

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP82/2014

CATCHWORDS

Injunction

APPLICANT	St Kilda Arts & Events Company (Vic) Pty Ltd
RESPONDENT	Apes with Wings Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Injunction Hearing
DATE OF HEARING	25 August 2014
DATE OF ORDER	2 September 2014
CITATION	St Kilda Arts & Events Company (Vic) Pty Ltd v Apes with Wings Pty Ltd (Building and Property) [2014] VCAT 1055

ORDERS

- 1 The interim injunction granted on 23 July 2014, and extended by order made 25 August 2014, is dissolved.
- 2 The Applicant's injunction application is dismissed.
- 3 Costs reserved with Liberty to apply. I direct the Principal Registrar to list any application for costs before Senior Member Farrelly, allowing 2 hours.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr D. Kim of Counsel
For the Respondent	Mr L.E.P. Magowan of Counsel

REASONS

- 1 In this proceeding, the Applicant, St Kilda Arts & Events Company (Vic) Pty Ltd, seeks injunctive relief to protect its alleged right of occupation, as tenant, of the premises at Lot 1, 54 Acland Street, St Kilda (“the premises”). The Owner of the premises, Apes with Wings Pty Ltd (the Respondent) says that the injunctive relief sought should not be granted.
- 2 By a contract of sale dated 4 July 2013, Victorian Pub Properties (“VPP”) sold the premises to Ms Mette Salom and/or nominee (“the Sale Contract”). The Sale Contract provided for a settlement date of 4 July 2014. As at the date of the Sale Contract, the entity “Dogs Bar Pty Ltd” occupied the premises as tenant pursuant to a lease agreement with VPP (“the Dogs Bar Lease”). Dogs Bar Pty Ltd conducted its bar/restaurant business, known as “Dogs Bar”, at the premises. VPP and Dogs Bar Pty Ltd were closely related entities in that Mr David Carruthers was the sole director, secretary and shareholder of both entities.
- 3 Two further Contracts of Sale of real estate were also entered on 4 July 2013. Under one of those contracts, VPP sold to Mette Salom and/or nominee lots 5, 6, 8, 10, 11 and 12 at 55 Acland Street, St Kilda. Under the other contract, Mr Carruthers and his wife Mrs Deborah Carruthers sold to Mette Salom and/or nominee Lots 7 and 9, 54 Acland Street St. Kilda. Both contracts nominated a settlement date of 4 July 2014.
- 4 The Respondent became the “nominated” purchaser under the three contracts. The effect of the three contracts was that VPP and Mr and Mrs Carruthers together sold their lots in the property at 54 Acland Street St Kilda to the Respondent, with the settlement date being 4 July 2014. It is only the Sale Contract, in respect of the premises that is in issue in this proceeding.
- 5 Following VPP’s refusal to settle the three contracts on 4 July 2014, a receiver was appointed to VPP on 8 July 2014. The receiver supervised the settlement of the three contracts that day, 8 July 2014.
- 6 The Respondent says that, under the Sale Contract, it was entitled to vacant possession of the premises. The Applicant, however, was in occupation of, and conducting its bar/restaurant business at, the premises. The Applicant claimed to be entitled to continue its occupation and use of the premises as tenant under a retail lease agreement with VPP.
- 7 Early in the morning of 22 July 2014, the Respondent changed the locks at the premises and engaged security personnel to prevent the Applicant from entering the premises. Later that day, the Applicant filed its Application in the Tribunal seeking urgent injunctive relief. The application included a short affidavit of Mr Carruthers in which he states, amongst other things, *“This morning we were locked out of our premises of 1/54 Acland Street prior to us arriving for work and without any supporting documentation ...”*

- 8 The application came before me on 23 July 2014. Mr Carruthers represented the Applicant and the Respondent was represented by Mr McKenzie of counsel. Having heard briefly from both parties, I granted an interim injunction, to 26 August 2014, requiring the Respondent to allow the Applicant access, occupation and quiet enjoyment of the premises. I adjourned the application to further hearing on 25 August 2014 and made orders for the filing and service of affidavit material and submissions by both parties ahead of the hearing. The injunction was granted upon the usual undertaking as to damages given by the Applicant, by its director Mr Carruthers. The injunction was also conditional upon the Applicant making payment to the Respondent in the sum of \$16,000.00 by 1 August 2014, such sum representing (putative) rent which, according to Mr Carruthers, was due and payable on the first day of each month.
- 9 Affidavit material and written submissions were duly filed and served, and the matter came back before me on 25 August 2014. On this occasion the Applicant was represented by Mr Kin of counsel and the Respondent was represented by Mr Magowan of counsel. Save for some brief evidence given at the hearing by Mr Carruthers, the evidence was confined to the affidavit material filed by the parties. At the conclusion of the hearing I reserved my decision and ordered that the injunction granted on 23 July be extended until such time as the Tribunal ordered otherwise.

THE SALE CONTRACT

- 10 Included within the Sale Contract documentation is a copy of the Dogs Bar Lease. It is dated 11 September 2008 and provides for the lease of the premises by VPP, as landlord, to Dogs Bar Pty Ltd, as tenant, for a term of 5 years with four further optional 5 year terms. The lease identifies the permitted use of the premises as “*Licensed restaurant and bar and/or functions*” and identifies the tenant’s trading name as “*Dogs Bar*” The lease is signed by Mr Carruthers in his capacity as Director/Secretary of each of VPP and Dogs Bar Pty Ltd.
- 11 The “Particulars of Sale” within the Sale Contract include a sub-heading “LEASE”, under which it is noted that the property is “*SUBJECT TO LEASE*” and it is also noted that there is a “*DEED OF SURRENDER DATED FROM THE 20th JANUARY, 2014*”.
- 12 The Sale Contract documentation also includes an undated document entitled “*Deed of Agreement For Surrender of Lease*” pursuant to which VPP and Dogs Bar Pty Ltd agree to the surrender of the unexpired portion of the [Dogs Bar] Lease (“the Lease Surrender Agreement”). The recitals in the Lease Surrender Agreement indicate that the surrender was to take effect as and from 20 January 2014. The Lease Surrender Agreement was executed by Mr Carruthers in his capacity as Director/Secretary of each of VPP and Dogs Bar Pty Ltd.

- 13 The Sale Contract includes a scheduled of fixtures and fittings which are noted to be included with the sale of the property. The items listed in the schedule appear to be the various fixtures and fittings used to conduct the Dogs Bar business, such items including chilled food cabinets, glassware, coolroom, dishwasher, deep fat fryer, canopy and fan, benches, stoves and ovens, winestore with racking, fridge, office desks and workstations, indoor and outdoor furniture.
- 14 The Sale Contract includes several Special Conditions, three of which were amended on the day the contract was signed.
- 15 There are two Special Conditions marked “C”, each of which has been crossed through. The initials of Ms Salom and Mr Carruthers appear next to each condition as confirmation of the crossing out or deletion of the conditions. The two conditions read as follows:
- C. The purchaser acknowledges that the purchase is subject to the lease annexed hereto [the annexed lease being the Dogs Bar Lease]. The vendor agrees to procure a deed of cancellation of the lease executed by the vendor as landlord and the Dogs Bar Pty Ltd as lessee such cancellation to take effect on the 20th January 2014. The purchaser to hold the deed of cancellation in escrow from settlement to the 20th January, 2014.
- C. From the date of settlement to the 20th January 2014, the rental under the lot one lease shall be \$14,208.33 per calendar month which is calculated upon a per annum rental of \$155,000.00 plus GST. In addition the lessee shall be responsible for outgoings.
- 16 The third amendment, also confirmed by the initials of Ms Salom and Mr Carruthers, is Special Condition “D” which, absent the amendment, reads as follows:
- D. At the option of the purchaser, to be advised to the vendor 14 days prior to settlement date, on the 20th January, 2014 the Vendor will procure that the lessee will change its corporate name “Dogs Bar Pty Ltd” so that the purchaser may direct that the name may be registered by another entity. The purchaser shall be responsible at its sole cost for all of the requirements of Liquor Licensing Commission in relation to any transfer of the current liquor licence and any other registration and licensing transfer requirements for the new entity. The vendor further warrants that it will procure the co-operation of the current lessee in all respects with the transfer of the current liquor licence and all other intellectual property such as Web site, Twitter and Facebook necessary for the operation of the business of the “Dogs Bar” from the current licence holder to the purchaser’s designated entity at the sole cost of the purchaser. [underlining added]

By the amendment, the words “on the 20th January, 2014” (underlined above) were replaced with the words “4th July, 2014”.

- 17 The parties have differing views as to the intention behind the amendments.
- 18 It is common ground that on 4 July 2013 the property (the premises and the other lots for sale at 54 Acland Street, St Kilda) was passed in at auction, and that the Respondent and VPP subsequently, that same day, negotiated and reached agreement and signed the three contracts, including the Sale Contract.
- 19 In her affidavit sworn 22 August 2014, Ms Salom says that she signed the Sale Contract in the presence of representatives of the real estate agent who conducted the auction and presided over the post auction negotiations, and Ms B. Jessop, a solicitor of the firm Jessop and Komesaroff who acted for the vendor, VPP. In her affidavit Ms Salom says:

Ms Jessop informed me that there was a lease in place up to 20 January 2014 for the bar but as the period of settlement had now been extended beyond that date, the property will be vacant possession upon settlement. She informed me that since the lease was no longer relevant, that is being terminated prior to settlement, the two Special Condition clauses “C” and “C” were no longer needed. Ms Jessop crossed them out and asked me to initial the changes, which I did.

- 20 At the hearing, I asked Mr Kim and Mr Magowan whether either of them wished to put any questions to Ms Salom, and that if they did, I would allow them to do so. Neither Counsel wished to put any questions to her.
- 21 At the hearing, I wished to question Mr Carruthers and, for that reason, Mr Carruthers was called to give evidence. Mr Kim and Mr Magowan also put questions to Mr Carruthers.
- 22 In his affidavit sworn 8 August 2014, Mr Carruthers says that the Sale Contract documentation, prepared prior to the auction, was prepared in anticipation of achieving a sale price [for all the lots] that would enable he and his wife “*to clear our debts and return up to about \$1,000,000 in capital to us*”. He says also that the Sale Contract was prepared in anticipation of a three month settlement but with provision for “*possession of the business was to be delayed until 20 January 2014 to enable Dogs Bar to enjoy the Christmas and summer trade*”.
- 23 Mr Carruthers says that as the sale price eventually agreed to [for all the lots] did not meet his expectations, he was not prepared to sell the premises with vacant possession. That is, he would agree to sell subject to Dogs Bar Pty Ltd retaining an entitlement to continue to run the Dogs Bar business at the premises. He says that it was for this reason that the two Special Conditions “C” were crossed through. The amendment to Special Condition “D” confirmed the agreed settlement date of 4 July 2014. Mr Carruthers says that he asked Ms Jessop about the amendments to the Special Conditions, and she said to him “*We’ve got plenty of time to talk*”.

about the lease, we need the contract signed". He says that he believed the amendments to the lease cancelled the Lease Surrender Agreement.

- 24 No affidavit of Ms Jessop was filed in the proceeding and she was not called to give evidence.
- 25 Bearing in mind that the amendments to the Sale Contract were overseen by a solicitor advising Mr Carruthers and representing the interests of the Vendor, VPP, I do not accept Mr Carruthers' evidence as to the intended effect of the amendments to the Special Conditions. If the intention was to cancel the Lease Surrender Agreement, such intention could easily have been made clear by further amendments to the Sale Contract.
- 26 The Sale Contract documentation speaks for itself. It records an agreement that has meaning and business efficacy, and in my view there is no justification for importing or implying into the contract a term or meaning beyond what is expressed in the documentation.
- 27 In my view, the express terms of Sale Contract documentation:
 - (a) confirm that the premises are subject to a lease [the Dogs Bar lease] but also confirm the existence of a deed of surrender of the lease , effective as of 20 January 2014, with a copy of the deed of surrender [the Lease Surrender Agreement] included within the Sale Contract documentation;
 - (b) lists the fixtures and fittings which are included with the sale of the premises; and
 - (c) obliges VPP to procure the co-operation of Dogs Bar Pty Ltd, the tenant under the Dogs Bar lease, for the transfer of the liquor licence and all other intellectual property such as website, Twitter and Facebook necessary for the operation of the "Dogs Bar" business to the purchaser's designated entity.
- 28 In my view the Sale Contract provides that, upon settlement, the Respondent would obtain ownership of the premises, together with the fixtures and fittings as listed in the schedule in the Sale Contract, free of any lease obligations. The Respondent was also entitled to seek the transfer to it, or its designated entity, of the liquor licence and intellectual property in respect of the Dogs Bar business conducted at the premises, and VPP warranted that, in this regard, it would procure the co-operation of the holder of the liquor licence and the intellectual property. That VPP could meet such warranty was apparent, given that Mr Carruthers wholly controlled both VPP and the corporate entity that held the liquor licence and intellectual property and conducted the Dogs Bar business at the premises.

HOW THE APPLICANT BECAME THE “TENANT” AT THE PREMISES

- 29 How the Applicant came to be the current “tenant” at the premises is explained in Mr Carruthers’ affidavits filed in this proceeding.
- 30 Company search extracts of the Applicant show that Mr Carruthers became the sole director, secretary and shareholder of the Applicant on 29 November 2013.
- 31 On 2 December 2013 Mr Carruthers, in his capacity as sole director of VPP, Dogs Bar Pty Ltd and the Applicant, executed a number of documents:
- (a) a deed of agreement between Dogs Bar Pty Ltd and VPP, pursuant to which Dogs Bar Pty Ltd and VPP agreed to cancel the Lease Surrender Agreement and renew the Dogs Bar Lease for a further term of 5 years commencing on 11 September 2011;
 - (b) a transfer of the Dogs Bar Lease, effective 2 December 2013, to the Applicant (then known as Zarcon Pty Ltd) as the new tenant; and
 - (c) a sale of business contract whereby Dogs Bar Pty Ltd sold its “Dogs Bar” business, conducted at the premises, to the Applicant for \$40,000. The assets sold included a liquor licence and fixtures and fittings as set out in an attached schedule. The schedule lists the same fixtures and fittings as listed in the schedule of fixtures and fittings in the Sale Contract between VPP and the Respondent entered 4 July 2014. Although the contract is not dated, Mr Carruthers confirmed in evidence that it was signed on about 2 December 2013. The contract notes a settlement date of 2 December 2013.
- 32 Four days later, on 6 December 2013, Dogs Bar Pty Ltd was placed into liquidation by creditors voluntary winding up. A *Report as to Affairs* of the company, signed by Mr Carruthers on 19 December 2013, lists approximately 46 unsecured creditors (not including Mrs Carruthers) owed a total sum of \$591,284. Mrs Carruthers, alone, is listed as an unsecured creditor for a sum of \$625,000.
- 33 In an email to the Respondent’s lawyers dated 1 May 2014, the Liquidator advises that “*I do not have a transfer of lease between Dogs Bar Pty Ltd and St Kilda Arts & Events Company (Vic) Pty Ltd...*”.
- 34 It was not until 9 July 2014, the day *after* the settlement of the Sale Contract, that the Applicant, through its lawyers, forwarded to the Respondent copies of the abovementioned deed of agreement and transfer of lease. It was during the course of this proceeding that the Respondent obtained a copy of the abovementioned sale of business contract as between Dogs Bar Pty Ltd and the Applicant, the document having been produced by the Liquidator of Dogs Bar Pty Ltd in answer to a summons

to produce documents issued by the Tribunal at the request of the Respondent.

- 35 A further document obtained by the Respondent from the Liquidator of Dogs Bar Pty Ltd is an undated “*SALE OF PLANT AND EQUIPMENT*” agreement between Dogs Bar Pty Ltd and VPP, executed by Mr Carruthers in his capacity as director of each entity. Under this agreement, Dogs Bar Pty Ltd purports to sell to VPP the fixtures and fittings listed in a schedule attached to the agreement for a sum of \$9540, payable by way of three instalments. The instalment payments are noted as due and payable by 2 December 2013, 6 January 2014 and 3 February 2014. The schedule of fixtures and fittings lists the same fixtures and fittings as those listed in the abovementioned sale of business contract between Dogs Bar Pty Ltd and the Applicant, and those listed in the schedule in the Sale Contract. It appears that Mr Carruthers produces documents at will, depending on the need sought to be met at any given time, as to the ownership of the fixtures and fittings used in the running of the Dogs Bar business.

INJUNCTION

- 36 In any application for interlocutory injunctive relief, the Tribunal must be satisfied, first that there is a serious question to be tried as to the applicant’s entitlement to relief, and second that the balance of convenience favours granting the injunction sought. The two requirements are not separate and independent of each other, but should be examined together. Consideration as to the likelihood of the Applicant succeeding at trial is a necessary part of deciding whether there is a serious question to be tried and a factor in the evaluation of the balance of convenience.¹
- 37 The fundamental issue in dispute between the parties is whether the Applicant is entitled to occupation and use of the premises as a tenant pursuant to the purported transfer of the Dogs Bar Lease on or about 2 December 2013.
- 38 The Applicant points to the lease transfer document and says that there is a lease under which it holds entitlements as lessee.
- 39 The transfer of lease document is undated and it is significant, in my view, that the liquidator of Dogs Bar Pty Ltd has indicated, in correspondence to the Respondent’s lawyers, that he holds no such document. Assuming that the Applicant can prove that the document was executed prior to the liquidation of Dogs Bar Pty Ltd, there remains the issue as to whether, in all the circumstances surrounding the creation of the document, the Applicant is entitled to rely on the document in asserting its rights as “tenant” of the premises.

¹ *Bradto Pty Ltd v State of Victoria; Tymbrook Pty Ltd v State of Victoria* [2006] VSCA (21 April 2006) at [39]

- 40 The transfer of lease is one of several documents created and executed by Mr Carruthers, in his capacity as owner and controller of VPP, DogsBar Pty Ltd and the Applicant, aimed at reviving the Dogs Bar Lease and renewing it for a further term, and then transferring the lease to the Applicant together with a transfer of the Dogs Bar business and the fixtures and fittings used to conduct that business.
- 41 Having regard to the nature and effect of the Sale Contract as discussed above, I am of the view that the conduct of Mr Carruthers in relation to the creation and execution of such documents, and by extension the conduct of the corporate entities he controls including the Applicant, may well amount to conduct that is “unconscionable” at law. In my view, the Applicant will be unable to rely upon the transfer of lease document, to establish its position and entitlements as lessee of the premises, if it is found that the document is the product of unconscionable conduct. This is a serious issue which will, if litigated further, be the subject of further evidence and submissions.
- 42 On the evidence before me, I consider it unlikely that the Applicant will succeed on the fundamental issue, namely its alleged entitlement to occupy and use the premises as lessee pursuant to a transfer of lease. In my view, the greatest risk of injustice lies in depriving the Respondent the opportunity to use the premises as it sees fit and requiring it to maintain a commercial relationship with a party whose conduct bears the shadow of unconscionability. For these reasons, I find that the balance of convenience weighs in favour of refusing the injunction sought.
- 43 **CONCLUSION**
- I will order that the interim injunction granted on 23 July 2014, and extended by the order made 25 August 2014, be dissolved. I will also order that the Applicant’s application be dismissed. I will reserve costs and draw the parties’ attention to section 92 of the *Retail Leases Act* 2003.

SENIOR MEMBER M. FARRELLY