VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP332/2016

CATCHWORDS

Australian Consumer Law and Fair Trading Act 2012 – Part 4.2 – order for sale of uncollected goods – s.55 – 'relevant charge" must arise under the terms of the bailment – goods in the possession of the landlord following re-entry – Landlord a gratuitous bailee – money owed to the Landlord with respect to the tenancy not arising under the terms of the bailment - no right of Landlord to refuse to permit the Tenant to collect his goods on account of moneys alleged to be owed under the lease - claim for mesne profits - presence of tenant's goods in the premises not the action of the tenant - no trespass to found claim

APPLICANT	Steinman & Associates Pty Ltd
RESPONDENT	Darren Brandon
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	8 April and 2 May 2016
DATE OF ORDER	4 May 2016
CITATION	Steinman & Associates Pty Ltd v Brandon (Building and Property) [2016] VCAT 706

Orders

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

SENIOR MEMBER R. WALKER

APPEARANCES*:*

For the Applicant	Mr K Steinman, Director and Mr G. Steinman
For the Respondent	In person

REASONS FOR DECISION

Background

1. The Applicant ("the Landlord") is the owner of a factory in Bayswater ("the Factory"). By a renewal of lease dated 25 October 2007 ("the Lease") the Landlord leased the Factory to the respondent ("the Tenant").

2. The Lease expired on 31 October 2009 and thereafter the Tenant continued as a monthly tenant of the Factory pursuant to the terms of the Lease.

3. The Tenant is a mechanic by training and formerly carried on a business repairing motor vehicles. Some time before the Lease was entered into he suffered acquired brain injury as a result of a motor accident which prevented him from working. He then moved his motor vehicles and tools into the Factory, which was smaller and cheaper than the premises that he had previously occupied. His intention was to recommence his business whenever his health permitted him to do so but that has not occurred. It appears that for the whole of the period of his occupancy of the Factory he has not carried out any activity in it apart from using it to store his motor vehicles, tools and other belongings. He paid rental up to and including the month of August 2015 although according to the director of the Landlord, Mr Steinman, payments were irregular.

4. On 2 November 2015, Mr Steinman wrote to the Tenant complaining of arrears of rent and informing him that the Landlord was going to give him a "notice to quit". He said that he requested the Tenant to remove his belongings from the Factory by 9 November 2015.

Re-entry

5. On 2 December 2015 the rental was still substantially in arrears and the Landlord re-entered the Factory and changed the locks. At the time of re-entry there were a number of motor vehicles within the Factory as well as a quantity of mechanic's tools and other chattels belonging to the Tenant and to other people. Mr Steinman, informed the Tenant that he would retain possession of these items until such time as the arrears of rental and other monies which the Landlord claimed pursuant to the Lease were paid.

6. Mr Steinman said that, in the course of discussions that he then had with the Tenant, he suggested that the Tenant authorise him to sell the cars in the Factory and retain from the proceeds of sale the amount that the Landlord claimed was owed and then pay the balance to the Tenant. Mr Steinman said that the Tenant agreed to this course of action and that he sent a document to the Tenant for him to sign conferring authority upon the Landlord to sell the goods. The Tenant denies that any such agreement was reached although he acknowledges that such a document was sent to him for signature which he refused to sign.

7. To support his evidence Mr Steinman produced a text message on his mobile telephone from the Tenant in which the Tenant complains that documents did not arrive at the time that had been suggested but the message does not confirm

any agreement in the terms Mr Steinman asserted. On this state of the evidence and in the absence of the signed authority that the Landlord was seeking I am not satisfied that it is proven that there was any agreement in the terms alleged.

8. On 16 January 2016 a further $5,000 was paid to the Landlord by the Tenant's mother. In response Mr Steinman sent a letter to the Tenant in the following terms:

> "I have received $5000 as part of your outstanding A/C, however you have not sent back the signed agreement as requested and furthermore you have not paid the $2700 which your mother said was owed to you by the owner of the golf, you now tell me that you have not spoken to the alleged owner for about 10 years.
>
> This would suggest that the $2700 will not be forth coming any time soon, if ever!
>
> It would appear that your mother has broken the verbal agreement which I confirmed in to her in the written agreement I forwarded to her last Wednesday and confirmed delivered the following day by Australia Post. It has not been returned as requested.
>
> **<u>You now have two choices</u>:**
>
> **1. To pay the outstanding amount owing which now includes a further one months' rent and additional costs before you have access to the Factory.**
>
> **Or**
>
> **2. To give me security in the form of either the Landcruiser or the BMW (inside – provided you can provide proof of ownership). The vehicle would be returned to you once all outstanding monies are paid. This will allow you access to recover all other goods in the Factory for sale.**
>
> The second option gives you access to the Factory to allow you to raise the outstanding money, I cannot be any fairer.
>
> If you fail to carry out either one of these choices I will have no other option than to proceed with the sale of everything in the Factory immediately after the 31st January which was the date agreed to.
>
> **THERE WILL BE NO FURTHER NEGOTIATION IN THIS MATTER.**" (sic.)

9. Following the sending of this letter there was a telephone conversation between Mr Steinman and the Tenant in which the Tenant sought access to remove his belongings. Mr Steinman informed the Tenant that he was retaining the cars as security and that he would be removing one of the cars from the Factory and storing it. In a letter that he wrote to the Tenant on 7 March 2016, Mr Steinman described the conversation as follows:

> "During that conversation I informed you that I was going to remove one of the cars off site for security until you finalised his account, you asked me which car I was taking, I replied the BMW, you said "not that one". I removed the Toyota instead. At no time did you object to this proposal."(sic.)

10. It is not suggested that the Tenant agreed to the removal of the Toyota. It is simply said that he did not object during this conversation. The Tenant denies

that he agreed to allow the removal of any of the motor vehicles and I am not satisfied that there was any such agreement. It appears that Mr Steinman simply told the Tenant what he proposed to do.

11. The Landlord then removed the Toyota from the Factory and put it into storage. In the course of removing it the Landlord incurred some expense in labour and in rendering the hoist in the Factory operable. It appears that it has since sent monthly accounts to the Tenant for the storage charges of the Toyota although none of these have been paid.

12. By Clause 3(d) of the Lease, upon re-entry the Landlord would have been entitled to remove property of the Tenant from the Factory and store it at the risk and expense of the Tenant but, in the context in which that clause appears, its purpose was to enable the Landlord to obtain vacant possession of the demised premises. What the Landlord has expressly done here is remove the Toyota for the purpose of holding it as security for the monies that it claimed. That was not authorised by the Lease.

13. By a letter dated 28 January 2016 Mr Steinman informed the Tenant that he (the Tenant) had access to the Factory for the month of February only. The letter continued:

> "**YOU MUST REALISE THAT I LEGALLY HAVE FULL CONTROL OVER THE FACTORY. IT HAS BEEN RE-POSSESSED BY STEINMAN & ASSOCIATES PTY LTD. YOU ARE NOT TO CHANGE LOCKS OR PREVENT MY ACCESS IN ANY WAY IF REQD**.
> I have removed the Toyota FJ 45 to an off-site storage as discussed with you for security until you finalise your account. This allows you to remove all items in the Factory and sell yourself to obtain the best price in order to pay your debt. The Toyota will be returned to you once your outstanding account is settled.
>
> A statement and invoices for the removal costs will be forwarded to you later this week.
>
> Please ensure that the Ford truck and BMW also are removed during this period.
>
> Should you not comply with the conditions of your access, all goods will be either sold or taken to the rubbish tip, all at your expense if necessary we will continue with court action which has been placed on hold will enable you to settle the matter amicably.
>
> The auctioneer has already viewed the contents and is waiting for further instructions from me."

14. Notwithstanding this granting of access the Tenant did not remove his belongings from the Factory. In a letter dated 7 March 2016 the Landlord extended the access for the month of March and demanded payment of a total of $8,447.53 which was said to be the amount that was then owed for rental to and including the month of March and all the other monies including the arrears of rental at the time of re-entry. The Tenant still did not remove his belongings from the Factory.

This proceeding

15. On 23 March 2016 the Landlord commenced these proceedings seeking an order for the disposal and sale of the goods in the Factory which it contended had been abandoned.

16. The matter came before me for hearing on 8 April 2016 with two hours allocated. Mr Steinman appeared on behalf of the Landlord and the Tenant appeared with his mother who is also his carer. During the course of this hearing it was apparent that the Tenant wished to remove his belongings from the Factory. I therefore adjourned the hearing until 9 AM on 2 May 2016 in order to allow the Tenant time to do that.

17. When the matter came on for hearing on 2 May I was informed that a large proportion of the goods had been removed in the intervening period but that there were still some cars and other things in the Factory. The Tenant and his mother asked for an extension of several more days in order to enable them to remove the remaining items.

18. Mr Steinman objected that the Tenant had had sufficient opportunity to remove any items and that he was concerned that the Tenant would remove everything of value and leave him to deal with the rubbish. In the course of his evidence he sought an order that he be permitted to retain the cars. He also asserted a right to be paid all of the monies that the Landlord claimed from the proceeds of sale of the cars and other goods remaining in the Factory and said that, if those remaining goods were removed there would be nothing for him to sell in order to obtain payment of what the Tenant owed to the Landlord.

19. I pointed out to Mr Steinman that the remedy of levy and distress for rent had been abolished and that it appeared to me that he was not entitled to seize and sell the Tenant's belongings. (For an interesting description of the history of the old Common Law remedy and the effects of its abolition, see *Asian Pacific building Corporation Pty Ltd v. Sharon Lee Holdings Pty Ltd* [2013] VSC 11).

20. Mr Steinman argued that, under the provisions of Part 4.2 of the Act the Landlord was entitled to be paid from the proceeds of sale of the goods that are still in the Factory. Since only one hour had been set aside to deal with the matter it was not possible for me to consider the Landlord's contention and determine this claimed entitlement in the very limited time that was available. I therefore informed the parties that I would examine the legislation further and considered the submissions Mr Steinman had made and the evidence that had been given and deliver a short written decision within the next couple of days. Having now considered the matter I find that the position is as I had understood it to be.

The statutory scheme

21. The scheme set out in Part 4.2 of the Act applies to goods to the possession of goods under a bailment (s.56). It is intended to facilitate the disposal of what are termed "uncollected goods". That term is defined in s.54 in the following terms:

> "(1) Goods under bailment are uncollected goods if—
>
> (a) the goods are ready for delivery to the provider in accordance with the terms of the bailment, but the provider has not taken delivery of the goods and has not given directions as to their delivery; or
>
> (b) the receiver is required to give notice to the provider when the goods are ready for delivery but cannot locate or communicate with the provider; or
>
> (c) the receiver can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the provider but cannot locate or communicate with the provider; or
>
> (d) the provider has not paid the relevant charge payable to the receiver in relation to the goods within a reasonable time after being informed by the receiver that the goods are ready for delivery.
>
> (2) Goods are not uncollected goods for the purposes of subsection (1)(a) if the provider's failure to take delivery arises from—
>
> (a) the receiver refusing to make delivery; or
>
> (b) the receiver preventing the provider from taking delivery."

22. The term "receiver", means the person who takes possession of goods under a bailment and "provider", means the person who gives possession of goods under a bailment. In each case, possession must be given and taken under a bailment, which can be for reward, in the course of business, gratuitous and involuntary or a sub-bailment (s.3(1)). The definition of bailment is an inclusive one and does not alter the Common Law meaning of the term.

Bailment

23. The Act provides in s.57 that the common law relating to the bailment of goods remains in force to the extent to which it is not affected by Part 4.2 and a person is entitled to exercise any rights that the person may have at common law in relation to the recovery of goods or compensation for the loss of or damage to goods except to the extent to which that Part otherwise provides.

24. A Landlord who takes possession of premises containing the Tenant's goods has been described as a gratuitous bailee of those good (see *Curtin v. Medlow Holdings Pty Ltd* [2001] Q Conv R para 54-552).

Are these uncollected goods?

25. For the goods which are the subject of this proceeding to be uncollected goods, within the meaning of the Act, the only part of the definition set out in s.54(1) that could be relevant is s.54(1)(d). It is clear that the Landlord is preventing the Tenant from taking delivery of his goods and so it is necessary for the Landlord

to establish that the reason for that is that the Tenant has not paid the "relevant charge" to it in relation to the goods.

26. By s.55, the term "relevant charge" is defined as follows:

> "(1) The relevant charge is the amount payable by the provider to the receiver for goods under bailment and payment of which entitles the provider to take delivery of the goods.
>
> (2) Unless determined otherwise by a court order, the amount payable to the receiver is the sum of the following—
>
> (a) for any carriage or storage of the goods or for any repairs, cleaning, treatment or other work done in connection with the goods—
>
> (i) the amount agreed to by the provider and receiver as the charge payable to the receiver; or
>
> (ii) in the absence of an agreement, an amount that is reasonable;
>
> (b) the amount of costs for any storage, maintenance or insurance of the goods incurred by the receiver from—
>
> (i) the giving of a notice under Division 2 of the receiver's intention to dispose of the goods until the disposal of the goods; or
>
> (ii) the making of an application for a court order under Division 3 until the disposal of the goods."

27. By subsection (1), the charge must be an amount payable by the provider to the receiver for goods under bailment. The bailment in this case being gratuitous, there is no agreement by which the Landlord is to receive any payment with respect to the bailment of the goods.

28. Moreover, since there was no contract for the carriage or storage of the goods or for any repairs, cleaning treatment or other work to be done in connection with the goods there is no payment due to the Landlord with respect to any of those matters. The only contractual agreement between the parties was the Lease of the Factory. There was no contract entered into between them with respect to any of these goods and no money falling due to the Landlord from the Tenant under the terms of any bailment respect to the goods.

29. As a consequence there is no "relevant charge" to be paid by the Tenant to the Landlord in relation to the goods within the meaning of s.54(1)(d). Accordingly, by s.54(2) these goods are not uncollected goods within the meaning of the Act and so the application for an order for the sale of the goods must be dismissed.

The Landlord's monetary claims

30. The Landlord also seeks an order for the payment to it by the Tenant of the arrears of rent, outgoings and other monies owed.

31. On 8 April, I directed the Landlord to file a list of the amounts that it claimed. The various amounts set out in the documents that were filed, put into categories, are as follows:

Rental from 1 December 2015 to 1 May 2016:	$4,710.00
Outgoings from 1 December 2015 to 1 May 2016	$ 1,067.00
Common area expenses	$ 40.40
Water usage	$ 53.66
Locksmith for re-entry	$ 192.50
Replacement of fire extinguisher / service of fire hose	$ 237.86
Solicitors' fees charged	$ 635.00
Further solicitors fees yet to be charged	$ 500.00
Expenses of removing and storing Toyota	$ 1,595.28
VCAT fees	$ 632.30
Further hearing fee 2 May 2016	
Personal Property Security search fees	$ 14.00
Accommodation and travelling for Mr Steinman to attend hearing on 8 April 2016	$2,206.68
Accommodation and travelling for Mr Steinman to attend hearing on 2 May 2016	$2,206.68

32. The current rate of the monthly rental was not disputed, nor was it suggested that the re-entry on 2 December 2015 was unlawful. No rate notices or other documentation to support the water usage, outgoings or common area expenses were produced. The monthly outgoings were said by Mr Steinman to be the annual outgoings divided by 12 and he said that the Factory was separately metered.

33. Missing from the list that was provided are the arrears of rental and outgoings for the months of September October and November 2015. Three months rental and outgoings and common area expenses for that period, allowed at the rate that is claimed from 1 December 2015, would amount to $3,489.36. The payment of $5,000 that was received in January 2016 will also need to be deducted from any amount found to be due.

34. The amounts claimed as rental following the re-entry are not recoverable as such because upon re-entry, the Lease and the covenant to pay rent and outgoings came to an end. These amounts can only be sought to be recovered, if at all, as mesne profits arising from the continued trespass by the Tenant following the determination of the Lease. A claim for mesne profits is a claim for damages for trespass to land and the measure of such damage is the rental value of the premises at the time. This is commonly taken to be the amount of rent the parties had agreed upon although that is not always the case.

35. The only basis upon which could be said that the Tenant remained in possession following the termination of the Lease by re-entry is the continued presence of

his belongings in the Factory. The problem with the claim is that it is clear that the Tenant did not leave his belongings in the Factory but rather, that the Landlord locked them in, asserting a right to hold them as security for the monies that it claimed to be owed.

36. After the Landlord took possession of the Toyota the Tenant was allowed access in January and February but he did not remove his belongings and it was not until May that any of them were collected. It is possible that, had the Landlord allowed the Tenant access immediately after re-entry to remove his belongings, he would not have removed them but that is speculation because the situation never arose. The Tenant's belongings have been in the Factory since the re-entry because the Landlord has kept them as security and refused to allow the Tenant to collect them. Consequently, I cannot infer from their presence in the Factory any continued trespass by the Tenant which would found a claim for mesne profits. The loss suffered by the Landlord from the inability to re-let the factory since the re-entry is of its own creation. Neither rental nor mesne profits can be allowed for that period. However the arrears of rental and outgoings period before the re-entry should be allowed.

37. In regard to the common area expenses before re-entry, Mr Steinman said that these related to maintenance and lawn mowing. The amount in each case is modest and within what one would expect and so they should be allowed. Since the lawfulness of the re-entry is not disputed the amount claimed with respect to the locksmith should also be allowed. The account for the solicitors' fees was produced and appears to relate to the re-entry. Those costs are recoverable pursuant to Covenant 1(y) of the Lease and so they should be allowed.

38. The claim with respect to the fire extinguisher replacement is not established. The ground of the claim appears to be Special Condition 3 which provides that the Tenant shall be responsible for the cost of maintenance, including refilling when required and safekeeping of fire extinguishers in the Factory and to replace them if they are lost. There is no evidence that the fire extinguisher in the Factory requires replacement or that it is lost and Mr Steinman acknowledged that the expenses claimed with respect to the fire extinguisher have not been incurred but are merely anticipated.

39. The expenses of removing and storing the Toyota do not arise under the Lease but are the result of the Landlord attempting to obtain some security for the monies that it claims from the Tenant by seizing part of the Tenant's property without any lawful justification. There is no basis for claiming any of these expenses from the Tenant.

40. There should be allowed to the Landlord the rental and outgoings up to the date of termination, which are $3,489.36, the locksmith's charge of $192.50 and the solicitors' fees of $635.

Legal costs and costs of the proceeding

41. The further solicitors' fees of $500 that are claimed have not yet been charged to the Landlord by the solicitors. It appears that Mr Steinman has been told by his

solicitors that there will be a further bill rendered in approximately that sum. It is unclear what this will be for, but it appears likely to be related to this proceeding.

42. The claim with respect to the VCAT fees, the search fees and the travelling and accommodation expenses incurred by Mr Steinman in coming down to Melbourne from Sydney where he lives in order to appear and give evidence in this proceeding are also expenses related to this proceeding.

43. Neither party was legally represented before the Tribunal. The Landlord has claimed these, costs as stated above, but it is unclear whether they are claimed as legal costs or as monies that are payable by the Tenant under the terms of the Lease.

44. If it is the latter it would need to fall within Covenant 1(y) of the Lease. That imposes a liability on the Tenant to pay the Landlord's solicitors' costs of and incidental to the preparation, completion and execution of the Lease and all reasonable costs and expenses which the Landlord might expend or incur in consequence of any default by the Tenant in the performance or observance of any covenant or agreement contained or implied in the Lease.

45. As stated above, I am satisfied that the first account from the solicitors falls within this covenant but the rest of the costs appear to relate to the unsuccessful claim to secure the proceeds of sale over the Tenant's belongings. It does not seem to me that that they arise as a result of any default by the Tenant in the performance or observance of any covenant or agreement contained or implied in the Lease. They were incurred at a time when the Lease was at an end and in pursuit of an application that was unsuccessful.

46. If these expenses are claimed as legal costs of this proceeding then, by s.109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998, prima face all parties appearing before this tribunal meet their own costs unless the Tribunal finds that it is fair in the circumstances that one party be ordered to pay the costs of another.

47. Since the Landlord's claims are to be dismissed and no application for costs was made by the Tenant I see no reason why the general rule established by s.109(1) should not prevail and consequently there will be no order as to the cost of these proceedings.

Conclusion

48. The claim for an order for the sale of the Tenant's belongings in the Factory fails because the goods in question are not uncollected goods. Further, since the rental and outgoings up to the date of termination, together with the locksmith's charges and the solicitors' fees are less than the amount of $5,000 paid by the Tenant in January, there are no further monies due to the Landlord.

49. The proceeding will therefore be dismissed. There will be no order as to costs.

50. There is no counterclaim by the Tenant seeking recovery of any excess amount paid, the return of his cars and other property in the Factory or for the return of the Toyota that the Landlord has in storage.

51. The only orders that I can make are with respect to the claim that is before me, which is the claim by the Landlord. Since I have found that the goods in question are not uncollected goods within the meaning of the Act I am unable to make any order as to their disposal.

52. However I find that all of these goods are the property of the Tenant and that the Landlord has no right to retain them or keep them from the Tenant. Those findings are binding on both parties.

53. If the Tenant is unable to obtain his belongings from the Landlord then he should seek legal advice. Certainly, the Landlord has no claim with respect to any of these goods and it has no right to retain them.

SENIOR MEMBER R. WALKER