VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP464/2019

CATCHWORDS

RETAIL LEASES – INJUNCTIONS – Application by tenant for an injunction restoring the tenant to possession – no serious question to be tried concerning the right of the landlord to re-enter – application dismissed.

APPLICANT	Lots of Cuddles Childcare Pty Ltd
RESPONDENT	Golden Sunshine Coast Pty Ltd
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Injunction application
DATE OF HEARING	25 March 2019
DATE OF ORDER	25 March 2019
DATE OF REASONS	9 July 2019
CITATION	Lots of Cuddles Childcare Pty Ltd v Golden Sunshine Coast Pty Ltd (Building and Property) [2019] VCAT 1023

ORDER

1. The application is dismissed.
2. No order as to costs.

A T Kincaid
Member

APPEARANCES:

For Applicant	Ms Nadya Voloshina, Solicitor
For Respondent	Mr J Searle of Counsel.

REASONS

1. On 19 March 2019 the respondent ("**the landlord**") locked out the applicant ("**the tenant**") from retail premises leased by the tenant, from which the tenant had provided child care services ("**the premises**").
2. On 25 March 2019, I heard the tenant's application for an injunction to restore the tenant to possession pending a hearing on the issues in dispute. I dismissed the tenant's application, giving reasons orally. The tenant has since requested written reasons for my decision.
3. The lease was entered into between the tenant and the landlord's predecessor in title (the "**lease**"). The lease was for a 3-year period from 1 June 2016 to 31 May 2019. The lease granted an option to the tenant to renew the lease for a further term of 3 years.
4. The tenant relied on an affidavit of Fiona Kershaw, a director of the tenant, sworn 20 March 2019.
5. The landlord opposed the application, on the grounds that at the time it re-entered, the tenant had failed to pay $4,953.25 owing pursuant to a notice of breach dated 8 February 2019 served by the landlord (the "**notice of breach**"). The landlord relied on an affidavit of Ce Sun, a director of the landlord sworn 24 March 2019, and which was provided to me shortly before the hearing.
6. Under the lease, the tenant was bound to exercise its option to renew between 1 December 2018 and 1 March 2019. There was no evidence that the tenant had done so pursuant to the provisions of the lease. However the landlord had not served on the tenant the required notice under section 28 of the *Retail Leases Act 2003* ("**the Act**") until about 8 March 2019.[1] I therefore took the view at the hearing that but for the matters in dispute between the parties leading to the re-entry, the lease would otherwise still have been on foot pursuant to section 28(2) of the Act.
7. The tenant wished to renew the lease for a further 3 years and, at the date of the hearing, had informed the landlord of this but had not yet done so in writing.
8. I found that there was no serious question to be tried in relation to the right of the landlord to re-enter when it did, generally for the reasons contained in the affidavit of Mr Sun, and which reasons I shall now summarise.

Terms of the lease

9. Clause 6.2 of the lease provided:

> The landlord must take out at the start of the term and keep policies of insurance for the risks listed in item 11 against-

[1] See Exhibit 41 to the affidavit of Sun

6.2.1 damage to and destruction of the building, for its replacement value;

6.2.2 removal of debris,

6.2.3 breakdown of landlord's installations and

6.2.4 breakage of glass, for its replacement value

10. By clause 1.1(d)(i)-(iv) of the lease, the premiums and charges payable by the landlord in respect of these policies of insurance were included in the definition of "building outgoings".

11. In respect of public liability, the tenant was bound by clause 2.3 to obtain public liability cover in the amount of $20 million, but in the event the landlord took it upon itself to do so. The premium payable was also included in the definition of "building outgoings" for which the tenant was liable to pay.

12. By clause 2.1.5 of the lease, the tenant was required to pay all building outgoings in accordance with clause 5.4 of the lease.

13. Clause 5.4 of the lease provided:

> In relation to building outgoings-
>
> 5.4.1 the landlord must pay the building outgoings when they fall due for payment but, if the landlord requires, the tenant must pay when due a building outgoing for which the tenant receives notice directly and **reimburse** the landlord within 7 days of a request all building outgoings for which notices are received by the landlord.
>
> 5.4.2 the tenant must pay **or reimburse** the landlord [in accordance with clause 5.4.1] the proportion specified in item 10 [being all the outgoings] (**emphasis added**)

14. Clause 6.2 provided:

> The landlord must take out at the start of the term and keep current policies of insurance for the risks listed in item 11 against:
>
> 6.2.1 damage to and destruction of the building, for its replacement value,
>
> 6.2.2 removal of debris,
>
> 6.2.3 breakdown of landlord's installations,
>
> 6.2.4 breakage of glass for its replacement value.

15. Clause 7.4 provided that a breach by the tenant of clauses 2.1.5 and 5.4.2 are breaches of an essential term and constituted repudiation.

16. Clause 7.5 of the lease provided:

> Before terminating this lease for repudiation (including repudiation consisting of the non-payment of rent), or for an event to which section 146(10) of the *Property Law Act 1958 (Vic)* does not extend, the landlord must give the tenant written notice of the breach and a

period of 14 days in which to remedy it (if it is capable of remedy) and to pay compensation for it…"

17. In December 2018 the landlord's insurance brokers obtained quotations from six insurers in respect of the risks described in clause 6.2 of the lease and for public liability, for the period from 22 December 2018. The range of quotes received was between $3,700 and $8,440. On about 11 December 2018, the landlord accepted the lowest quote from AIG in the amount of $3,700. The terms of the insurance obtained were described in the broker's tax invoice to the landlord of the same date in the amount of $3,700.

18. The agents for the landlord ("**ASL**") subsequently sent to the tenant an invoice dated 12 December 2018 in the amount of $3,698.35. The landlord intended that it would pay the insurance premium for the period from 22 December 2018 to 22 December 2019, having first been put in funds by the tenant. A subsequent invoice of the same date was issued by ASL, amending the amount claimed by the landlord on account of insurance premium to $3,668.45.

19. The tenant's director Ms Kershaw attests that she then informed the landlord that she thought the premium was too high, and that she wanted to obtain a cheaper quote. She contends that she subsequently provided to ASL two insurance quotes of "approximately $2,500 each". Copies of these quotations were not in evidence.

20. Ms Kershaw says that she was then informed by ASL that the landlord had paid the insurance premium, and that the landlord insisted on being paid the $3,668.45 earlier claimed in reimbursement.

21. Mr Sun on behalf of the landlord deposed that although the tenant stated that it had obtained two quotations for approximately $2,500 each with respect to insurance, in his experience it would be unlikely that such policies would extend the same cover as required by the lease and as provided by the policy obtained by the landlord.

22. The amended invoice dated 12 December 2018 not having been paid by the tenant, by the notice of breach served pursuant to clause 7.5 of the lease, the landlord in effect informed the tenant that it was in breach of its obligation under clause 5.4.2 of the lease to reimburse the landlord for building outgoings in the amount of $3,668.45 (being the lease premium), a second instalment of rates in the sum of $954.80 and compensation of $330 in respect of a default notice previously served in respect of the non-payment by the tenant of rent for October and November 2018. The total claimed by the notice of breach was therefore $4,953.25.

23. By the notice of breach, the tenant was given until 5 pm on 27 February 2019 to remedy the breach failing which, the tenant was informed, the landlord may exercise its right to re-enter the premises.

24. By letter dated 4 March 2019 solicitors for the landlord recorded that the tenant had failed to remedy the defaults described in the notice of breach,

and, in effect, informed the tenant that it was prepared not to re-enter until 1 June 2019.

25. The tenant responded by email dated 6 March 2019 to the effect that it would be complaining about the landlord's conduct to various authorities, and did not signify any agreement with the landlord's concession that the tenant leave by 1 June 2019.

26. The tenant sent a further email dated 6 March 2019 stating that it had "notified ASL that the insurance policy [premium] was way too high and that the tenant would be seeking additional quotes and it was in dispute". The email also made unparticularised allegations about the landlord's financial statements being "all over the shop".

27. The landlord deposed that by 18 March 2019, the tenant owed the landlord $5,776.01.

28. I found from a letter from the landlord to the tenant dated 22 March 2019, that of the amounts claimed in the notice of breach, on 18 March 2019 the tenant had still not paid:

    (a) $500.75 being the entire second instalment of rates;

    (b) $330 being compensation in respect of the default notice previously served in respect of the non-payment by the tenant of rent for October and November 2018; nor

    (c) any part of the insurance premium.

29. In the circumstances, the landlord resolved to re-enter on 19 March 2019 in reliance on the failure of the tenant "to remedy all defaults [referred to in the notice of breach] in the required time or at all".

30. Following re-entry, by its letter dated 22 March 2019, the landlord made a claim for $5,776.01 which included a claim for the insurance premium, but pro-rated for the period to 18 March 2019, the date prior to the day of taking of possession.

31. The tenant submitted in support of its application that the landlord had, prior to re-entering, failed to comply with a compulsory mediation procedure set out in clause 16 of the lease. I took the tenant to be submitting that it had initiated the mediation procedure by the contents of its second email dated 6 March 2019. I concluded that given that the Act applied to the lease, by its express terms the clause 16 mediation procedure had no application to the lease.

32. The granting of an injunction of the type sought by the applicant would have necessarily preserved the status quo (that is to say, the tenant would have been restored to possession) until the substantive hearing of the dispute. It was therefore necessary for the tenant to persuade me that there was a serious question to be tried concerning the entitlement of the landlord to take possession when it did. Whether there is a serious question to be tried requires a judgment to be made, for the purpose of which I was

required to examine both the legal foundations of the claim made by the tenant in the proceeding, and such of the evidence in support as was exposed in the tenant's application. I concluded on the evidence that the claim, in effect, that the landlord's claim for reimbursement of the insurance premium was exorbitant, was not reasonably arguable, and therefore did not have a real prospect of succeeding. I had regard to the amount of $3,700 claimed by the landlord in this respect, the estimated amount of $1,700 referred to in the disclosure statement dated 12 July 2016 provided to the tenant and the unparticularised allegation by the tenant that it had obtained quotations, not in evidence, for $2,500. I formed the view that the extremely narrow range of divergence would have lessened the prospect of the Tribunal determining at the final hearing that the landlord's claim was exorbitant.

33. Further, notwithstanding the tenant's assertions by its affidavit that it had paid all sums claimed in the notice of breach other than the amount claimed for the insurance premium, there was conflicting evidence contained in Mr Sun's affidavit to the effect that the tenant had failed to do so.

34. A party seeking injunctive relief must also persuade the Tribunal, beyond satisfying it that there is a serious question to be tried, that the "balance of convenience" favours the grant of the injunction sought. Having found that there was no serious question to be tried as to whether or not the landlord was entitled to re-enter when it did, it was unnecessary for me to consider this further aspect.

35. Save in exceptional circumstances, the Tribunal grants relief from forfeiture of a tenancy, provided a tenant offers to pay immediately the amounts payable under a lease, and also makes good the damages incurred by a landlord as a result of the tenant's previous failure to pay amounts payable. The power to refuse relief, however, is reserved for cases of consistently lengthy defaults which lead to an inference that, even if relief be given, there is a reasonable likelihood that the rent or other amounts becoming due under the lease in the future will not be paid, at least some considerable time after the due date for payment. I also indicated that to the extent that the tenant applied for relief against forfeiture, given also the history of the tenant's prior defaults, as set out in the affidavit of Mr Sun, relief would be refused.

A T Kincaid
Member