VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP700/2017

CATCHWORDS

LANDLORD AND TENANT – Whether option to renew validly exercised; Whether tenant entitled to abate rent; Right to set-off; Whether lease forfeited – whether notice of default was still effective if only one of two defaults specified in the notice was able to be substantiated; Whether GST payable where a landlord seeks reimbursement of municipal rates and owners corporation fees.

FIRST APPLICANT	Quantin Pty Ltd (ACN 006 835 427)
SECOND APPLICANT	Raimondo Vitiello
RESPONDENT	Songzhan Yang
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	21 September 2017
DATE OF ORDER	12 October 2017
CITATION	Quantin Pty Ltd v Yang (Building and Property) [2017] VCAT 1642

ORDERS

1. Subject to Order 2 of these orders, the Respondent must quit and deliver up possession to the Applicant of the leased premises situate and known as Unit 8, 81-85 Wilson Street, Moonee Ponds, Victoria, 3039.
2. Order 1 is stayed until 2 November 2017 or such further time as may be ordered by the Tribunal.
3. Subject to Order 5 of these orders, the Respondent must pay the Applicant $7,967.88 on the Applicant's claim.
4. Subject to Order 5 of these orders, the Applicant must pay the Respondent $396 on the Respondent's counterclaim.
5. The Respondent may set-off the amount ordered to be paid pursuant to Order 4 of these orders against the amount ordered to be paid pursuant to Order 3 of these orders, such that the net amount payable by the Respondent to the Applicant in this proceeding is $7,571.88.

Liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	In person
For the Respondent	In person

REASONS (BP700/2017, BP701/2017 AND BP702/2017)

INTRODUCTION

1. The Respondent operates a number of serviced apartments forming part of a residential building complex located in Moonee Ponds. Unit 2 of that building complex is owned by Mr Vitiello,[1] in his personal capacity. Units 4 and 8 are owned by Quantin Pty Ltd,[2] a company controlled by Mr Vitiello (collectively to be referred to as **'the Landlords'**). The Respondent (**'the Tenant'**) leases all three apartments pursuant to three separate leasehold agreements. All three leases contain the same terms, save for the amount of rental to be paid. Each lease commenced on 1 July 2001 for an initial term of five years with three further options of five years each. The Tenant took over the business of operating the serviced apartments in April 2013, after the three leases were transferred to him by the previous tenant.

2. The parties fell into dispute at or around the time when the penultimate term was about to expire; namely, 30 June 2016. Under the terms of each lease and upon the expiration of each term, the Landlords were entitled to vary the rent according to market. The procedure set out in each of the leases required the Landlords to notify the Tenant as to what they considered to be the market rent in respect of each of the apartments. If the Tenant agreed, then the market rent would be fixed at that amount. However, if the Tenant disagreed, then the leases required the parties to jointly appoint a valuer to determine market rent, which would then be binding on the parties. Further, under the terms of each lease, where the parties disagreed as to what the market rent should be, and pending any determination by the jointly appointed valuer, rent was to be paid at 90 per cent of the amount initially suggested by the Landlords. Following determination by the jointly appointed valuer, rent would be adjusted to take into account any overpayment or underpayment made during that valuation period.

3. In the present case, the parties were unable to agree on the market rent going forward. This disagreement was exacerbated by the parties also failing to reach consensus as to what repairs or refurbishment was to be undertaken by the Landlords to each of the apartments.

4. As a consequence, a valuer was appointed to determine market rent for each of the apartments. During that process, the Tenant paid rent 90 per cent of the Landlords' suggested market rent. This arrangement was adhered to by the parties until April 2017, at which point the Tenant formed the view that the Landlords were not entitled to charge rent at 90 per cent of what they considered to be market rent. According to the

[1] The Applicant in proceeding BP702/2017 and Second Applicant in proceedings BP700/2017 and BP701/2017.
[2] The First Applicant in proceedings BP701/2017 and BP702/2017.

Tenant, this was because the Landlords had failed to provide the Tenant with notices under s 28 of the *Retail Leases Act 2003* (**'the RLA'**) specifying the date after which the three options to renew were no longer exercisable. Therefore, the Tenant argued that the options to renew had not been exercised and its tenure was that of tenant over-holding. The Tenant further contended that the Landlords' failure to prepare any written renewal of lease reinforced this point. That being the case, the Tenant believed that he had overpaid rent because the rent payable from 1 July 2016 should have been the same rent that was payable prior to that date, rather than 90 per cent of what the Landlords considered to be market rent.

5. The Tenant further contended that in addition to overpaying rent, he was entitled to abate or partially abate rent as a result of losses which he has suffered as a result of the demised premises being in disrepair.

6. As a result of the Tenant failing to pay rent for the month of April 2017 (in respect of all three apartments), the Landlords served the Tenant with three separate notices of default on 4 April 2017, requiring the Tenant make good the default with 14 days, failing which the leases would be determined.

7. On 24 April 2017, the Landlords attempted re-entry. This was resisted by the Tenant, following which, the Landlords commenced these three proceedings on 18 May 2017, seeking orders for recovery of possession of all three apartments. In addition, the Landlords seek damages, comprising arrears of rental, non-payment of GST and compensation for repairs undertaken to the apartments.

8. The Tenant counterclaims against the Landlords in all three proceedings. He seeks compensation, couched as loss of earnings, by reason of the apartments being in disrepair. He further seeks an order that the Landlords be compelled to renew the three leases.

ISSUES

9. Having regard to the matters raised by the parties, the following issues arise for consideration:

   (a) Has the Tenant exercised his option to renew all three leases?

   (b) What is the amount of rent that should have been paid from 1 July 2016 until April 2017?

   (c) Is the Tenant entitled to compensation for loss of earnings and if so, is that able to be set off against rent otherwise due under the leases?

   (d) Was the purported termination of the leases by the Landlords effective?

   (e) Are the Landlords entitled to damages?

(f) Should an order for possession be made?

10. What follows are my findings in relation to each of the issues set out above.

HAVE THE OPTIONS BEEN EXERCISED?

11. It is common ground that the Landlords did not serve the Tenant with a notice under s 28 of the RLA. That provision states, in part:

> 28. Obligation to notify tenant of option to renew
>
> (1) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisble –
>
> (a) at least 6 months; and
>
> (b) no more than 12 months –
>
> before that date but is not required to do so if the tenant exercises, or purports to exercise, the option before being notified of the date.
>
> (2) If sub-section (1) requires the landlord to notify the tenant but the landlord fails to do so within the time specified by that sub- section –
>
> (a) the retail premises lease is taken to provide that the date after which the option is no longer exercisable is instead 6 months after the landlord notifies the tenant as required;
>
> (b) if that date is after the term of the lease ends, the lease continues until that date (on the same terms and conditions as applied immediately before the lease term ends); and
>
> …

12. As indicated above, it is the Tenant's contention that because the Landlords did not serve the Tenant with a notice under s 28 of the RLA, the lease continues until such time as that is done *on the same terms and conditions as applied immediately before the lease term ends*. If the Tenant's contention is correct, then it will have overpaid rent prior to the April 2017 rental falling due, as follows:

UNIT 2			
Month	**Rent paid**	**Rent payable prior to July 2017**	**Overpayment**
July 2016	$1,800	$1,658.33	141.67
August 2016	$1,800	$1,658.33	141.67
September 2016	$1,800	$1,658.33	141.67
October 2016	$1,800	$1,658.33	141.67
November 2016	$1,800	$1,658.33	141.67
December 2016	$1,800	$1,658.33	141.67
January 2017	$1,800	$1,658.33	141.67
February 2017	$1,800	$1,658.33	141.67
March 2017	$1,800	$1,658.33	141.67
			1,275.03
UNIT 4			
Month	**Rent paid**	**Rent payable prior to July 2017**	**Overpayment**
July 2016	$1,980	$1,824.16	$155.84
August 2016	$1,980	$1,824.16	$155.84
September 2016	$1,980	$1,824.16	$155.84
October 2016	$1,980	$1,824.16	$155.84
November 2016	$1,980	$1,824.16	$155.84
December 2016	$1,980	$1,824.16	$155.84
January 2017	$1,980	$1,824.16	$155.84
February 2017	$1,980	$1,824.16	$155.84
March 2017	$1,980	$1,824.16	$155.84
			$1,402.56
UNIT 8			
Month	**Rent paid**	**Rent payable prior to July 2017**	**Overpayment**
July 2016	$1,980	$1824.16	$155.84
August 2016	$1,980	$1824.16	$155.84
September 2016	$1,980	$1824.16	$155.84
October 2016	$1,980	$1824.16	$155.84
November 2016	$1,980	$1824.16	$155.84
December 2016	$1,980	$1824.16	$155.84
January 2017	$1,980	$1824.16	$155.84
February 2017	$1,980	$1824.16	$155.84
March 2017	$1,980	$1824.16	$155.84
			$1,402.56

13. That would mean that $4,080.12 was overpaid over the period 1 July 2016 to and including March 2017 in respect of the three apartments. It is common ground that rent was not paid in respect of any of the three apartments for April 2017. If rent was payable in accordance with the leases prior to any renewal, a total of $5,306.65 would have been payable

for the month of April 2017. However only $4,080.12 represents the overpayment. This still leaves a shortfall of $1,226.53.

14. Nevertheless, the Tenant also claims that it incurred expenses which should have been paid by the Landlords and which amount to $1,518. He further claims to have suffered damages, in terms of lost earnings, by reason of the apartments being in disrepair, in the amount of $25,270.

15. Leaving aside the question of whether the Tenant has a right to set-off damages against rental, I am of the view that the Tenant was not entitled to only pay rent in accordance with the amount due prior to any renewal. I have formed this view because I find that the Tenant did exercise the option to renew all three leases, notwithstanding the failure on the part of the Landlords to serve the Tenant with a notice under s 28 of the RLA or prepare written deed of renewal.

16. In particular, by written notice dated 25 February 2016, the Tenant sent to each of the Landlords three documents each entitled *Notice of Exercise of Option*. Those documents set out the relevant details of each applicable lease and then stated:

> THE TENANT GIVES NOTICE THAT IT HEREBY EXERCISES THE OPTION TO RENEW THE LEASE FOR THE FUTURE TERM OF FIVR (5) [sic] YEARS COMMENCING 1st JULY 2016

17. In response to that notice, the Landlords notified the Tenant on 3 June 2016 of what they considered to be the market rent for the renewed term. As indicated above, the parties were unable to agree on the market rent, largely because the Tenant also wanted a commitment from the Landlords in relation to certain repair or refurbishment work. Under the terms of each lease, a valuer was then to be appointed to determine market rent. Pending the determination by the appointed valuer, the Tenant was required to pay 90% of what the Landlords considered to be the market rent for the renewed term. Clause 4.4 of the leases provided:

> **4.4 Payment of Rent Pending Review**
>
> Until the determination of Rent has been made:
>
> (1) the Lessee will pay Rent at the rate of 90% of the amount stated in the Lessor's notice.
>
> (2) any variation in Rent as the result of a review under this Part will take effect on the review date; and
>
> (3) within 14 days of the determination, the Lessor will refund any overpayment of Rent or the Lessee will pay any shortfall.

18. Indeed, up until April 2017, the Tenant duly paid *90% of the amount stated in the Lessor's notice*.

19. Section 28 of the RLA does not require a landlord to serve a notice under that section if the tenant has already exercised or purported to exercise the option to renew before receiving any notice. In the present case, the Landlords should have served the s 28 notice at some point during the period 1 July 2015 to 1 January 2016. They failed to do so and as a consequence, the Tenant took matters in his own hands and served the three notices on 25 February 2016 that he was exercising the option to renew each of the three leases.

20. In my view, once a tenant exercises or purports to exercise an option to renew, the requirement for a landlord to give notice under s 28 of the RLA extinguishes. This is the case even in circumstances where a landlord has failed to give notice within the prescribed period set out under that provision. Therefore, the fact that the Landlord failed to give notice under s 28 of the RLA is of no consequence. Consequently, it is not open for the Tenant to contend that its tenure beyond 1 July 2016 was on an over-holding basis. I find that after 1 July 2016, the Tenant occupied the three apartments pursuant to a renewed lease, notwithstanding that a deed of renewal had not been prepared or executed by the parties. In that respect, s 16 of the RLA provides that a retail premises lease is not made illegal, invalid or unenforceable if it is not in writing and signed by the parties.

WHAT IS THE AMOUNT OF RENT DUE?

21. On 9 June 2017, Donald Brindley, the appointed expert valuer, published his valuation report setting out his determination of market rent in respect of each of the three apartments. He found:

    (a) Unit 2 market rent from 1 July 2016 was $23,000 per annum excluding GST.

    (b) Unit 4 market rent from 1 July 2016 was $24,000 per annum excluding GST.

    (c) Unit 8 market rent from 1 July 2016 was $24,000 per annum excluding GST.

22. Both Unit 4 and Unit 8 attract GST as the Landlord of those apartments is registered for GST. GST is not, however, payable in respect of Unit 2 as the Landlord of that apartment is not registered for GST.

23. It is common ground that as of 22 September 2017, the Tenant has paid the following amounts over the rental period commencing July 2016 to and including September 2017:

    (a) Unit 2 in the amount of $23,760;

    (b) Unit 4 in the amount of $25,105; and

    (c) Unit 8 in the amount of $25,105.

24. Having regard to the market rent as determined by Mr Brindley, the shortfall in rent over that same period is $20,780, calculated as follows:

Unit 2 [3]			**Unit 4** [4]			**Unit 8** [5]		
Due	Paid	Shortfall	Due	Paid	Shortfall	Due	Paid	Shortfall
28,750	23,760	**4,990**	33,000	25,105	**7,895**	33,000	25,105	**7,895**

TENANT'S CLAIM FOR COMPENSATION

25. The Tenant alleges that there are a number of matters which have caused his business loss. Most of those matters relate to the condition of the apartments, although the Tenant also claims compensation relating to the attempted re-entry by the Landlords on 24 April 2017. The total amount claimed is $26,788 made up as follows:

    (a) Unit 2: $10,390 representing loss of earnings and $440 representing expenses incurred in carrying out repairs.

    (b) Unit 4: $8,890 representing loss of earnings and $682 in respect of carrying out repairs.

    (c) Unit 8: $5,990 representing loss of earnings and $396 in respect of carrying out repairs.

26. Many of the matters raised are common to all apartments. Therefore, I will consider the items by category, rather than by individual apartment.

Leaking air-conditioner

27. The Tenant alleges that the air-conditioning units in Unit 2 and 4, which were supplied and installed by the Landlords under a previous tenancy were defective and required repair. The Tenant paid $440 in respect of Unit 2 and $506 in respect of Unit 4, making a total claim of $946 under this head of loss.

28. In addition, the Tenant claims $2,400 loss of earnings which he says represents 24 weeks at $50 per week – per unit.

29. The Landlords contend that the air-conditioning units are the Tenant's installations and as such, the Landlords have no responsibility to maintain or repair those components. The lease is silent as to whether the air-conditioning units form part of the demised premises or constitute tenant fixtures.

30. However, the Disclosure Statement has marked the air-conditioning units as part of the installations supplied by the landlords. Mr Vitiello conceded that he supplied and installed the air-conditioning units prior

[3] GST is not payable as the Landlord for this property is not registered for GST.
[4] GST is payable as the Landlord for this property is registered for GST.
[5] GST is payable as the Landlord for this property is registered for GST.

to the lease is being transferred to the Tenant. However, he said that this was done gratuitously and that it was never meant to be a landlord installation.

31. Having regard to the fact that the air-conditioning units are fixed to the apartments, as opposed to being easily detached or removed, I find that they have become fixtures and now form part of the apartments. Further, given that the air-conditioning units were supplied and installed by the Landlords, I do not regard the air-conditioning units as being tenant's fixtures.

32. Accordingly, I find that the Landlords are responsible to maintain the air-conditioning units in a condition commensurate with their condition at the commencement of the lease or time of installation, if that occurred after.[6] Therefore, I find that the Landlords are liable to pay or reimburse the Tenant $956 in respect of the repair costs incurred by the Tenant.

33. As for the loss of earnings claim, insufficient evidence has been adduced to satisfy me, on the balance of probabilities; that the defective air-conditioning units resulted in a loss of earnings. In particular, according to the Tenant the problem was notified to the Landlord on 10 June 2016 and then repaired on 19 December 2016. A period of 24 weeks at a reduced income of $50 per apartment is sought. No evidence was given as to what rate was charged to guests prior to 10 June 2016 compared to the rate charged after 10 June 2016. Indeed, the majority of the period in question covers the winter and spring months of the year. In those circumstances, it is difficult to understand how the whole of the period from June to December could have been adversely affected by defective air-conditioning units.[7]

34. In any event, I find that the absence of any financial documentation evidencing any reduction in income over that period fatal to the Tenant's claim for loss of earnings. Therefore, I find the claim for lost earnings unproven.

Entrance doors

35. The Tenant contends that the front door frames to two apartments were damaged due to water exposure from a leaking gutter. Photographs were produced showing the deteriorated door frames. According to the Tenant, notice was given to the Landlords on 10 June 2016 but the work was not repaired until 23 November 2016.

36. The Landlords concede that the door frames were in a poor state. However, they contend that their condition was not solely as a result of leaking gutters but also as a result of the Tenant having installed a large security lock on the front door behind the security door, which hindered

[6] Section 52 of the RLA.
[7] The apartments are independently heated.

the opening and closing of that security door, and thereby placing undue load on the doorframes for each apartment.

37. No expert evidence was called by either party in support of their respective positions. Nevertheless, doing the best that I can with the evidence before me, and having regard to the photographs which were produced, it appears to me that the poor condition of the doorframes resulted from exposure to the elements over a long period of time. I am not satisfied, based on the evidence presented, that the installation of the security lock on the front door of the two apartments materially contributed to the poor condition of the doorframes. Indeed, the photographs clearly show peeling paint and bare timber, which I do not attribute to the installation of the security door lock.

38. Given that this is a structural component of the apartments, I find that the Landlords are responsible for making good that component of work.

39. The Tenant claims $2,000 in lost earnings. This represents 20 weeks at $50 per week for two apartments. Again, no financial evidence has been presented to verify the Tenant's unsubstantiated assertions concerning lost income. For example, there is no documentation which demonstrates that earnings were increased after remedial work was undertaken.

40. Therefore, I find this aspect of the Tenant's claim unproven.

Inhibiting access during attempted re-entry

41. The Tenant alleges that he was unable to gain access into his office, located within the building complex, for one day while the Landlords were attempting to re-enter the apartments on 24 April 2017. He claims $1,500 in respect of this interference. In addition, the Tenant claims compensation in the amount of $800, which he contends represents lost earnings as a result of the Landlords' action.

42. The Landlords contend that they were entitled to re-enter on 24 August 2017. On that basis, they say that there are no grounds upon which to make this claim. The Landlords further contend that even if there was no entitlement to re-enter on that day, the whole exercise lasted for only two hours. Therefore, it could not be said to have any material effect on the Tenant's business.

43. As previously mentioned, there are no documents produced to prove that the Landlords' conduct had any adverse impact on the Tenant's earnings. For example, no documents or evidence was produced as to what the earnings were prior to this incident compared to immediately afterwards. The claim is based solely on the Tenant's 'guestimate' of loss.

44. That being the case, I am not satisfied, on the balance of probabilities, that the Landlords' conduct on that day had any detrimental effect on the Tenant's earnings. I find this aspect of the Tenant's claim also unproven.

Tiles and grout in bathroom have been damaged

45. The Tenant alleges that the tiles and the grout in the bathrooms of Unit 2 and 4 need replacement and that their deteriorated condition has adversely affected the earning capacity of the Tenant. It claims $2,200, which represents 55 weeks at $20 per week per apartment.

46. There is no expert evidence, or expert report which verifies that the tiles and grout in the bathroom need replacement or repair. The Landlords contend that when the complaint was raised on 10 June 2016, it was done as part of a number of complaints regarding the condition of the three apartments and in an attempt to negotiate more favourable terms for the renewed lease. Further, Mr Vitiello gave evidence that he arranged for a plumber to inspect the bathroom who reported that there was no discernible defect.

47. In the absence of any expert evidence, photographs or other documentation, I am unable to find, on the balance of probabilities; that the condition of the bathrooms was such that it warranted remedial work. Further, as I have already indicated, the Tenant's claim for loss of earnings is not supported by any financial documentation which would verify any diminution in earnings by reason of this particular circumstance.

48. Consequently, I find this aspect of the Tenant's claim unproven.

Aluminium sliding doors not working

49. The Tenant contends that the aluminium sliding windows were difficult to slide open and close. Mr Vitiello said that the problem lay with the tracks of the aluminium windows not having been cleaned, which he contended was an obligation of the Tenant. He said that the aluminium windows were encased within concrete and there was no evidence of anything having moved or being broken which would impede their sliding operation.

50. There is no expert evidence which would shed light on this issue. Accordingly, I am unable to find this aspect of the Tenant's case proven. Moreover, the claim for $3,300, representing 52 weeks of reduced income for all three apartments is not supported by any financial documentation. Accordingly, I find this claim unproven.

Dishwasher not working

51. The Tenant claims the dishwasher in Unit 2 is not working or not working properly and requires replacement. He claims $300. The Landlords contend that the dishwasher is not part of the Landlords' installations. Therefore, they argue that they are not responsible for the maintenance or replacement of that appliance.

52. In my view, the dishwasher is a chattel. Although it may be connected via plumbing to the pipes forming part of the apartment, that connection is only necessary in order to operate the appliance and does not, of itself, define the dishwasher as a fixture.

53. Therefore, I find that the dishwasher belongs to the Tenant and as a result, it is the Tenant's obligation to maintain and replace that appliance if it is no longer functioning. For that reason, this aspect of the Tenant's claim is dismissed.

Stains on outside of building

54. The Tenant contends that the outside of the three apartments have become dirty or stained. He contends that this has adversely impacted on his earnings by $3,120, representing 52 weeks at $20 per week per apartment.

55. As is the case with the other claims for loss of earnings, no financial documentation has been produced to verify any reduction in earnings by reason of this circumstance. In particular, there is no evidence as to what the earnings were prior to this issue having arisen compared to earnings after the issue manifested. Further, there is no expert opinion evidence to support the Tenant's contention that a higher rate could be charged if the outside of the three apartments were cleaned.

56. For the reasons which I have already outlined, I find this aspect of the Tenant's claim unproven.

Internal wall and ceiling, window sills and skirting boards damaged

57. The Tenant contends that there are marks on the internal walls and ceilings, and that window sills and skirting boards have been damaged. He says that these factors have adversely impacted on his ability to earn income. He claims $8,250 in relation to this matter, which represents 52 weeks for all three apartments.

58. There is no evidence as to what internal walls, ceilings, window sills or skirting boards have been damaged. There is no evidence as to how these elements of the building have been damaged or when these issues first arose. Importantly, there is no financial documentation or evidence verifying that this state of affairs has adversely impacted on the Tenant's earnings.

59. For the reasons which I have already outlined, I find this aspect of the Tenant's claim unproven.

Bathroom shower base reseal

60. The Tenant contends that the shower base in Unit 4 had to be resealed because it was leaking. He claims $176 which he expended in repairing that leak.

61. The Landlords contend that the problem with the shower base was due to a failure to clean that fixture. I do not accept that proposition.

62. In my view, it is unlikely that the Tenant would have expended $176 to reseal the shower base if the alternative was to simply clean it. Further, I find that as the problem with the shower base manifested during the currency of the tenancy, the obligation to maintain and repair that shower base rested with the Landlords, pursuant to s 52 of the RLA.

63. Accordingly, I find this aspect of the Tenant's claim proven.

Central heating system not working

64. The Tenant contends that the central heating system in Unit 8 was not operating properly. He gave evidence that he paid $396 for a technician to repair that appliance. The Landlords concede that the central heating system is a fixture. Accordingly, they do not contest liability in relation to this item.

65. Accordingly, I find this aspect of the Tenant's claim proven.

Conclusion on Tenant's claim for compensation

66. Having regard to my findings set out above, I find that the Landlords must reimburse the Tenant $1,518 made up as follows:

    (a) repair of air conditioning units (Unit 2 and Unit 4) in the amount of $946;

    (b) resealing of bathroom shower base in Unit 4 in the amount of $176; and

    (c) repair of central heating system in Unit 8 in the amount of $396.

IS THE TENANT ENTITLED TO SET OFF ITS LOSS AGAINST RENT ARREARS?

67. As indicated above, the Tenant seeks to set off its counterclaim against rent in arrears. Clause 4.1 of the leases states:

> 4.1 Rent
>
> (1) The Lessee must pay the Rent to the Lessor without demand, deduction or right of set-off by equal monthly instalments in advance on the first day of each month.

68. In my view, the leases expressly provide that rent must be paid without set-off. Accordingly, I find that the Tenant had no right to set-off its losses against rent in arrears.

DID THE LANDLORDS LAWFULLY RE-ENTER

Unit 2

69. On 4 April 2017, the Landlords' process server served the Tenant with a notice of default dated 3 April 2017. That notice alleged that the Tenant failed to pay rent for the month of April in the amount of $1,800 and further failed to pay outgoings, which represented $410.75 for owners corporation insurance and $323 for council rates, both of which were said to have been the subject of an invoice dated 9 February 2017. The notice further said that if the payment of $1,800 and $733.75 was unpaid after 14 days, the Landlord would exercise his rights and re-enter the premises.

70. It is common ground that no payment was received within 14 days. Further, and as I have already found, the Tenant's contention that it had overpaid rent is unsustainable. Rent in the amount of $1,800 was due and payable on 1 April. Further, having regard to the terms of the leases, I find that the Tenant was also liable to reimburse the Landlord in respect of council rates and owners corporation fees. Invoices in respect of these outgoings were forwarded to the Tenant in December 2016 and February 2017. Attached to those invoices was the source invoice that had already been paid by the Landlord.

71. Clause 15.1 of the leases state:

> 15.1 Default
>
> The Lessee will be in default if:
>
> (1) the Rent or any money payable by the Lessee is unpaid for 14 days
>
> …
>
> 15.2 Forfeiture of Lease
>
> Subject to giving any prior demand or notice required by any Law (and for the purpose of s 146 of the Property Law Act 1958, the period of notice shall be 14 days) and without prejudice to any other claim which the Lessor has may have against the Lessee or any other person in respect of default, if the Lessee defaults as specified in clause 15.1 the Lessor may:
>
> (1) re-enter and take possession of the Premises (by force if necessary) and eject the Lessee and all other persons and this lease will terminate
>
> …

72. The default notice was served on 4 April 2016. It alleged that the rent for the month of April 2016, which was due and payable on the first day of that month had not been paid. In my view, the notice was served

prematurely, insofar as it relied upon April rent not having been paid. In particular, as clause 15.1(1) of the lease states, a lessee will be in default if the rent or any money payable is unpaid for 14 days. As far as rent was concerned, that 14 day period had not yet crystallised and in those circumstances, it cannot be said that the failure to pay rent prior as of 4 April 2016 constituted a default, permitting the Landlord to serve a notice under clause 15 of the lease.

73. However, outgoings in the amount of $733.75 had been in arrears for more than 14 days prior to service of the default notice. Those outgoings were first claimed by the Landlord in December 2016 and again, pursuant to an invoice dated 9 February 2017.

74. In *Gair v Smith*,[8] the Victorian Supreme Court held that a notice of default was still effective if only one of two defaults specified in the notice was able to be substantiated. In *Commercial Tenancy Law*, the learned authors described that proposition as follows:

> A notice referring to several alleged breaches of covenant is not invalidated *in toto* because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely upon them: *Pennell v City of London Brewery Co* [1900] 1 Ch 496; applied in *Shepherd v Lomas* [1963] 2 All ER 902; [1963] 1 WLR 962 at 970; see also *Gair v Smith* [1964] VR 814 at 817; *Woorarra Pastoral Co Pty Ltd v Cash* (SC (Vic), Adam J, 25 June to 1970, unreported) .[9]

75. Accordingly, I find that it was open for the Landlord to rely upon that default as a basis upon which to re-enter and forfeit the lease.

76. Given that the Tenant does not dispute that outgoings were due and payable under the lease, I find that the Landlord for Unit 2 was entitled to re-enter on 24 April 2017 and that his attempt to do so resulted in that lease coming to an end.

Unit 4

77. As was the case with Unit 2, a notice of default was served on the Tenant by the Landlords' process server on 4 April 2017. The default notice in respect of Unit 4 alleged at the Tenant was in default of that lease by failing to pay April rent in the amount of $1,800 and outgoings, comprising $451.83 for owners corporation insurance fees and $361.90 for council rates. The notice of default alleged that the amounts charged in respect of owners corporation fees and council rates was the subject of an invoice dated 9 February 2016. It included an element of GST.

78. For the reasons which I have already outlined above, there was no entitlement to serve a notice of default in respect of April rent until at

[8] *Gair v Smith* [1964] VR 814, 817.
[9] Bradbrook, Croft and Hay *Commercial Tenancy Law* (Lexis Nexis Butterworth 3rd ed. 2009), 603.

least 14 April 2016. However, that is not the case in respect of outgoings, which were invoiced on 9 February 2016.

79. The Tenant does not dispute that he was responsible to pay those outgoings but says that the invoice rendered by the Landlord of Unit 4 (and Unit 8) included GST, which he contends was not payable. The Tenant referred to the source invoices, which did include any GST component. In those circumstances, he argued that he was not obliged to pay GST on Landlord rendered invoices. The amount of GST still remains unpaid.

80. I do not accept that proposition. In *Atlantis Investing Pty Ltd v Pami Investments Pty Ltd*,[10] I considered this question in the context of similar facts. I found:

> 48. In my view, the methodology adopted by the Landlord is consistent with the Australian Taxation Office's ruling: *Goods and Services Tax Determination GSTD 2000/10* (consolidated on 24 April 2013). Under that ruling, it is immaterial whether the supply to the Landlord is not subject to GST. If a tenant reimburses a landlord for such an expense, the transaction is categorised as a taxable supply which attracts GST. In other words, it is part of the consideration for the supply of the demised premises.
>
> 49. Paragraph 8 of *GSTD 2000/10* states:
>
> > 8. Payment by the landlord of local council rates, land tax or other charges may not be subject to GST because of the operation of Division 81. If the tenant is required under the terms of the lease to reimburse the landlord's expenditure of an Australian tax or an Australian fee or charge under Division 81 of the GST Act, this is not the payment of an Australian tax or an Australian fee or charge by the tenant. Division 81 of the GST Act does not apply to the tenant's reimbursement of the rates, land tax or other charges.
>
> 50 Therefore, I find that the Landlord's treatment of adding GST to Landlord-Tenant invoices for reimbursement of municipal and water rates is in accordance with the relevant *Goods and Services Tax Determination* and valid. It does not matter that the original supply invoice did not attract GST.

81. For the reasons set out in *Atlantis Investing*, I find that GST was payable on invoices rendered by the Landlord of Unit 4 (and Unit 8), as the total amount paid by the Tenant is regarded as a payment in return for the supply of the leased premises by the Landlord. Therefore, I find that

[10] [2015] VCAT 1926.

those outgoings were due and payable upon demand and had not been paid, or fully paid, within the 14 day period specified under the default notice.

82. Accordingly, I find that the Landlord of Unit 4 was within its right to rely upon the notice of default, insofar as it related to non-payment of outgoings, as a ground to re-enter Unit 4 on 24 April 2016 and that its attempt to do so resulted in that lease coming to an end.

Unit 8

83. As was the case with Unit 2 and 4, a notice of default was served on the Tenant by the Landlords' process server on 4 April 2017. The default notice in respect of Unit 8 alleged at the Tenant was in default of that lease by failing to pay April rent in the amount of $1,800 and outgoings, comprising $451.83 for owners corporation insurance fees and $349.80 for council rates. The notice of default alleged that the amounts charged in respect of owners corporation fees and council rates was a subject of an invoice generated by the Landlord dated 9 February 2016. It also included an element of GST.

84. For the reasons which I have already outlined above, there was no entitlement to serve a notice of default in respect of April rent until at least 14 April 2016. However, that is not the case in respect of outgoings, which were first invoiced on 9 February 2016. I find that those outgoings were due and payable upon demand and had not been paid within the 14 day period specified under the default notice.

85. Therefore, I find that the Landlord of Unit 8 was entitled to re-enter that apartment. I further find that its attempt to do so on 24 April 2016 terminated the lease.

THE LANDLORDS' CLAIM FOR DAMAGES

86. In addition to claiming arrears of rent and outgoings, the Landlords also claim reimbursement for costs associated with making good the apartments. In particular, the Landlords claim for the cost to repair the door frames the amount of $3,118.50. In my view, they are not entitled to be reimbursed for that amount. As I have already found, I am not persuaded, on the balance of probabilities, that the deterioration of the door frames was caused or materially caused by the installation of the security lock to the front door by the Tenant. The photographs produced during the course of the hearing illustrate the door frames in very poor condition, with paint peeling and timber appearing to be rotted. I do not consider these defects to be caused by the installation of a security lock to the front door. Accordingly, that aspect of the Landlords claims is dismissed.

87. In relation to outgoings, the Landlord of Units 4 and 8 claims $146.86, which represents the GST component charged in respect of two of the apartments, calculated as follows:

    (a) $32.90 in respect of the Landlord's invoice for reimbursement of council rates in amount of $318 in respect of Unit 4.

    (b) $41.08 in respect of the Landlord's invoice reimbursement of owners corporation fees in the amount of $410.75 in respect of Unit 4.

    (c) $31.80 in respect of the Landlord's invoice for reimbursement of council rates in the amount of $318 in respect of Unit 8.

    (d) $41.08 in respect of the Landlord's invoice for reimbursement of council rates in the amount of $410.75 in respect of Unit 8.

88. As indicated above, the Tenant erroneously took the view that GST was not payable because the source invoices did not contain any component of GST.

89. In my view, GST is payable and the amount of $146.86 is due and payable by the Tenant to the Landlords of Units 4 and 8.

90. Therefore, I find that the Tenant must pay the Landlords the following amounts:

    (a) In respect of Unit 2, $4,989.90, payable to the Second Applicant;

    (b) in respect of Units 4 and 8, $15,936.86, payable to the First Applicant and made up as follows:

        (i) $7,895, being rent in arrears in respect of Unit 4;

        (ii) $7,895, being rent in arrears in respect of Unit 8; and

        (iii) $146.86, being the payment of GST on outgoings in respect of Units 4 and 8.

SHOULD AN ORDER FOR POSSESSION BE MADE

91. Having regard to my findings set out above, I find that all three leases have been forfeited by the Landlords as of 24 April 2017. In forming that view, I am mindful that the Tenant has continued to make payments to the Landlords, albeit at an amount less than what would otherwise be required had the leases remained on foot. These payments relate to all three apartments and have been accepted by the Landlords.

92. However, I do not consider that factor constitutes a waiver of the Landlords' rights to terminate the leases. In particular, in pursuance of those rights, the Landlords issued three separate proceedings seeking an order from the Tribunal that they be given possession of their respective apartments. In my view, that conduct clearly evidences that the

Landlords have not resiled from their primary objective; namely, seeking possession.

93. In light of that, I do not consider that the receipt of monies, even if categorised as rent, can be viewed as conduct inconsistent with their primary objective. In all likelihood, receiving money is simply mitigating their loss, pending final orders of the Tribunal. This situation is to be contrasted with one where a landlord has served a notice of default and then accepted rent after the notice period has expired but before acting on the notice. In that situation, it might be argued that the acceptance of rent constitutes a waiver of the landlord's right to terminate, in reliance upon the notice.

94. However, the breaches upon which the termination of lease are grounded relate solely to the non-payment of outgoings claimed in the Landlords' invoices dated 9 February 2017. The amount of arrears as of 24 April 2017 was less than $1,000 for each apartment.

95. In my view, it would be unfair to order that the Tenant deliver up possession of each of the apartments on the basis of that default, without first giving the Tenant liberty to make application for relief against forfeiture.

96. For that reason, I will stay the operation of any order for possession for a period of 21 days so as to allow the Tenant to consider his position, having regard to my reasons. In that time, the Tenant should consider whether to make application for relief against forfeiture or alternatively, appropriate arrangements to vacate the apartments.

SENIOR MEMBER E. RIEGLER