

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1542/2018

**CATCHWORDS**

Retail lease, Sections 41, 51, 54(2), 61 & 77 of the *Retail Leases Act 2003* (Vic), claims by tenant for malfunctioning air conditioning and exhaust system, unconscionable conduct and delay in providing documents necessary for sale of tenant's business. Counterclaim by landlord for refund of portion of fitout contribution.

<b>APPLICANT</b>	Pell Five Pty Ltd (ACN: 603 576 058)
<b>RESPONDENT</b>	SMTP Nominees Pty Ltd (ACN: 150 665 839)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member L Forde
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14 & 15 October 2019
<b>DATE OF ORDER</b>	25 October 2019
<b>CITATION</b>	Pell Five Pty Ltd v SMTP Nominees Pty Ltd (Building and Property) [2019] VCAT 1683

**ORDER**

1. The applicant's claim is dismissed.
2. The respondent's counterclaim is dismissed.

L. Forde  
**Senior Member**

**APPEARANCES**

For Applicant: Mr F Andrianopoulos & Mr D Pulitano– directors  
For Respondent: Mr S. Freire of Counsel

## REASONS

- 1 Pell Five operated a café/restaurant known as Kitty Burns. The premises were part of a residential development at Acacia Place, Abbotsford on the banks of the Yarra river. It originally leased the premises from Hampton, the developer of Acacia Place. In April 2015, Hampton sold the café premises to SMTP. In the third year of operation, two directors of Pell Five and key personnel involved in the café, for personal reasons, had to leave the business. This necessitated a sale of the business which eventually occurred in February 2018.
- 2 Following the sale, Pell Five brought four claims against SMTP seeking compensation of \$777,008.47. By the time the case came before me the claims decreased to \$139,455.26. SMTP counterclaimed seeking reimbursement of \$45,000 in relation to the fitout contributions.
- 3 The parties agree that the *Retail Leases Act 2003* (Vic) (**RLA**) applies to the lease.
- 4 I have named Pell Five's claims the air-conditioning claim, the sublicence claim, the Muck Sucker claim and the unconscionable conduct claim.

### Air-conditioning claim

- 5 Pell Five claims compensation of \$16,699.78 for a period totalling 69 days when it says the air-conditioning in the premises broke down. It claims a refund of rent for these days (approximately \$280 a day) and does not claim loss of business or the cost of spoiled food. It says it did not have quiet enjoyment of the premises as required under clause 6.1 of the lease and on this basis is entitled to compensation under s54 of the RLA.
- 6 Clause 6.1 of the lease provides that SMTP must give Pell Five quiet enjoyment "without any interruption by the landlord or anyone connected with the landlord..."
- 7 Pell Five says SMTP breached s54(2)(d) and (e)(i) which provide that a landlord is liable to pay reasonable compensation for loss suffered by a tenant if it failed to:
  - a. take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or
  - b. rectify as soon as practicable any breakdown in plant or equipment that is not under the tenant's care or maintenance.
- 8 The air-conditioning system was unusual. It is not in dispute that the system consisted of three parts. SMTP owned the air-conditioning unit in the premises. To operate, the air-conditioning unit was connected to a heat exchange unit and submersible pump housed in a pontoon floating on the Yarra river. These parts, known as the linked cooling system, were located outside the premises and owned by the OC (**OC**).

- 9 It is agreed that there was no fault with the air-conditioning unit in the premises. It is also agreed that there were reoccurring issues with the linked cooling system with the consequence that the premises did not, on occasions, have functioning air-conditioning. In fact, Pell Five claims which is accepted <sup>1</sup> that at times hot air blew back into the premises.
- 10 SMTP submits that clause 6.1 of the lease is only breached if it interrupts Pell Five's use. It says it did not do so.
- 11 SMTP says that, as it did not own the linked cooling system, it had no control over the installations and was not responsible to Pell Five for any breakdown of that system. SMTP had no right or obligation to repair the linked cooling system as it did not own that system. The obligation to repair fell on the OC being the owners. Its property managers engaged with Pell Five about the issues and took appropriate steps such as calling upon AC Goulding to investigate the issue and long-term solutions. It says it did all that it was required to do to raise the issue with the OC.
- 12 Pell Five's claims under s 6.1 of the lease and s 54 (2)(d) and (e)(i) of the RLA must fail. The linked cooling system was not within SMTP's control or responsibility. It was not a landlord installation. As such no liability on this basis can be attributed to SMTP. SMTP did not interfere with Pell Five's quiet enjoyment.
- 13 Even if I am wrong on liability under clause 6.1, Pell Five has not demonstrated any real loss. It bears the onus of proof. Based on the email and text message evidence<sup>2</sup> of complaints about the air-conditioning I am satisfied that the premises were affected for 37 days by malfunctioning air-conditioning. I also accept the oral evidence of one of Pell Five's directors Mr Andrianopoulos that by his calculations on 69 days<sup>3</sup> the café was affected by malfunctioning air-conditioning.
- 14 While I accept there were issues with the air-conditioning, Pell Five cannot simply claim a refund of rent on those days. The evidence was that the business continued to trade on each of those days. Mention was made in an email dated 8 February 2018<sup>4</sup> of some patrons leaving because of heat, and desserts melting. This date was the day that Pell Five's sale of the business settled. That email is the only evidence of loss as opposed to inconvenience. In the absence of evidence, even if the landlord was liable, damage has not been established.

### **Sublicence claim**

- 15 Pell Five claims \$59,126.48 as damages caused by SMTP's delay in signing assignments of sublicences. The amount claimed is the amount Pell Five

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<sup>1</sup> Evidence of Andrianopoulos, director.

<sup>2</sup> Exhibits A5 & A6

<sup>3</sup> Which includes the 37 days identified in emails and texts

<sup>4</sup> Part of exhibit 5, email from the restaurant manager to Mr Andrianopoulos

says it paid in legal fees associated with the assignment of sublicences to the purchaser of its business.

- 16 In addition to the café premises Pell Five held sublicences of an alfresco area and loading bay. The sublicences are referenced in the lease. When it sold its business the sublicences needed to be transferred to AU Sinka the purchaser of the business. There were delays in the transfer arrangements of the sublicences which Pell Five claims delayed settlement and cost it additional legal fees. It incurred its own legal fees and paid the OC legal fees and SMTP's legal fees. It seeks a refund of these fees.
- 17 It is not disputed that: -
  - a. the alfresco area and loading bay are common property and under the control of the OC;
  - b. by written licences dated 9 June 2016 between the OC and the original developer and landlord, Hampton, the OC licensed the alfresco and loading bay areas to Hampton;
  - c. by lease made on or about 30 March 2016 between Hampton and Pell Five, Hampton agreed to use reasonable endeavours to procure for the benefit of Pell Five a sublicense between the OC, Hampton and Pell Five to use the alfresco and loading bay area;
  - d. written sublicences dated 9 June 2015 between the OC, Hampton and Pell Five were entered into for the alfresco and loading bay areas;
  - e. SMTP purchased the premises from Hampton pursuant to a contract of sale completed about 15 January 2016;
  - f. on 3 October 2017 Pell Five entered into a contract of sale of the business with AU Sinka;
  - g. on 1 December 2017 Pell Five provided SMTP proposed forms of a deed of transfer of lease and deeds of assignment of the sublicense for the alfresco and loading bay areas;
  - h. JP Sesto & Co solicitors acted for SMTP. They had not acted for SMTP when it purchased the premises.
- 18 Pell Five claims that:
  - a. there was a delay in settlement of its sale contract with AU Sinka caused by confusion around whether, when SMTP bought the premises, there had been an assignment of the alfresco and loading bay licences to it so that it could then assign them to AU Sinka;
  - b. the sublicences formed part of the lease;
  - c. SMTP breached s 51 and s 61 of the RLA and clause 9 of the lease by failing to expeditiously consent to assign the sublicences to AU Sinka;
  - d. SMTP's delays in determining whether the sublicences had been assigned at the time it purchased the premises caused the incurring of

unnecessary legal costs by Pell Five, the OC and SMTP, all of which costs Pell Five was forced to pay. Had SMTP produced the relevant documents in December 2017, there would have been a saving of \$59,126.48 in legal costs.

- 19 SMTP says that by deeds dated 15 January 2016 between the OC, Hampton and SMTP the original head licences dated 8 June 2014 were discharged and replaced with novated head licences between the OC and SMTP with effect from 15 January 2016.<sup>5</sup> JP Sesto did not have a copy of these documents; nor did the OC in December 2017. In the absence of the original documents, JP Sesto provided proposed forms of deeds of novation in respect of the sublicences. SMTP was prepared to complete the transfer on the basis of the documents as amended so long as other preconditions had been satisfied.
- 20 It is not in dispute that the deeds dated 15 January 2016 were located by a director of SMTP on 4 February 2018. Settlement of the sale of the business from Pell Five to AU Sinka occurred on 8 February 2018.
- 21 Section 51 of the RLA provides that a landlord cannot claim from the tenant legal costs associated with the negotiation, preparation or execution of the lease. Given that the passing on of its legal costs by SMTP to Pell Five in relation to the settlement of the sale contract to AU Sinka is unrelated to the costs in s 51, there is no breach by SMTP of the section. Pell Five has misunderstood the nature of the provision.
- 22 Section 61(6) of the RLA provides that a landlord must deal expeditiously with a request for consent to an assignment of the lease.
- 23 Pell Five incorrectly asserts in its points of claim that SMTP did not novate the required licences when it purchased the premises from Hampton. The evidence of Mr Scott Merrillees, director of SMTP, which I accept, is that the licences were novated and he sent email copies of the relevant deeds to his managing agent on 4 February 2018. The deeds were in evidence.
- 24 Pell Five says the licences are part of the lease and on this basis the RLA applies to the licences. This is not correct. While the licences are contemplated in the lease, they are not part of the lease and are not covered by the RLA. They are a separate contract involving a party (the OC) which is not a party to the lease.
- 25 I accept that there was confusion caused by JP Sesto not being aware that the deeds dated 15 January 2016 existed which resulted in further legal costs to the parties. However, there was no breach of the RLA by SMTP and consequently Pell Five is not entitled to any compensation. SMTP was under no obligation to Pell Five to procure the transfer of the sublicences to use the alfresco or loading bay areas to AU Sinka.

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<sup>5</sup> TB1599 and 1612

## **Muck sucker claim**

- 26 Pell Five claims \$13,629 being the cost incurred of investigating noise complaints arising from its use of a large industrial kitchen exhaust fan known as a “muck sucker” and the cost of modifying the muck sucker to reduce noise emissions. The muck sucker captures fumes generated from the kitchen and expels air into a courtyard area.
- 27 The muck sucker was installed as part of the original fitout of the café prior to SMTP’s purchase of the premises.
- 28 The parties accept that noise from the unmodified muck sucker exceeded legal requirements and caused tenants in the complex and neighbouring business owners to complain to the OC. One tenant threatened legal action against Pell Five.
- 29 Pell Five claims SMTP breached s 41 of the RLA as capital costs are to be borne by SMTP under clause 3.3 of the lease.
- 30 Section 41 of the RLA provides that a provision in a retail lease is void if it requires a tenant to pay an amount in respect of the capital costs of plant in the premises. The provision is not void if there is a provision in the lease requiring the tenant to undertake capital works.
- 31 Clause 3.3 of the lease provides that Pell Five is not obliged to carry out structural or capital repairs or alterations.
- 32 Pell Five says it took a commercial decision to rectify the issue then seek reimbursement from SMTP. It did not want the residents complaining about it when they were also a source of business. It claims that the modification was of a capital nature and therefore the responsibility of SMTP. It further said in closing arguments that the muck sucker as disclosed in the Disclosure Statement accompanying the lease, was not fit for purpose and the landlord was obliged to upgrade it to comply with the law.
- 33 It is not in dispute that SMTP owns the muck sucker.
- 34 I accept SMTP’s position that the claim must fail because the terms of the lease allocate responsibility for addressing noise issues to Pell Five.
- 35 I accept that under the lease:
- a. the permitted use of the premises was as a restaurant or café but subject always to compliance with the requirements of planning permit number PL 09/0877;<sup>6</sup>
  - b. SMTP did not represent that the premises could be used for that use according to law;<sup>7</sup>
  - c. Pell Five could not do anything which might cause nuisance damage or disturbance to a tenant, occupier or owner of any adjacent property;<sup>8</sup>

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<sup>6</sup> Cl 2.2.1; schedule item 15

<sup>7</sup> Cl 2.2.1

- d. Pell Five was required to comply with all laws regarding the premises and to comply with the terms and conditions of any planning permits affecting the premises;<sup>9</sup>
- e. Pell Five agreed it was responsible for compliance with an attached extract from the planning permit marked planning permit summary and as such was required to ensure that the noise emanating from the restaurant complied with the state environmental protection policy; and
- f. there is no evidence to support the allegation that the muck sucker was not fit for purpose.<sup>10</sup>

36 By reason of the above matters I find that Pell Five and not SMTP was responsible for ensuring that the impact of any noise on adjoining apartments and other premises adjacent to the premises remained within acceptable limits in the circumstances it was responsible for any modifications to the muck sucker to ensure it meant its contractual obligations.

#### **Unconscionable conduct claim**

37 Pell Five claims it was forced to reduce the sale price of its business to AU Sinka by \$50,000 because SMTP required security equivalent to 12 months' rent instead of the standard 6 months. It says SMTP acted unconscionably in requiring the increased security in circumstances where it knew Pell Five was compelled to sell.

38 Pell Five claims SMTP breached s 77 of the RLA by engaging in unconscionable conduct.

39 Pell Five acknowledges that it was forced to sell the business because two of its directors who were directly responsible for the day to day operations of the business had to step down for personal reasons in 2017.

40 AU Sinka was the intended purchaser. Pell Five notified SMTP of the intended sale requesting consent to assign the lease to the purchaser. SMTP requested certain financial information about the purchaser and proposed guarantors.

41 SMTP's position is that:

- a. It had doubts, reasonably based, about the incoming purchaser because one of the contacts negotiating the deal declined to provide a personal guarantee, acquisition of the business was then funded with cash the source of which would not be disclosed, lack of evidence about bank loans or overdrafts, lack of a statement of assets and liabilities for each of the proposed guarantors verified by chartered

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<sup>8</sup> CI 2.2.4

<sup>9</sup> CI 8(a) of the schedule

<sup>10</sup> No evidence or submissions were made about the purpose of the muck sucker vis-a-vis the operation of the cafe

accountant and lack of information about other business interests of the proposed guarantors;

- b. at the time of the negotiations for the sale of the business Pell Five had legal representation<sup>11</sup> and no challenge was made to SMTP's stance that it would consent to the transfer on terms;
- c. there were other options available to Pell Five to structure a deal other than reducing the purchase price, for example vendor finance;
- d. Pell Five is now repenting its business decision and seeking to recoup from SMTP;
- e. SMTP was not advised that in order to provide a security deposit of 12 months Pell Five was required to reduce its sale price; and
- f. there is no documentary evidence to support Pell Five's contention that the \$50,000 reduction to the price was in any way connected to the terms imposed by SMTP for its consent to transfer.

42 Pell Five contends that to require 12 months rental security as the extra security was not reasonably necessary for the protection of the landlord's interest and as such SMTP acted unconscionably by using their bargaining strength due to the circumstances Pell Five were in.

43 Neither party addressed me on the legal law relating to unconscionable conduct under section 77 of the RLA. In relation to another issue, Pell Five relied upon the decision of SM Walker in *Meadsview Pty Ltd v Fenton*<sup>12</sup>. In that case, the member relied upon the Court of Appeal decision in *Director of Consumer Affairs v Scully*<sup>13</sup> which made observations on unconscionable conduct. Some of the words used to describe unconscionable conduct included conduct found to be unethical in some manner or to show at least some degree of moral tainting in the transaction.

44 I am not satisfied that the landlord did anything other than impose a condition to protect its position in circumstances where it was not satisfied with the financial position of the incoming purchaser. Pell Five has acknowledged that the only reason it proceeded to sell at a reduced value was because of the dire position it was in with two of its directors falling ill. There is no evidence of unconscionable conduct. The claim must fail.

45 In summary the tenant has failed in each of its four claims against the landlord. I will make orders dismissing its claim

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<sup>11</sup> this is not in dispute.

<sup>12</sup> [2018] VCAT 1249

<sup>13</sup> [2013] VSCA 292



## Counterclaim

- 46 SMTP, by way of counterclaim, seeks \$45,000 from Pell Five being a return of 10% of the landlord's contribution towards the fitout of the premises pursuant to clause 2(p) of the schedule to the lease.<sup>14</sup>
- 47 Pell Five defends the claim on the basis that the lease relied upon by SMTP is not the lease signed by Pell Five. Clause 2(p) of the schedule relied upon by SMTP does not appear in the lease signed by the tenant. In other words there are two versions of the lease before me.
- 48 I accept the position of Pell Five for the following reasons: -
- a. the lease relied upon by SMTP is contained in the contract of sale between SMTP and Hampton. The original contract was not in evidence. A photocopy of the contract appears in the Tribunal book.<sup>15</sup> The signing page of that lease unlike every other page of the lease in the Tribunal book has perforations in the margin. This suggests that the signing page is not part of the original document.
  - b. Pell Five produced the original lease, a copy of which appears in the Tribunal book.<sup>16</sup> That lease contains a different clause in the schedule to the one being relied upon by SMTP. The clause in Pell Five's lease provides for a reimbursement of fitout costs if the tenant vacates in the first year and nothing thereafter;
  - c. The signing page in the lease attached to SMTP's contract of sale with Hampton is identical and most likely a photocopy of the signing page in the Pell Five lease. That is consistent with the binding on the original Pell Five lease which when removed would result in perforated photocopying marks like the ones appearing on the signing page of both lease versions.
  - d. Pell Five produced an email from Hampton's managing agent agreeing to amend the proposed lease to the terms which appear in the version of lease<sup>17</sup> relied upon by it as the correct lease.
- 49 As the claw back clause relied upon by SMTP is not contained in the final lease signed by Pell Five, the counterclaim must fail.

L. Forde  
**Senior Member**

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<sup>14</sup> TB938-939

<sup>15</sup> TB348-1137

<sup>16</sup> TB95-138

<sup>17</sup> *ibid*