.

THE LANDLORD'S CLAIMS

- 14 In his opening, Mr Moloney handed up a document headed 'Statement of Claim' which explained that the landlord's total claim was for \$40,964.39, comprising three elements as follows:
- (a) a claim totalling \$14,634.26 for rent for suites 2 and 3, together with a claim for recovery of building and common area expenses payable under the leases for suites 2 and 3;
 - (b) a claim totalling \$7,708.46 for rent for suites 7 and 8, together with a claim for recovery of building and common area expenses payable under the leases for suites 7 and 8;
 - (c) a claim for recovery of costs in relation to making good all four suites and other areas, totalling \$18,621.67.
- 15 At the hearing Mr Moloney handed up a summary of the landlord's claims in relation to suites 2 and 3, which broke down the claim for \$14,634.26 as follows:
- (a) a claim for rent for suite 2 for January, February and March 2016 at \$1,973.12 per month, a total of \$5,919.39;
 - (b) a claim for rent for suite 3 of the same months, at \$1,409.38 a month, a total of \$4,228.14;
 - (c) claims for building outgoings from 1 October 2015 to 31 December 2016 for \$579.46 and \$727.43; and
 - (d) claims for building outgoings from 1 January 2016 to 31 March 2016 for \$1,257.57 and \$1,637.19;
 - (e) a claim for insurance for suite 2 of \$163.85; and

- (f) a claim for insurance for suite 3 of \$121.23.
- 16 The landlord's summary of the claim in relation to suites 7 and 8 broke the claim for \$7,708.46 down to:
 - (a) a claim for rent for suite 7 for January 2016 for \$1,409.38;
 - (b) a claim for rent for Suite 7 up to 16 February 2016 for \$741.37;
 - (c) a claim for rent for Suite 8 for January 2016 for \$1,409.38;
 - (d) a claim for rent after 16 February 2016 \$741.07;
 - (e) a claim for building outgoings from 1 October 2015 to 31 December 2015 of \$650.49 plus \$650.49;
 - (f) a claim for outgoings from 1 January 2016 to 16 February 2016 for \$941.37 and \$941.37;
 - (g) a claim for insurance in relation to Suite 7 of \$111.52; and
 - (h) a claim for insurance for Suite 8 of \$111.52.

CLAIMS INITIALLY CONCEDED

- 17 On the first day of the hearing, the tenant conceded certain invoices charged by the landlord in relation to outgoings. However, some of those concessions were withdrawn at the beginning of the second day. In these circumstances, no reliance is placed on any concessions in these reasons.

ALLEGED CONCESSION BY MR GALLAGHER

- 18 On the first day of the hearing Mr Moloney placed reliance on an email from Brett Gallagher of the tenant dated 1 June 2016 acknowledging outstanding invoices totalling \$18,905.21. Three submissions are made about this by Mr Miller. The first is that the invoices were not reasonable, and therefore should not be relied on under clause 2.1.8 of the lease as creating a liability to pay. The second is that the invoices are not acknowledged. The third is that if Mr Gallagher made any concession, he did so without authority. In other words, his agency is challenged.
- 19 The first point made by Mr Miller is that in order to generate a liability to pay under clause 2.1.8 of the lease, the invoices have to be reasonable. This means they have to be examined. Accordingly, I do not decide the case on the basis of any concession made by Mr Gallagher.

CLAIM FOR RENT AND OUTGOINGS FOR SUITES 2 AND 3

- 20 It was not contended by the landlord that notice to vacate had not been given in a timely manner. However, Mr Moloney argued that the landlord was entitled to continue charging rent after the notice to vacate was given until such time as the keys were returned and the premises made good in accordance with the obligation under the lease.

- 21 The tenant conceded its obligation to make good. Mr Miller assisted by pointing to clauses 5.1.1 and 5.1.2 of the lease.
- 22 The tenant's position was that the make good works were complete by 16 December 2015. The tenant relied on an email from Simon Lloyd to Cindy Walters at The Moloney Group dated 16 December 2015 which refers to the four tenancies being 'vacated and restored'.

Helio Display Suite & Site Office Handover Rectification Works Agreement

- 23 The tenant, in its Points of Defence, also referred to a letter from Triurban Construction Pty Ltd ('Triurban') dated 1 February 2016 to Mr Moloney which was headed 'Helio Display Suite & Site Office Handover Rectification Works Agreement'. On the first day of the hearing Mr Lloyd gave evidence about this document. He could not recall when it was prepared. He said that he is a two finger typist and would not have typed it, and suggested it might have been typed by Sandra Borello, who was responsible for the display suite. He suggested that Ms Borello might have prepared the document after a site inspection in December.
- 24 At this point, I asked Mr Miller whether Ms Borello would be giving evidence, and I gave a *Jones v Dunkel*¹ warning.
- 25 Mr Moloney gave evidence that the letter was dated 1 February 2016. He said he recalled going on leave and coming back around Australia Day. He recalls Mr Lloyd was keen to meet, and that a meeting took place after Australia Day. He had the letter from Triurban within 24 to 48 hours.
- 26 Later on the first day of the hearing Mr Miller conceded that the letter was dated 1 February 2016. He indicated Ms Borello would not be called.

Performance of make good works

- 27 However, Mr Miller submitted that the works identified in the letter were minor in nature, and would not have prevented a tenant for the premises being sought. The issue regarding the rent and outgoings for suite 2 and suite 3 accordingly came down to whether the work was of such a nature that its performance would have prevented the landlord from leasing the suites.
- 28 Mr Moloney's evidence was that the work was attended to in February but was not done in such a way that the suites were left neat and tidy. He tendered photographs showing the state of the suites in February 2016 which had been sent on 8 March 2016 by email from his executive assistant to Marie-Claire McCaffrey at the tenant's office.
- 29 Mr Lloyd was shown these photographs. He could not recall getting the work done, but said he would have done.
- 30 Mr Moloney also relied on photographs showing work being done on the facade of suite 2 on 23 March 2016.

¹ (1959) 101 CLR 298

31 When the difference between 23 March 2016 and the end of the month was pointed out to him, Mr Moloney conceded that the rent for suites 2 and 3 should have ended on 23 March.

The powerboard

32 I consider Mr Maloney's concession to be generous, as I regard the evidence clear that suite 3 at least had not been completely restored to its original condition by 23 March 2016, on the basis that the powerboard had not been reconnected.

33 The tenant gave no evidence about the creation of the display suite. My notes of the evidence given by Mr Lloyd on the first day of the hearing recorded he had joined the tenant about 15 months before 'last September'. He agreed that this meant that he had arrived in or about June 2015. This was well after the creation of the display suite.

34 Mr Moloney's evidence was that before the tenant combined suites 2 and 3 to create the display space they were separated by a wall. The power board to suite 3 was on this wall. When the partition wall was demolished, the powerboard went with it.

35 Mr Moloney confirmed that as part of the make good works the tenant had recreated the partition wall and put a powerboard on it. However, Mr Moloney's complaint was that the powerboard had not been connected back to the original power source.

36 Mr Moloney's evidence was that the lack of power which resulted was not identified until a prospective tenant was being shown suite 3. This accounted for the fact that it took some months for the work to be undertaken, and it is noted that the rectification work was undertaken by Bomber Thompson Electrics in August 2016.

37 I make the observation that I do not think that suite 3 had been restored until the power had been reconnected to the powerboard. However, I note the concession made by Mr Moloney, and find that the landlord is entitled to rent and outgoings up to and including 23 March 2016 in respect of suites 2 and 3.

SUITES 7 AND 8

38 Mr Moloney's contention about the rent and outgoing for suites 7 and 8 was based on an email sent in February 2016 which set out the required make good works. He contended it took the tenant until 16 February 2016 to complete the required carpet cleaning and painting, and that is why the claim is made to that date.

39 Mr Miller, on the first day, indicated that concessions had been made regarding outgoings, but not in relation to the rent. In relation to the rent, he contended that the rectification works had reached the point in December 2015 where a new tenant could have been introduced to the premises. In other words, it was asserted that the steam cleaning of the carpet, the

painting and the refitting of the existing skirting duct leads were not matters material to releasing.

- 40 Mr Miller appeared to have changed his position on the second day, as he said that the tenant's position was that the works could have been completed within seven days.
- 41 On this basis, the tension between the parties regarding suites 7 and 8 was that the tenant said that they were ready by 7 February, but the landlord was insisting that the rent and outgoings be paid up to and including 16 February 2016.
- 42 Mr Moloney's claim that the rent was due up to 16 February 2016 was based on this being the date upon which his office had noted the keys were returned. He did not produce any document evidencing this date, and said that he had not made the note personally, but that someone in the office to whom he had spoken had noted the date.
- 43 I find it surprising that a landlord of Mr Moloney's experience would come to a hearing at the Tribunal not armed with such fundamental evidence. On the other hand, also I find it surprising that the tenant, which is a property company, did not take any step to properly document the day upon which it returned the keys. The tenant was not able to give any evidence at all about when the keys to suites 7 and 8 were returned, and doing the best I can in the circumstances, as I am obliged to do, I accept Mr Moloney's date of 16 February 2016.
- 44 On this basis, I find that rent and outgoings for suites 7 and 8 are to be allowed up to 16 February 2016

INSURANCE INVOICES

- 45 The insurance premiums were conceded by the tenant to the extent of approximately 50% of the sum claimed by Mr Moloney. The explanation was that Mr Moloney had pro-rated the insurance invoices on the basis that they were due from 30 September 2015 until 30 March 2016. The tenant had pro-rated them from 30 September 2015 up to the end of December 2016.
- 46 I find that in relation to suites 2 and 3, the pro rata calculation should be up to 23 March 2016. In relation to suites 7 and 8, the calculation should be up to 16 February 2016.

RECTIFICATION WORKS

Bomber Thompson Electrics invoice

- 47 The major invoice contained in the set of invoices submitted under this head of claim in terms of size is that of Bomber Thompson Electrics dated 29 August 2016 in the sum of \$6,858.50.

- 48 The first attack on recovery of this sum made by the tenant was that the invoice was not addressed to the landlord, but to another party, namely ‘Moloney & Moloney’.
- 49 Mr Miller submitted that in these circumstances the landlord had not made out any loss. I consider that this is a sound point in the sense that it is incumbent upon a claimant to demonstrate that it has suffered loss. Without relevant evidence, a claim made by one legal entity for a loss incurred by another will fail. A well-known example is the *24 Hour Fitness* case which was appealed from the Tribunal to the Supreme Court.²
- 50 Here, Mr Moloney filled the gap in the chain of evidence to my satisfaction as he gave sworn evidence that appropriate accounting had occurred within the entities within the Moloney Property Group so that, ultimately, the Bomber Thompson Electrics account became the liability of the landlord. I accept the claim on that basis, and do not disallow it on the basis the invoice was not directed to the landlord in the first instance.
- 51 I now turn to the underlying substance of the invoice. I have heard evidence from Mr Moloney regarding the need to rectify the situation relating to the powering of the powerboard in suite 3. I refer to that evidence above. On the basis of that evidence, I am satisfied that power was available to suite 3 before the tenant took occupation and took down the partition wall and removed the powerboard. I am also satisfied, on that evidence, that after the tenant had made good as far as it could by re-erecting the partition wall including the powerboard, the powerboard was not powered. I find for the landlord on the issue of the necessity for the powerboard to be reconnected.
- 52 I note that part of the invoice was challenged on the basis that Mr Lloyd took the view that the invoice was for much more work than was necessary. He said that the only work that had to be done was the reconnection of the power board to the mains. I accept the evidence of Mr Moloney to the effect that the electrician considered all his work needed to be done to make good the power supply. I allow recovery of the Bomber Thompson Electrics invoice in full.

Plumb Master invoice

- 53 The next invoice for consideration related to the work of Plumb Master. It is dated 24 August 2016, and is in the sum of \$1,553.20. The invoice is expressed to relate to the measurement and replacement of 15 metres of flashing, and the investigation of, and alteration of pipe work for, the installation of an existing hot water service in a new location.
- 54 Mr Moloney put in evidence a photograph taken by an employee of the Moloney Group, Mr Michael Di Protero. That photo showed rubbish in the gutter on the roof. It was not disputed that the rubbish had been caused by

² The citation of the ultimate decision of the Court of Appeal is *24 Hour Fitness Pty Ltd v W&B Investment Group Pty Ltd* [2015] VSCA 216.

the tenant's development next door. The photo also showed damage had been caused to the flashing.

- 55 Mr Moloney's evidence in relation to the flashing was that he had owned the property for approximately 40 years, he had been on the roof many times during that period, and he was aware that flashing existed between his property and adjoining terrace house. I accept the inference that it was when the adjoining terrace house was demolished by the tenant for the purposes of creating its own development that the flashing was damaged. I find that the tenant is responsible for the replacement of the flashing
- 56 I also accept Mr Moloney's evidence that a hot water service servicing the tenants, attached to bricks, had been moved. I also accept on balance it was the servants or agents of the tenant who moved the hot water service. I accordingly find the Plumb Master invoice should be paid by the tenant in full.
- 57 The Plumb Master invoice was not addressed to the landlord, but to an employee of the Moloney Group. I refer to the sworn evidence of Mr Moloney given in relation to the Bomber Thompson Electrics that the appropriate intercompany accounting had been done so that the invoice ultimately became a liability of the landlord, and for this reason I am prepared to allow the invoice as part of the landlord's claim.

Abbotsbrook invoices

- 58 The next invoices in the bundle of invoices submitted in relation to the rectification costs related to the time of Mr Di Protero. They were respectively for \$726.00, \$4,884.0 and \$3,036.00. Each invoice was on the letterhead of 'The Moloney Group' but also carried the name Abbotsford Pty Ltd. Each invoice was headed 'Property Management Invoice' and was stamped 'Entered'. And each invoice was addressed to the landlord.
- 59 Mr Moloney's evidence was these invoices related to Mr Di Protero's work at the premises. The amount charged for Mr Di Protero's time was \$60 per hour, which is the rate at which his time was charged by his employer within the Moloney Group, Abbotsbrook Pty Ltd, and then booked to the landlord. Mr Moloney said that rate was appropriate, and it was nothing unusual about the accounting arrangement.
- 60 Mr Di Protero gave evidence by telephone. He confirmed that he had attended at the premises and carried out work. In particular, he had cleaned up toilets following a flood which had been caused by rubbish in the gutter.
- 61 In respect of the gutter, I was referred to the photograph which had been tendered by Mr Moloney. I was told that it was taken by Mr Di Protero, and showed rubbish on the roof. I accept Mr Moloney's evidence that the rubbish in the gutter shown in the photograph was left by the tenant, or its servants or agents, and I accept that the rubbish in the gutter caused the flood, which created a consequential need for a clean up. I accordingly hold the tenant liable for that.

- 62 I turn to the invoice for \$726.00 which relates to work carried out to the week ending 26 July 2016. It is expressed to relate to 'Remove glue off tiles / seal box gutter / remove rubbish / pickup paint / sand & paint'. In relation to the removal of glue off tiles, Mr Moloney gave evidence that tiles in the foyer, and outside the building, had been splattered by the tenant's construction works. He also gave evidence about the other work carried out, and said that those works were all consequential upon the tenant's damage. I find for the landlord in respect of this invoice.
- 63 The second invoice for \$4884.00 was for the week ending 9 August 2016, and related to painting, cleaning of glass, cleaning of the kitchen, cleaning the upstairs kitchen and toilets, and 'worklist'. I note that cleaning of the kitchens and toilets was work consequential on the flood, and accept the invoice on the evidence referred to above.
- 64 The third invoice for \$3036.00 was for the week ending 16 August 2016 and was issued on 5 September 2016. It related to work including painting outside, cleaning front glass, and cleaning outside tiles. I accept that invoice also.
- 65 I was anticipating an attack being made by the tenant on the hourly rate of \$60 charged for Mr Di Protero's time, but no such attack was made. No evidence was given as to what a more appropriate rate might have been. I accept the rate of \$60 claimed.
- 66 I note the accounts were each addressed to the landlord. In the light of Mr Moloney's evidence that the appropriate adjustments had been made within the Moloney Group, I accept the Abbotsbrook invoices were properly charged to the landlord.

The invoices for materials

- 67 The final six invoices are for materials which Mr Moloney said had been purchased by Mr Di Protero in order to carry out rectification works.
- 68 There was a MPS Plaster Supply invoice for \$10, four Mitre 10 invoices respectively for \$309.05, \$310.91, \$320.10 and \$156.16. The remaining invoice was from Dulux invoice, and was for \$467.75
- 69 The invoices were firstly attacked by Mr Miller on the basis that they were not addressed to the landlord. This was because the MPS Plaster Supply and the Mitre 10 invoices were directed to Desson Nominees Pty Ltd. The Dulux invoice was directed to that company and also to Rialton Nominees Pty Ltd.
- 70 On the basis of Mr Moloney's evidence, I would have been prepared to allow the invoices notwithstanding that accounting issue.
- 71 However, I am concerned about the second point made by Mr Miller, which is that there is no evidence on the face of invoices tying them to make good work for suites 2, 3, 7 or 8.

- 72 I note that Mr Di Protero was called by telephone. The invoices were not put to him, and he gave no direct evidence connecting the materials to the work carried out by him.
- 73 I note the concern expressed by Mr Miller that the tenant might be being asked to pay for general maintenance work. In the circumstances, I think the evidence fails to establish, on the balance of probabilities, that the invoices are directly linked to make good work. Accordingly, I disallow the invoices for materials issued by MPS Plaster Supply, Mitre 10, and Dulux.

SUMMARY

- 74 Although I disallow the invoices for materials, I confirm that I allowed the three invoices for Mr Di Protero's time of \$726.00, \$4,884.00, \$3,036.00, as well as the Plumb Master invoice for \$1,553.20 and the Bomber Thompson Electrics invoice for \$6,858.50.

THE ORDERS MADE

- 75 The order for payment of the sum of \$38,244.87 by the tenant to the landlord was calculated with the assistance of the parties, having regard to the findings made above.
- 76 The order for reimbursement of the filing fee of \$535.30 and the hearing fee paid by the applicant \$487.90, a total of \$1063.20, was made under s 115B of the *Victorian Civil and Administrative Tribunal 1998* because the landlord had been substantially successful.

MEMBER C EDQUIST