VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R33/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Section 104 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether a summons for production of documents should be quashed. Whether categories of documents sought to be produced pursuant to a summons for production are relevant to any legitimate issue in the proceeding. Section 77 of the *Retail Leases Act 2003* – whether claim for unconscionable conduct invalidates a landlord's right to forfeit a lease upon breach by the tenant.

APPLICANT	Trombone Investments Pty Ltd (ACN 124 192 845)
FIRST RESPONDENT	T.B.T (Victoria) Pty Ltd (ACN 006 325 873)
SECOND RESPONDENT	Andy B Pty Ltd (ACN 132 838 487)
INTERVENOR	Bill Romanovski
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	5 February 2014
DATE OF ORDER	11 February 2015
CITATION	Trombone Investments Pty Ltd v T.B.T (Victoria) Pty Ltd (Building and Property) [2015] VCAT 289

ORDERS

1. The summons for production of documents dated 22 January 2014 and issued to Hannah Fong by the Principal Registrar at the request of the Applicant is quashed.
2. The summons for production of documents dated 22 January 2014 and issued to the First Respondent by the Principal Registrar at the request of the Applicant is quashed.
3. The summons for production of documents dated 22 January 2014 and issued to the Intervenor by the Principal Registrar at the request of the Applicant is quashed.
4. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant:	Mr J Searle of Counsel
For the First Respondent:	Mr P Best of Counsel
For the Second Respondent:	No appearance
For the Intervenor:	Mr J Griffin, solicitor

Introduction

1. This proceeding concerns a dispute between the Applicant, who is the tenant of premises located in central Melbourne (**'the Tenant'**) and the First Respondent who owns those premises (**'the Landlord'**). The proceeding comprises a number of issues which concern the validity of the Tenant's occupancy and its right to transfer its lease (if it exists) to another entity.[1]

2. In particular, on 3 February 2014, the Landlord served the Tenant with a default notice pursuant to s 146 of the *Property Law Act 1958*. It alleged that the Tenant had given up possession or had shared occupancy of the premises with another entity; namely, Andy B Pty Ltd, without the Landlord's consent. On 19 February 2014, the Landlord served the Tenant with a further notice demanding that the Tenant deliver up possession of the premises.

3. The Tenant disputes the validity of the s 146 notice and any entitlement on the part of the Landlord to re-enter the premises. Further, the Tenant has sought to transfer the lease to Andy B Pty Ltd. However, the Landlord has refused to consent to the assignment. Accordingly, the Tenant seeks a declaration that the purported termination is invalid and further declaratory relief giving effect to the transfer of the lease to Andy B Pty Ltd.

This interlocutory application

4. The current application concerns three summonses issued by the Principal Registrar at the request of the Tenant, which are contested by the Landlord and the Intervenor, who is the recipient of one of those summonses. The summonses are contested principally on the ground that the category of documents sought to be produced is too wide and irrelevant to the legitimate issues to be determined in this proceeding. It is also contended by the Landlord and Intervenor that there are deficiencies in the method of service, which provide another ground upon which the summonses should be quashed.

5. The three summonses contested by the Applicant and the Intervenor are:

   (a) a summons for production of documents issued to the Landlord dated 22 January 2015;

   (b) a summons for production of documents issued to Hannah Fong, a director of the Landlord;

   (c) a summons for production of documents issued to Bill Ramonovski, a private building surveyor who practises within the business *Checkpoint Building Surveyors*.

[1] The Landlord contests that a valid lease currently exists.

6. The category of documents sought to be produced are similar as between each of the summonses and in the case of the summons issued to the Landlord and Hannah Fong, practically identical. Generally, the categories of documents relate to the issuing of planning permits, building permits, correspondence and other documents concerning building work undertaken at the premises. That building work was the subject of building approval given by the Intervenor or the building surveying company of which he is part.

7. Both the Landlord and the Intervenor have sought an order that the summonses be quashed.

8. Mr Searle of counsel, who appeared on behalf of the Tenant, submitted that the documents sought to be produced are relevant to the issues raised by the Tenant in its *Further Amended Points of Claim* dated 12 June 2014. The relevant parts of the pleading concern an allegation that the Landlord has acted unconscionably in its dealings with the Tenant, such that it would be unconscionable for it to rely on a default notice, given pursuant to s 146 of the *Property Law Act 1958*, as grounding an entitlement to terminate the lease between it and the Tenant.

9. The allegation that the Landlord has acted unconscionably, or at least what is said to flow from it, is central to the first issue in dispute. In particular, by its *Points of Counterclaim*, the Landlord contends that it has lawfully forfeited the lease between it and the Tenant in reliance upon the s 146 notice. It argues that it is therefore entitled to re-enter the premises. Accordingly, the validity of the s 146 notice is central to the relief which it seeks.

10. The allegations of unconscionable conduct by the Landlord and the relief sought are set out in the particulars subjoined to paragraphs 15B, paragraph 15C and in the prayer for relief of the *Further Amended Points of Claim*:

> 15B. Further or alternatively in breach of s 77 of the Retail Leases Act 2003 by serving the Purported 146 notice and/or by purporting to rely upon the same to forfeit the lease (which is denied) by the Purported Notice of Re-Entry the Respondent has engaged in conduct in connection with the lease that is, in all the circumstances, unconscionable.
>
> Particulars
>
> (a) Prior to commencement of the lease, the premises had been vacant for approximately 12 years. The premises were uninhabitable.
>
> (b) The former tenant, Sobel Investments Pty Ltd, spent approximately $400,000 in improvements to the premises and in otherwise making the premises habitable.

(c) The current tenant, Trombone, has spent approximately $20,000-$30,000 on additions to, and maintaining, the fit-out.

(d) The rental paid by Trombone under the lease is substantially below market rental for the premises.

(e) There has been a long-standing history of acrimony towards Trombone by TBT.

(f) TBT has served a series of s.146 notices on Trombone, and the previous tenant, which it has either withdrawn or which the Tribunal has found were not effective to determine the lease.

(g) In or about April 2009 TBT served a s.146 notice in which it asserted that the lease commenced on 22 March 2009 and that Sobel Investments Pty Ltd had breached it by not paying outgoings, GST and rent. TBT refused to withdraw the notice. On a contested hearing Senior Member Walker declared that the notice was not effective to determine the lease and Trombone refers to and relies upon the Senior Member's findings in that regard reported in *Sobel Investments Pty Ltd v TBT (Victoria) Pty Ltd* [2009] VCAT 1703.

(gb) The Respondent is and was aware on the date it served the Purported s.146 Notice and the Purported Notice of Re-Entry, as is recorded in the reasons for decision of Senior Member Walker in *Sobel Investments Pty Ltd v TBT (Victoria) Pty Ltd & Anor (Retail Tenancies)* [2009] VCAT 1703, that:

"The proposed use of the premises by the Applicant [Sobel] was as a Japanese bathhouse and massage salon to be operated by Mr Borazio's daughter who has some qualification in Japanese massage. The premises were also to incorporate a flat to house a manager."

(h) On or about 17 August 2010, TBT, through its then solicitors, Freehills served another s.146 [notice] in which it asserted that Sobel Investments Pty Ltd had breached the lease by performing works at the premises for which there was no building permit.

(i) In proceeding R301/2011 Member P Eggleston refused TBT access to the premises for inspection of the flooring structure and in his reasons recorded that "11. On the material before the Tribunal I accept that the water pipe in the building is an ongoing issue".

(j) On or about 5 March 2014, TBT served another purported s.146 notice in which it asserted that Trombone had not paid rent and/or outgoings. In fact, the account number provided by TBT for payment was incorrect. TBT refused

to withdraw the notice despite its own error being pointed out to it. The notice had been served despite the fact that Trombone had always up to that time and since met its obligations to pay rent and outgoings.

(k) TBT commenced proceeding R112/2013 in relation to alleged water leaks from the premises. It has continued to prosecute that proceeding, and to serve a purported s.146 notice dated 1 April 2014 (referred to in paragraph 32 below as the purported April Notice) on Trombone which required works to be undertaken within 14 days. At the time those works were the subject of orders made by Senior Member Reigler [sic] requiring them to be carried out in 45 days. Further, TBT did so, despite the fact that at that time, a special referee, Mr Tony Croucher, was only able to detect leaking after aggressive testing was conducted, and despite the fact that TBT itself has failed and/or refused to make the building watertight, contrary to its obligation under the lease.

(l) TBT has not treated the tenants in the building of which the premises formed part equally. Whilst it has purported to protect the rights of the tenant immediately below (Mr Big Stuff and formally Seniorittas) [sic] and Sam Telmo, TBT has failed to protect Trombone from risks associated with Mr Big Stuff's and/or San Telmo's failure to install the appropriate mechanical ventilation in accordance with AS 1668.2 and the cooking odours emanating from Mr Big Stuff's premises and nuisance caused thereby. The failure to install the appropriate mechanical ventilation in accordance with AS 1668.2 has jeopardised the insurance policies required under the lease, the insurance premiums of which have been paid and/or contributed to by Trombone on the assumption that the insurance policies were and would remain valid and enforceable.

(m) Andy B and Trombone have a common director and shareholder, Andrea Borazio. In its request to transfer its leases to Andy B, Trombone was willing to remain liable for the rental and other obligations of the assignee.

(n) By proceedings and its issuing and/or reliance upon multiple s.146 notices, TBT has embarked on an unfair pressure campaign against Trombone for the purpose of bringing Trombone's lease to an end and obtaining substantially higher market rental for the premises.

15C. Further or alternatively in breach of section 21(1) and/or 22 of the Australian Consumer Law by serving the purported s.146 notice and/or by purporting to rely upon the same to forfeit the lease (which is denied) by the Purported Notice of Re-Entry the Respondent has engaged in conduct in connection with the lease

and the supply possible supply of services (namely an interest in land pursuant to the lease) to another person, namely the Applicant, that is in all the circumstances unconscionable.

Particulars

The Applicant refers to and repeats the particulars to paragraph 15B hereof.

…

AND THE APPLICANT CLAIMS:

…

E. Such further or other orders, declarations, injunctions and/or other relief as the Tribunal deemed appropriate, including such further or other declarations, injunctions and/or other relief as the Tribunal thinks fit pursuant to the Retail Leases Act 2003 further or alternatively the Australian Consumer Law

Are the documents sought to be produced relevant?

11. As I indicated during the hearing on 5 February 2015, the question whether the documents are relevant raises a threshold question; namely whether at law, the s 146 notice served on 3 February 2014 can be impugned and rendered void by reason only of a finding that the Landlord had acted unconscionably, in a general sense, in its dealings with the Tenant up to that point. Put at its highest, Mr Searle submitted that the Landlord had embarked on a campaign to oust the Tenant and that this campaign was motivated by reasons other than any breach of the lease.

12. Mr Best of counsel, who appeared on behalf of the Landlord and Mr Griffin, solicitor, who appeared on behalf of the Intervenor, argued that the validity of the s 146 notice stands on its own. They submitted that whether there is unconscionable conduct which predates its issuance is irrelevant. They argued that one only looks at the breaches alleged within the s 146 notice and if they are not proved, the notice fails. On the other hand, if the allegations of breach set out in the s 146 notice are proved, then the reverse holds true.

13. I do not accept, as a general proposition, that conduct which predates the issuing of a s 146 notice cannot be relevant to the validity of the notice. There may be examples where a party's conduct gives rise to an estoppel or where the actions of a landlord have caused or materially contributed to a tenant's breach. Such conduct may be relevant to the validity of a s 146 notice relied upon and cannot be ignored.

14. In the present case, the acts or omissions alleged against the Landlord do not directly touch upon the allegations of breach contained in the s 146 notice. Those allegations of breach are set out in the s 146 notice as follows:

> NOW TAKE NOTICE that Trombone has committed the following breaches of the Lease and engaged in the following repudiatory conduct.
>
> > In breach of Clause 4.7 of the Lease Trombone has given up possession or has shared occupancy of the Premises with Andy B Pty Ltd without TBT's consent.

15. In fact, the alleged unconscionable conduct on the part of the Landlord is said to go back as far as 2008, being a date that predates the current Tenant's occupation of the premises. In that respect, the transfer of lease as between the Tenant and Landlord occurred on 4 September 2012, after it was assigned from the former tenant, Sobel Investments Pty Ltd (**'Sobel'**). The current Tenant and Sobel share a common director. Further, Mr Searle indicated that both Sobel and the Tenant are trustees for the same beneficiary. He submitted that in those circumstances, there was a common connection between the former and current tenants, such that the acts visited upon the former tenant can be taken into account in assessing the Landlord's conduct vis-a-vis the current Tenant.

16. I reject that submission. If the connection between the former tenant and the current Tenant was so interwoven, there would have been no need to transfer the leasehold interest held by one to the other. Both companies are separate legal entities. I am not persuaded that the matters raised by the Tenant concerning the relationship between the former tenant and the Landlord are materially relevant to the relationship between the Landlord and the current Tenant.

17. In my view, the allegations of unconscionable conduct on the part of the Landlord are too remote to affect the validity of the s 146 notice. This is not a situation where the allegations of breach have any direct connection to the alleged unconscionable conduct, such that it could be said that it would be unconscionable for the Landlord to rely upon the s 146 notice. Even if it were proved that the Landlord had engineered a campaign to oust the Tenant, that alone would not deprive the Landlord of being able to rely upon its rights under the Lease upon there being a breach by the Tenant, unless it could be shown that the Landlord's conduct in some way, either directly or indirectly, caused the breach.

18. I reject the submission that a finding of unconscionable conduct on the part of the Landlord, without any connection to the breach itself, invalidates or impugns the s 146 notice. More needs to be shown in order to establish the nexus between the unconscionable conduct and the breach. The substantial allegations set out in paragraph 15B and 15C of the *Further Amended Points of Claim* and the particulars subjoined to those paragraphs do not establish that nexus. In my view, the matters set forth in paragraph 15B of the *Further Amended Points of Claim* and the particulars subjoined to that paragraph are largely irrelevant to the legitimate issues for determination.

19. In forming that view, I am mindful that the relevance of the pleading was the subject of a strike-out application heard by me on 6 June 2014. Ultimately, I refused to strike out the pleading, even though I had misgivings as to whether the matters set out in paragraph 15B of the pleading were relevant to the issues in dispute. Ultimately, I held that the pleading should be allowed to stand on the proviso that argument as to its relevance could be re-agitated at the commencement of the hearing, once witness statements had been prepared and exchanged.

20. Witness statements have now been filed and exchanged. They touch upon the allegations of unconscionable conduct and the matters raised by paragraph 15 of the pleading. However, determining the relevance of the matters contained in the witness statements has not yet been the subject of adjudication by the Tribunal. As I indicated above, any contest as to the relevance of such evidence was to have been considered at the commencement of the hearing. However, the current application to quash the three summonses has made it necessary to determine the issue prior to trial.

21. Having read the principal witness statement filed on behalf of the Tenant, I note that a significant portion of the evidence relating to matters raised by paragraph 15 of the pleading, concern events which occurred prior to the transfer of the lease. In particular, disputes and litigation as between Sobel and the Landlord. As I have already indicated, I am not persuaded that those matters are materially relevant to the relationship between the Tenant and the Landlord, and the issues raised in this proceeding.

22. Of significance are allegations relating to the issuing of a building permit by the Intervenor or the building surveying company which employed him. In the affidavit of Jermone Borazio sworn on 19 December 2014 (which constitutes his witness statement), he contends that a building permit originally issued by the Intervenor for fit-out works undertaken by Sobel was fraudulently altered, with the effect that a part of the fit-out works were no longer covered by the original building permit. As a result, the municipal building surveyor, Melbourne City Council, issued a Building Notice in August 2010, which then led to the Landlord issuing a s 146 notice, alleging that Sobel had undertaken building work without building approval. Ultimately, the issue was resolved. Nevertheless, it is one example raised in Mr Borazio's affidavit of conduct which the Tenant contends constitutes unconscionable conduct by the Landlord. It is that issue which lies at the heart of the contention that documents held by the Intervenor and others, which relate to the building approval process, are relevant to the issues in dispute.

23. As I have already indicated, I do not regard the matters which occurred prior to the assignment of the lease as being relevant to the issues in dispute as between the Landlord and the Tenant in this proceeding. In my view, a line must be drawn between what occurred during Sobel's

occupancy of the premises and what has occurred during the Tenant's occupancy of the premises. By analogy, if the allegations concerning the building permit were the subject of a damages claim, that claim would need to be prosecuted by Sobel. The Tenant would have no standing because it is a separate legal entity.

24. My observations must be considered in light of the issues to be determined in the current proceeding: the validity of the s 146 notice served on the Tenant on 3 February 2014 and whether there should be a transfer of the lease from the Tenant to Andy B Pty Ltd. In paragraphs 16 - 20 of the Tenant's *Further Amended Points of Claim* dated 12 June 2014, the Tenant sets out the relief it seeks:

> 16. By reason of one or more of the matters referred to in paragraphs 7 to 15C hereof, the Applicant is entitled to:
>
> (a) a declaration that the Purported 146 Notice is ineffective, void and/or invalid;
>
> (b) a declaration that the Purported 146 Notice Of Re-Entry is ineffective, void and/or invalid;
>
> (c) a declaration that the Lease has not been forfeited, rescinded and/or terminated by the Respondent;
>
> (d) a declaration that the Applicant is and is entitled to be in possession of the premises; and
>
> (e) a permanent injunction restraining the Respondent from determining the lease and taking possession of the premises pursuant to the Purported Notice of Re-Entry and/or at law.
>
> 17. Further or alternatively if (which is denied), the Applicant breached clause 4.7 of the lease and/or engaged in repudiatory conduct referred to in the Purported s.146 Notice, then the Applicant says that any such breaches or repudiatory conduct have now been remedied.
>
> 18. By reason of the matters referred to in paragraph 17 hereof, or in any event, the Applicant says it is entitled to relief against forfeiture.
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> 19. Pursuant to the provisions of the Act and clause 4 of the lease, the Applicant has requested the Respondent to consent to a transfer of lease to Andy B Pty Ltd ("Andy B") and has complied with its obligations under clause 4.3 of the lease in that respect.
>
> …
>
> 20. In breach of the provisions of the lease and contrary to the provisions of the Act, the Respondent has failed and/or refused to consent to the transfer of the lease.

25. From the Tenant's perspective the only two issues are the validity of its tenure and the Landlord's refusal to consent to the transfer of the lease to Andy B Pty Ltd. From the Landlord's perspective, it alleges that the

Tenant has unlawfully shared occupation and allowed Andy Pty Ltd to trade from the premises in contravention of the lease covenants. That is the basis of the s 146 notice served on the Tenant. The Landlord seeks an order that the Tenant and/or Andy B Pty Ltd vacate and deliver up possession of the premises (in addition to damages by way of mesne profits).

26. In my view, the issues for determination are narrow and do not encompass the wide spectrum of conduct alleged by the Tenant and particularised in the paragraphs subjoined to paragraph 15B of the pleading.

Conclusion

27. I do not accept that in this particular case the conduct on the part of the Landlord, which may or may not constitute unconscionable conduct, is relevant in determining the validity of the s 146 notice or whether the Landlord should give consent to the transfer of the lease to Andy B Pty Ltd. As I have already commented, that conduct, insofar as it relates to the relationship between the Tenant and the Landlord, is far too remote for it to be arguable that there is a nexus between the conduct and the breach alleged in the s 146 notice. Accordingly, I am of the view that the validity of the s 146 notice must be determined by reference to the allegations of breach referred to in it. The allegations of unconscionable conduct, insofar as they relate to the relationship between the Tenant and the Landlord, may be relevant in a claim in damages. However, that is not what is being prosecuted by the Tenant in this proceeding.[2]

28. Accordingly, I find that the subject-matter of the three summonses is irrelevant to any issue that may legitimately arise at the hearing of this proceeding. Therefore, I will order that those three summonses be set aside.[3]

SENIOR MEMBER E RIEGLER

[2] See further *Guastalegname v One Ten Enterprises Pty Ltd* [2010] VCAT 800.
[3] *Purnell Bros Pty Ltd v Transport Engineers Pty Ltd* (1984) 73 FLR 160 at 175.