

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. R266/2012

**CATCHWORDS**

Retail Premises Lease. Failure of Applicant lessee to prove claim as to false representations by the Respondent. Breach of lease by Applicant. Assessment of Respondent's damages.

<b>APPLICANT</b>	Mr Joseph Doddridge Silvapulle
<b>RESPONDENT</b>	Sturt Street Pty Ltd (ACN 127 141 691)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5, 6 and 7 August 2014
<b>DATE OF ORDER</b>	7 August 2014
<b>DATE OF WRITTEN REASONS</b>	3 October 2014
<b>CITATION</b>	Silvapulle v Sturt Street Pty Ltd (Building and Property) [2014] VCAT 1255

**ORDERS**

1. The Applicant must pay the Respondent \$23,553.00.
2. The Respondent is entitled to retain the security deposit bond paid to it by the Applicant.
3. No order as to costs.

**SENIOR MEMBER M. FARRELLY**

**APPEARANCES:**

For the Applicant	Mr J. Silvapulle in person
For the Respondent	Mr Guthrie of Counsel

## REASONS

- 1 The hearing in this matter was conducted on 5, 6 and 7 August 2014. At the conclusion of the hearing I made the following orders:
  - (a) The Applicant must pay the Respondent \$23,553.
  - (b) The Respondent is entitled to retain the security deposit bond paid to it by the Applicant.
  - (c) No order as to costs.

Oral reasons for the orders were provided on the day, 7 August 2014. By letter to the Tribunal dated 26 August 2014, the Applicant requested that written reasons be provided. These written reasons are provided in response to the Applicant's request and as confirmation of the oral reasons provided on 7 August 2014.

## BACKGROUND

- 2 As at July 2007, the Applicant Mr Silvapulle had operated his liquor store business for a number of years from leased premises at Shop 6, 153-159 Sturt Street, Southbank, Victoria ("Shop 6"). At that time, Mr Silvapulle's brother in law operated his convenience store business from leased premises at Shop 1 ("the premises"). at the same address. The owner of the Sturt Street property, which included shop 6, the premises and a number of other leased premises in a shopping arcade fronting Sturt Street, was Searspoint Pty Ltd ("Searspoint")
- 3 In 2007, the Applicant became interested in taking over the lease of the premises, in place of his lease of shop 6. Because the premises are situated at the front of the arcade fronting Sturt Street, whereas shop 6 is at the rear of the arcade, the Applicant considered that the premises offered a superior location for his business.
- 4 In around July 2007, the Applicant and his brother in law agreed to a transfer of the lease of the premises to the Applicant. A transfer of lease was prepared. At that time, the Applicant believed that Searspoint had agreed, at least informally, to the transfer.
- 5 On 1 August 2007, the agent for Searspoint informed the Applicant that, although a transfer of lease had been discussed, no final agreement had been reached and no documents had been executed by Searspoint. The agent also advised the Applicant that Searspoint had recently entered a contract of sale of the Sturt Street property with "Sturt Street Pty Ltd", the Respondent in this proceeding. The agent advised the Applicant that the Respondent was prepared to discuss a transfer of lease once the sale contract had settled and the Respondent became the registered proprietor of the property.
- 6 By around September 2007, the sale contract had settled and the Respondent was the registered proprietor of the Sturt Street property. After

failing to obtain the Respondent's agreement to a transfer of the lease, and believing that the Respondent was obligated to transfer the lease, the Applicant lodged a complaint at the office of the Small Business Commissioner. The complaint was referred to mediation on 14 November 2007 and, at that mediation, the Applicant and the Respondent reached agreement as to the granting of a lease of the premises to the Applicant. The agreement was confirmed in a "Terms of Settlement" document signed by the Applicant and the Respondent's representative on 14 November 2007 ("the TOS").

- 7 Pursuant to the TOS, a lease of the premises was subsequently prepared and signed by the parties on 19 December 2007 ("the lease"). The lease provided for a 5 year term with rent payable from 1 February 2008. The rent for the period 1 February to 30 June 2008 was calculated on an annual rate of \$44,776.96 per annum plus GST. From 1 July 2008, the rent would be as determined by market review, with annual increases of 4.25%. Prior to the execution of the lease the Respondent had, on 5 December 2007, provided to the Applicant a "disclosure statement" which provided information in respect of the proposed lease as required pursuant to the *Retail Leases Act 2003* ("the Act").
- 8 The "permitted use" of the premises under the lease was *café/wine bar and bottle shop*. This reflected the agreement reached by the parties and confirmed in the TOS. In the first few months of 2008 the Applicant attended to a fit-out of the premises.
- 9 On 21 September 2011, the Respondent entered and took possession of the premises following the failure of the Applicant to pay rent which was due on 1 September 2011.
- 10 In this proceeding, issued by the Applicant in October 2012, the Applicant claims loss and damage as follows:
  - (a) \$150,000 as the alleged cost expended by the Applicant on the fit-out of the premises.
  - (b) \$100,000 as the Applicant's alleged loss of business profit.
  - (c) \$50,000 as the alleged loss of the re-sale value of the Applicant's wine stock. The Applicant says that, following the termination of the lease, he was given inadequate opportunity to retrieve his wine stock from the premises.
  - (d) \$38,000 as the alleged loss arising from the Respondent's unreasonable refusal to assign the lease, or grant a new lease of the premises, to a prospective buyer of the Applicant's business.
  - (e) \$9,583 which the Applicant says is a credit due to him in respect of an adjustment to operating expense for the 2010 financial year.
  - (f) \$35,868 in respect of the security bond ("the security bond") paid to the Respondent at the commencement of the lease which has not

been returned to the Applicant.

- 11 The Applicant does not contest the termination of the lease. The Applicant's claim in respect of the fit-out costs and the loss of business profit is founded on the allegation that the Respondent, through its director Mr Rothe, made false representations which the Applicant was induced by, and relied on, in entering the lease. The Applicant says further that, by making the false representations, the Respondent acted unconscionably within the meaning of Part 9 of the Act. The alleged representations, as set out in the Applicant's "Points of Claim" filed in the proceeding, are that:
- (a) Sturt Street is going to be a pedestrian precinct;
  - (b) The Council is spending a substantial amount of money on rebuilding Sturt Street;
  - (c) The Shopping Centre [the arcade] is going to reflect this;
  - (d) The Shopping Centre will be "an upmarket shopping centre"
- (*"the representations"*)

- 12 The Respondent denies making *the representations*. By way of counterclaim, the Respondent claims damages in the sum of \$105,176.70 for loss of rent and operating expenses associated with the premises owing as at the date of termination of the lease and which, but for the Applicant's breach of the lease, would have been paid to the end of the term of the lease, that is until 18 December 2012.

### **THE HEARING**

- 13 Up until the commencement of the hearing, the Applicant was represented by lawyers. The lawyers withdrew immediately before the commencement of the hearing on 5 August 2014. The Applicant then represented himself and gave evidence.
- 14 Mr Peter Mosbey attended the hearing and gave evidence in answer to a summons issued at the request of the Applicant. Mr Mosbey was a handyman engaged by the Applicant to carry out some of the fit-out of the premises.
- 15 The Respondent was represented by Mr Guthrie of Counsel. Mr Rothe, a director of the Respondent, gave evidence for the Respondent. The Respondent also called evidence from Mrs Anderson and Ms Garvie, both of whom were at relevant times property managers with Burgess Rawson & Associates Pty Ltd ("*Burgess Rawson*"), the managing agent of the premises for the Respondent.

### **THE TERMS OF SETTLEMENT DATED 14 NOVEMBER 2007**

- 16 The TOS signed by the parties on 14 November 2007 provide as follows:

Whereas:

- (A) The parties are in dispute concerning the transfer of lease (“the lease”) of Shop 1, 153 Sturt Street Southbank Victoria (“the premises”) and the permitted use of the premises (“the dispute”);
- (B) The parties have agreed to settle the dispute on the following:

The parties agree as follows:

1. The tenant shall continue to occupy Shop 6, 153 Sturt Street Southbank Victoria on the same terms and conditions as presently exist until such time as he is permitted to commence his tenancy of the premises.
2. The landlord shall prepare a new lease at the landlord’s expenses of the premises and such lease shall be prepared and submitted to the tenant within 14 days from the date hereof.
3. The lease shall be in the form of the landlord’s standard lease and shall be for a term of 5 years with 2 further options of 5 years each commencing on the date of execution thereof by both parties.
4. The new lease shall at first instance be for a rental which is the same as the current lease of the premises up until 1 July 2008 whereupon the rent will be reviewed by a market review to be carried out by a specialist retail valuer appointed by the Small Business Commissioner at the request of the parties pursuant to s37 of the *Retail Leases Act 2003*.
5. The new lease shall contain an increase in the annual rent at the rate of 4.25% per annum which shall be applied annually including any further terms.
6. The new lease shall also require a bank guarantee in favour of the landlord in the name of the tenant for 6 months rental to be supplied to the landlord at the commencement of the new lease.
7. Prior to the tenant being granted permission to occupy the premises the landlord must provide to the tenant written approval of the tenant’s proposed fit-out of the premises and no fit-out works are to be commenced in the premises until such approval is provided.
8. The tenant agrees to carry out at his own expense a fit-out to the standard of the café franchise style e.g. Hudson’s Coffee.
9. The new lease shall also contain a demolition clause consistent with the *Retail Leases Act 2003*.
10. The tenant agrees to provide its proposed menu for approval by the landlord.
11. The landlord agrees that the permitted use of the premises under the new lease shall be for a bottleshop/wine bar and café.

12. Upon the execution of the new lease by both parties the tenant of the present lease shall surrender such lease and has the landlord's permission to do so without penalty.
13. The tenant shall use its best endeavours to apply for and procure a licence to serve liquor on the premises.
14. The landlord reserves the right to alter the staircase in accordance with its development plans of the building.
15. The landlord reserves the right to market the reletting of Shop 6 commencing from the date hereof.
16. The tenant agrees to make application for a permit to use the footpath area to provide tables and chairs for the café's customers.
17. The tenant shall have the right to erect signage at the front and rear of the premises as approved by the landlord.
18. The tenant agrees to pay the outgoing payable under the current lease for the premises from the date of the execution of the new lease by both parties.

### **FINDINGS ON THE REPRESENTATIONS**

- 17 There is no evidence that *the representations* were made, as alleged, by Mr Rothe or indeed any other representative of the Respondent.
- 18 Mr Rothe denies making *the representations* and says that the agreement between the parties was as set out in the TOS.
- 19 The only evidence from the Applicant at the hearing in respect of any "representations" given in respect of the lease is the Applicant's own evidence that, in communications he had prior to the mediation on 14 November 2007 with Ms Escudero, a representative of Burgess Rawson, Ms Escudero told the Applicant that in order to be granted a lease of the premises:
  - The landlord would require a fit-out of the premises as an upmarket café; and
  - Any fit-out plans would have to be approved by the landlord; and
  - The landlord would require a significant rental increase.
- 20 Ms Escudero was not called to give evidence. The above statements, if made by Ms Escudero, bear no resemblance to *the representations* alleged to have been made. Further, there is no evidence to suggest that the statements were false.
- 21 The TOS do not include *the representations*.
- 22 The disclosure statement provided to the Applicant prior to the execution of the lease includes none of *the representations*. Part 10 in the disclosure statement contains an acknowledgement which was signed by the Applicant. The acknowledgement reads:

I acknowledge that this statement contains all representations in relation to the proposed lease by the landlord and the landlord's agent and I am satisfied that all agreements are fully reflected in this statement.

- 23 While I accept that the Applicant expended money on the fit-out of the premises, such expenditure was incurred not by reason of any false representations made by the Respondent, but to make the premises suitable for their intended use as agreed in the TOS and as confirmed in the lease.
- 24 For the above reasons, I am satisfied that the Respondent did not make *the representations* and did not act unconscionably, and accordingly, the Applicant's claims in respect of the fit-out costs and alleged loss of profit fail.
- 25 For completeness I note also that the Applicant presented scant evidence as to the alleged cost of the fit-out and alleged lost business profit. Mr Mosbey gave evidence that his diary records show that he charged the Applicant sums of \$8051 and \$21,819 for fit-out works he carried out for the Applicant. No invoices or receipts were produced by Mr Mosbey. The Applicant did not produce documentation to substantiate the alleged fit-out expense or the alleged loss of business profit.

#### **ALLEGED LOSS OF VALUE OF WINE STOCK**

- 26 The Applicant says that, after the lease was terminated and the Respondent re-entered the premises, the Applicant was given inadequate opportunity to remove his valuable wine stock from the premises, with the result that some of the stock deteriorated before he finally collected what remained of his stock around 12 months after the termination of the lease.
- 27 I do not accept the Applicant's claim in this regard. It is apparent, on the evidence, that the Applicant was given ample and repeated opportunities to retrieve his stock and other belongings from the premises.
- 28 It is not disputed that, after the Respondent re-entered the premises on 21 September 2011, the Respondent provided the Applicant with access to the premises:
- 3 hours on 28 September 2011; and
  - 3 days on 4, 5 and 6 October 2011
- 29 Further opportunities was provided to the Applicant later in October 2011. By letter dated 14 October 2011 from the Respondent's lawyers to the Applicant's then lawyers, the Applicant was advised that:
- The Applicant would be provided with further access of 1 day in the period 18-21 October 2011 to collect refrigerated stock; and
  - The Applicant would be provided further access of 1 day in the period up to 11 November 2011 to collect any remainder stock.

- 30 The Applicant simply did not take the opportunities presented. He says that he was unaware of the further access times referred to in the letter of 14 October 2011 from the Respondent's lawyers to the Applicant's then lawyers. That is, he says his lawyers did not advise him of the contents of the letter. I doubt that the Applicant's lawyers would have withheld such information. In any event, there is no dispute that the letter was sent to the Applicant's lawyers and it cannot be said that the further opportunities for access as set out in the letter were not provided by the Respondent.
- 31 On the evidence before me, I am satisfied that the Applicant was given repeated and ample opportunities to remove his stock and belongings from the premises and, as such, his claim in respect of lost or perished stock fails.

### **ALLEGED LOSS OF OPPORTUNITY TO SELL BUSINESS**

- 32 The Applicant says that he had reached agreement with a proposed purchaser, Mr Khuntale, for the sale of the Applicant's business for a price of \$38,000, subject to the Mr Khuntale obtaining a lease of the premises. The Applicant says that the Respondent wrongfully refused to consider a transfer of the lease to Mr Khuntale.
- 33 Mr Khuntale was not called to give evidence. The Applicant produced a "contract" document signed by the Applicant and Mr Khuntale and dated 12 October 2011. The documentation, which appears incomplete, indicates that Mr Khuntale agreed to purchase chattels valued at \$18,000 and stock up to \$20,000. The document makes no reference to the lease. In any event, the document has been signed three weeks *after* the lease was terminated and the Respondent took possession of the premises. There is no evidence that, *prior* to the termination of the lease, the Applicant sought the consent of the Respondent to a transfer of the lease, or the granting of a new lease, to Mr Khuntale or anyone else. The Respondent cannot be held accountable for refusing to transfer the lease to Mr Kuntale when the proposed transfer, if it was put to the Respondent, was first put *after* the lease was terminated.
- 34 For the above reasons, I am satisfied that the Applicant's claim in respect of the alleged loss of sale of the business must fail.

### **OPERATING EXPENSES ADJUSTMENT**

- 35 The Applicant says that he has overpaid the Respondent \$9,583 in respect of operating expenses. Although not raised in the Applicant's Points of Claim, I granted leave to the Applicant to bring this claim.
- 36 The lease provides for the annual payment of operating expenses, with the sum to be paid set in advance and based on the sum paid for the previous financial year. In the event the actual sum, at year's end, turns out to be less or more than the sum allowed and paid for, an adjustment is made.
- 37 The Applicant says that there should be an adjustment of \$9,583 his way in respect of the 2010 financial year. He says that this was confirmed in a letter to him from Ms Garvie of Burgess Rawson. The Applicant could not



produce the letter and no other documents were produced to substantiate the claim.

- 38 Ms Garvie gave evidence that adjustments are routinely made at year's end, and that she has no recollection of the letter referred to by the Applicant, and no knowledge as to the alleged outstanding adjustment sum.
- 39 The Applicant bears the burden of proof and, on the evidence before me, I am not satisfied that the Respondent or its managing agent failed to make an adjustment in favour of the Applicant in respect of operating expenses.

### **SECURITY DEPOSIT REFUND**

- 40 There is no dispute that the Applicant paid the security bond at the commencement of the lease and that that it has not been refunded to the Applicant. Having heard evidence from Mrs Anderson of Burgess Rawson, and having viewed documentation confirming the bank account into which the security bond was paid, I am satisfied that the security bond was paid into an interest bearing account and that the current sum of the security bond is approximately \$36,440.
- 41 There being no evidence that the security bond has been wholly or partially applied to "make good" the premises after the termination of the lease, I am satisfied that the Applicant is entitled to a refund of the security bond, subject to any set-off in respect of damages awarded on the Respondent's Counterclaim.

### **THE RESPONDENT'S COUNTERCLAIM**

- 42 The Respondent's re-entry of the premises, and termination of the lease, was founded on the Applicant's breach of an essential term of the lease, namely the obligation to pay rent. The lease provides that, upon re-entry of the premises and termination of the lease, the Respondent remained entitled to recover damages arising by reason of the Applicant's breach of the lease.
- 43 The lease purports to provide a "liquidated damages" clause setting out a method of calculation of the Respondent's damages in the event of termination of the lease by reason of the Applicant's breach. The clause provides for the appointment of an accountant expert to assess damages measured as the value of rent and outgoings payable for the term of the lease, less the expected value of rent and outgoings that might be received from a new incoming tenant for the remainder of the lease term, plus the costs of the expert. In essence, the clause provides a method for assessing, at the time of termination of the lease, the future damages of the Respondent. The Respondent does not seek to enforce the clause because, with the lease term expiry date, 18 December 2012, having passed, damages may now be assessed in hindsight and it is impracticable and unnecessary to utilise the clause and incur the unnecessary expense of the accountant expert.
- 44 The Applicant does not seek to enforce the liquidated damages clause.

- 45 As no-one seeks to enforce the liquidated damages clause, and accepting that it would be somewhat artificial to now apply it in assessing the Respondent's damages, and bearing in mind the cost that would be incurred in appointing an accountant expert, I will assess the Respondent's damages on general principles.
- 46 As a general principle, the Respondent is entitled to be placed in the position it would have been in, but for the Applicant's breach of the lease. The Respondent also carried a duty, after the lease was terminated, to take reasonable steps to turn the premises to a profitable use. The duty may be met by taking reasonable steps to find a suitable tenant at a reasonable rent within a reasonable time.
- 47 Ms Garvie gave evidence that, following the termination of the lease, Burgess Rawson made some attempts to locate a new tenant for the premises, including placing an advertising board at the front of the premises and placing some advertisements on the internet. She says that, as far as she can recall, no applications for new tenants were passed on to the Respondent. She says also that that in late 2011 and early 2012, the retail rental market was generally flat and that it would have been difficult to find a tenant for the premises.
- 48 Mr Rothe gave evidence that in around November 2011 he was approached directly by a willing, potential tenant for the premises. The potential tenant operated a café at Middle Park. Mr Rothe says that he considered the potential tenant to be suitable, but he and the potential tenant could not reach agreement on the sum of rent to be paid. According to Mr Rothe, the potential tenant offered to pay annual rental of "somewhere in the fifty thousands" per annum, whereas Mr Rothe was looking for a sum of around \$76,000 per annum.
- 49 The premises were not re-leased until August 2013 when the "Chemist Warehouse" took a lease of the premises together with a lease of the adjacent premises which were part of the arcade owned by the Respondent. The rent paid by the Chemist Warehouse for the lease of both premises was around \$150,800 for the first year.
- 50 On all the evidence, I am satisfied that the Respondent, acting reasonably, ought to have turned the premises to a profitable use by accepting the offer of the suitable potential tenant in November 2011. For the purpose of assessing damages, I will assume that the new tenant would have paid \$50,000 rent per annum. Allowing also a reasonable time to prepare and execute a lease and fit-out the premises to suit the incoming tenant, I think it fair to assume that rent at \$50,000 per annum would have been payable from 1 March 2012. On this basis, and doing the best I can to be fair, I assess the Respondent's damages in respect of lost rent and outgoings as \$59,993, calculated as follows:

Rent and outgoings (excluding GST) owing as at \$41,362  
the date of termination of the lease, and payable

up to 28 February 2012	
Plus the sum of rent payable under the lease for the remainder of the term of the lease, 1 March 2012 to 18 December 2012	\$56,544
Sub total	\$97,906
Less putative rent for period 1 March 2012 to 18 December 2012 at \$50,000 per annum	\$39,913
Sub total	\$57,993
Add allowance for the reasonable costs associated with preparing, finalising and executing a new lease with a new tenant	\$2,000
Total damages	\$59,993

## **CONCLUSION**

- 51 After setting off the sum of the security bond, \$36,440, I arrive at the sum of \$23,553. I will order that the Applicant pay the Respondent \$23,553, and that the Respondent be entitled to retain the security bond.
- 52 Having regard to s92 of the Act, and being satisfied that neither party has conducted the proceeding in a vexatious way, I consider it fair to make no order as to costs.

## **END NOTE**

- 53 I note that the stamped orders sent to the parties after the conclusion of the hearing are incorrectly dated 5 August 2014. They should be dated 7 August 2014. I will make a further order to correct this administrative error.

**SENIOR MEMBER M. FARRELLY**