

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. R4/2014

**CATCHWORDS**

Electricity charges; no separate meter, whether charges to premises or an outgoing; appropriate proportion under the lease.

<b>APPLICANT</b>	Tymstock Pty Ltd
<b>RESPONDENT</b>	APACE- RENT- A-CAR PTY LTD (ACN 116 493 246)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member L. Rowland
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	13 May 2014
<b>DATE OF FINAL SUBMISSIONS</b>	5 June 2014
<b>DATE OF WRITTEN REASONS</b>	25 July 2014
<b>CITATION</b>	Tymstock Pty Ltd v Apace-Rent-A-Car Pty Ltd (Building and Property) [2014] VCAT 929

**ORDERS**

**The Tribunal orders and directs:**

1. Unless the parties file minutes of consent orders to give effect to the attached reasons within 21 days of this order, both applications shall be marked dismissed. The parties have liberty to apply to Member Rowland in relation to final orders.
2. Costs reserved. Any application for costs must be made within 30 days of this order. The party applying for costs must pay any applicable hearing fee. The parties are directed to the provisions of Section 92 of the *Retail Leases Act 2003*.

**MEMBER L. ROWLAND**

**APPEARANCES:**

For the Applicant

Mr Loxley of counsel

For the Respondent

Mr Ravech of counsel

## REASONS

- 1 The applicant, Tymstock Pty Ltd (“Tymstock”) is the landlord of a three storey building in North Melbourne. The respondent, Apace Rent A Car Pty Ltd trading as Advance Rentals (“Advance”) is a retail tenant of part of the ground floor of the building (“the premises”). Advance conducts a car hire business. The building has one electricity meter through which, electricity is supplied to the entire building. The dispute concerns the calculation of the electricity charges owing by Advance under the lease.

### Background

- 2 The building comprises four levels. Tymstock became landlord and owner of the building on 21 July 2008 when it purchased the building. At that time, Advance was the only tenant and occupier of the building. The previous owner and landlord struggled to let the building. As an incentive, the previous landlord let the premises to Advance for one year commencing on 1 December 2005 with no outgoings payable for the first term. The lease was renewed for 3 years with outgoings to be paid by Advance.
- 3 From 21 July 2008 Tymstock charged Advance 30% of the total electricity charges to the building. Advance paid the 30% without dispute. It says it was not provided with a copy of the electricity invoices. Advance alleged that the previous landlord charged it 10% of the total outgoings including electricity charges for the building.
- 4 In or around mid 2009, the lease between Tymstock and Advance was renewed for a term of 5 years. No new written lease agreement was entered into, rather the parties relied upon the initial lease which was a 2003 version of the standard Law Institute Lease of Real Estate.
- 5 In or about September 2009 Network Video Pty Ltd (“Network”) a company related to Tymstock leased the second floor of the building. The lettable area occupied by Network was approximately 200 square metres, about the same area occupied by Advance on the ground floor.
- 6 In October 2010, Tymstock commenced charging Advance 50% of the total electricity charges. Advance disputed the electricity charge and paid only what it considered it was liable for under the lease.
- 7 On 1 February 2012 a new tenant, ONQ leased the first floor of the building. On 28 February 2012 Tymstock installed a meter to measure ONQ’S electricity usage. ONQ’s electricity is not separately metered but rather, the usage is measured so that Tymstock can apportion the electricity account according to actual usage. Thereafter, Advance’s electricity charge was calculated by deducting ONQ’s usage, and dividing the remainder of the electricity bill between Tymstock and Advance.
- 8 In November 2013 the basement was let to a gymnasium. Tymstock installed a meter to measure the gymnasium’s electricity usage. Since

November 2013 the gymnasium's and the ONQ's usage is deducted from the electricity bill before it is divided between Tymstock and Advance.

- 9 Tymstock contended it was either too difficult and/or expensive to install a separate electricity meter for Advance.

### **Landlord and tenant contentions**

- 10 Tymstock claims that Advance must pay
- 100% of the total electricity supplied to the building from 21 July 2008 until September 2009 and then;
  - 50% of the total electricity supplied to the building from September 2009 until February 2012 and then;
  - 50% of the balance of electricity bill after deduction of the usage by the metered tenants from February 2012 to date.
- 11 After deducting the amounts paid by Advance, the balance claimed for electricity charges is \$19,477.51.
- 12 Tymstock contends that the electricity charges are payable by Advance under clause 2.1.4 or alternatively under clauses 2.1.9 or 20.7 of the lease.
- 13 Advance disputes the calculation of electricity charge and says that the charge should be only 10% of the total electricity accounts. Advance contends that the electricity is payable at the rate of 10% as an outgoing under either clause 2.1.2 or clause 2.1.9 of the lease.
- 14 Advance counterclaimed for various overpayments. Those matters were resolved between counsel during the course of the hearing, leaving only the issue of the electricity charges for determination.
- 15 The parties' rights and obligations regarding outgoings and electricity charges is governed by the *Retail Tenancies Act 2003* and the lease. It is necessary to examine the relevant provisions of the Act and the lease.

### **Recovery of electricity charges under clause 2.1.4 of the lease**

- 16 Tymstock's primary contention is that the electricity charges are not building outgoings but a direct charge to the rented premises to be paid under clause 2.1.4 of the lease. Clause 2.1.4 provides as follows:
- The Tenant must -
- 2.1.4 pay when due all charges for the provision of services to the Premises including gas, electricity, water and telephone.
- 17 There is otherwise no express agreement between the parties regarding electricity. Clause 2.1.4 makes the tenant liable for the tenant's own use of power, telephone and water, provided to the premises. In most but not all cases, power, water and telephone will be in the name of the tenant or at least separately metered. In those circumstances, the tenant is liable under clause 2.1.4 to pay their own gas, electricity, water and telephone charges.

However, in this case electricity is being supplied to the whole building and there is no separate meter to Advance's premises. In circumstances where electricity is being supplied to the whole of the building and there is no separate meter, the electricity charges are to be properly viewed as a building outgoing not as a direct charge to the premises. In the absence of a specific express agreement regarding electricity, electricity charges which are not separately metered cannot be recovered under clause 2.1.4 but rather must be recovered as a building outgoing if they are to be recovered at all.

### **Section 39 of the Retail Leases Act 2003**

18 Section 39 of the *Retail Leases Act 2003* deals with the recovery of outgoings from a tenant. The Act provides a scheme to enhance the certainty and fairness of retail leasing arrangements between landlord and tenants. In order for outgoings to be recoverable, the lease must specify which outgoings are recoverable and how the amount of the outgoings will be apportioned and paid by the tenant.

#### **39 Recovery of outgoings from the tenant**

- (1) The tenant under a retail premises is not liable to pay an amount to the landlord in respect of outgoings except in accordance with the provision of the lease that specify-
  - (a) the outgoings that are to be regarded as recoverable; and
  - (b) in a manner consistent with the regulations, how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and
  - (c) how those outgoings or any part of them may be recovered by the landlord from the tenant.

19 Regulation 10 provides as follows:

#### **10. Determination and apportionment of outgoing**

For the purposes of section 39(2) of the Act, the amount of an outgoing may be determined and apportioned to a tenant by multiplying the total amount of the outgoing by the relevant fraction.

“Relevant fraction” means the fraction calculated using this formula-

$\frac{A}{B}$

B

Where-

“A” is the lettable area of the retail premises; and

“B” is the total of lettable areas of all the retail premises which receives the benefit of the outgoing.

## Recovery of building outgoings under clauses 2.1.2, 2.1.7 and 20.7 of the lease

- 21 The lease provides for recovery of outgoings under clauses 2.1.2, 2.1.7 and 20.07. Tymstock contends that the tenant's proportion of electricity charges under the lease is either 100 per cent or 50 per cent of the electricity charges after deducting the metered tenants' share of the total electricity charges for the building. Advance contends that its share is 10 per cent of the electricity charges as an outgoing as set out in the lease.
- 22 Clause 2.1.2 provides that the tenant must:
- 2.1.2 pay when due the outgoings listed in Item 10 for which the Tenant receives notices directly, and reimburse within 7 days those which the Landlord requests.
- 23 Under Item 10 of the lease schedule Advance must pay or reimburse pursuant to clause 2.1.2 the following:
- Ten percent (10%) of all outgoings including council rates, water authority rates and property insurance levies plus GST if applicable.
  - Add any other outgoings which the Tenant is to pay
  - Ninety percent (90%) of all water usage charged to the Premises.
- 24 Under clause 2.1.2 of the lease and Item 10 of the lease schedule Advance is liable to pay Tymstock 10% of the electricity charges on the basis that the electricity charges form part of the building outgoings.
- Additionally, to clause 2.1.2 the lease provides that the tenant must:
- 2.1.9 pay the appropriate apportionment of the outgoings listed in Item 10 and the premiums referred to in clause 2.1.7 at the start and end of the Term, and in each of these cases the landlord must produce the relevant assessments and invoices to support the calculation.
- 25 Tymstock contends that clause 20 of the lease applies requiring Advance to pay outgoings in the appropriate apportionment and that the appropriate apportionment is either 100 per cent or 50 per of the total electricity charges.
- 26 I accept that clause 20 applies because the rented premises forms part of a building. Clause 20 provides for the landlord to be responsible for payment of outgoings and the tenant to pay its proportion of those outgoings as specified in Item 10 of the schedule. The specified proportion in Item 10 of the schedule is 10 per cent. Relevantly, clause 20 provides:
- 20. IF PREMISES ONLY PART OF BUILDING
  - 20.1 If the Premises are only a part of the Building, the provisions of this clause apply.
  - 20.7 In relation to Building Outgoings, the parties agree

- 20.7.1 the Landlord must pay the Building Outgoings when they fall due for payment;
- 20.7.2 the Tenant must pay or reimburse the Landlord the proportion specified in Item 10
- 27 The proportion of building outgoings set out in Item 10 is as follows:
- (a) in relation to Building Outgoings that benefit all of the premises in the Building: the proportion that the Lettable Area of the Premises bears to the total lettable area of the Building which at present is ten percent (10%).
  - (b) in relation to Building Outgoings that benefit the Premises and other premises but not all of the premises in the Building: the proportion that the Lettable Area of the Premises bears to the total Lettable Area of all premises (including the Premises) that benefit from the outgoing.
  - (c) in relation to Building Outgoings that benefit only the Premises: 100%.
- 28 The proportion of Building outgoings set out in sub paragraphs (b) and (c) in Item 10 of the lease schedule does no more than re-state the formula set out in section 39 of the Act and regulation 10. In my view, the statement of the proportion of outgoings is redundant, because the lease has already specified that the tenant is liable to pay or reimburse “Ten per cent (10%) of all outgoings” and 90 % of all water usage.
- 29 Tymstock having set the proportion at 10 per cent of all outgoings (save for water usage) cannot at a later date, claim a higher percentage for the electricity charges on the basis that it claims it was entitled to do so under the lease and statutory scheme.
- 30 Even if Tymstock by virtue of repeating a version of the statutory formula in the lease, was able to adjust the proportion of outgoings, based on occupancy of the building, nevertheless I find, for the reasons that follow, that Advance’s proportion of the electricity charges under the lease is still 10 per cent.

### **Findings on tenant’s proportion of building outgoings**

- 31 Tymstock contends that for the period that Advance was the only tenant in the building, the proportion of the electricity charge was to be calculated by reference to sub-paragraph (c) in Item 10 of the lease which provides that the tenant’s proportion of building outgoings is:

“in relation to Building Outgoings that benefit only the premises: 100%.”

Tymstock contends that Advance, as the only tenant of the building received all the benefit of the electricity supply. However, electricity was supplied to the whole of the building and the whole of the building benefited from the electricity supply not just Advance. It is true, that whilst Advance was the only tenant, Advance consumed most of the electricity but

not all of the electricity. I am satisfied that from time to time, power was used in other parts of the building, particularly when works were carried out in the lead up to a new tenant taking possession.

- 32 Adopting Tymstock’s argument, if the all the electricity charges should be paid by the tenant because it was the only tenant in the building, then all the building outgoings including rates, insurance, cleaning and maintenance should also be paid by it. In my opinion, that is not contemplated by either the Act or the Lease. The proportion of outgoings is to be calculated by reference to lettable area not usage or building occupancy. I am not satisfied that the supply of electricity only benefitted Advance whilst it was the only tenant. Therefore, the electricity charge is not to be apportioned under sub-paragraph (c) set out in Item 10 of the lease schedule.
- 33 Tymstock contends that whilst Advance was one of two tenants the electricity charge is to be apportioned under sub paragraph (b) in Item 10 in the lease schedule. Sub-paragraph (b) provides that the tenant’s proportion of building outgoings is to be apportioned as follows:

“In relation to Building Outgoings that benefit the Premises and other premises but not all of the premises in the Building: the proportion that the Lettable Area of the Premises bears to the total Lettable Area of all premises (including the Premises) that benefit from the outgoing.”

- 34 Again, I find that the whole of the building received and benefitted from the electricity supply. Therefore, sub-paragraph (b) does not apply. The appropriate proportion is provided in sub-paragraph (a) of Item 10 to the schedule which provides:

“In relation to Building Outgoings that benefit all of the premises in the Building: the proportion that the Lettable Area of the Premises bears to the total lettable area of the Building, which at present is ten per cent (10%);

Therefore, I find that the proportion of electricity charges payable by Advance is 10%.

**MEMBER L. ROWLAND**