

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1177/2017

CATCHWORDS

Building and Property List – Lease or permission to use premises – lack of certainty of premises and of term.

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| APPLICANT | US Model Railroad Club of Australia |
| RESPONDENT | Maltese Cultural Association of Victoria |
| WHERE HELD | Melbourne |
| BEFORE | Robert Davis, Senior Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 20 September 2018 |
| DATE OF ORDER | 20 September 2018 |
| DATE OF WRITTEN REASONS | 30 November 2018 |
| CITATION | US Model Railroad Club of Australia v Maltese Cultural Association of Victoria (Building and Property) [2018] VCAT 1889 |

ORDER

1. The Applicant's application is dismissed.
2. The Counter-claim is struck out.
3. No order as to costs.

Robert Davis
Senior Member

APPEARANCES:

| | |
|----------------|---------------------------|
| For Applicant | Mr M. Melville, in person |
| For Respondent | Mr R.A. Harris of Counsel |

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS

- 1 This application came to the Tribunal for an injunction by the applicant, which is a model train organisation known as ‘US Model Railroad Club of Australia’ (the ‘Model Railroad’). It is seeking an injunction to stop the respondent, which is the Maltese Cultural Association of Victoria (the ‘Association’), from shutting out the Model Railroad from the upstairs hall of 27 Talmage Street, Albion, which I am informed is an old railway switch house (the whole of which I will refer to as ‘the Premises’).
- 2 In 1994, the Association entered into a lease agreement with VicTrack, which is the owner of these premises, to use the premises for a communal activity at a peppercorn rent of \$400 per year. The premises were uninhabitable at the time and were dangerous. A considerable amount of work and money was expended by the Association in putting the premises in a suitable working order and part of that work involved putting in a floor and false ceiling, so that the premises became a two-storey premises.
- 3 A further agreement for a lease was entered into, between VicTrack and the Association, on the 18 December 2013. Relevantly, that document provides that the permitted use of the premises is the conduct of a Maltese social and cultural activities club, provided the tenant must not use the premises wholly or predominantly for the sale or hire of retail goods or retail provisions of services within the meaning of the *Retail Leases Act 2003*.
- 4 On 1 May 2014, the applicant was given permission to use the upstairs of the premises, being the hall and part of the corridor upstairs (the ‘upstairs premises’), for its activities. The document before me, which is signed by both of the parties, suggest that the rent would be \$250 every 3 months which would not change for the duration of the contract.
- 5 The term of the agreement there is stated to be for 20 years from the date of the letter. It was clearly a permission and that document, in my view, is insufficient for it to be a lease; as the upstairs premises is not described with any certainty in the sense that it is described as ‘a hall and part of a corridor upstairs’.
- 6 One could not define with certainty the premises given those circumstances. Thus, the requirement of “certainty” of the premises did not apply to that document, as the upstairs premises were not properly described.
- 7 In any event, it may not matter because that document has been superseded.
- 8 On 6 May 2017, or before that date, the Association was informed that the premises occupied by the Model Railroad were a fire hazard because there were petitions put up and there were apparently things on the floor creating a problem. As a result, a notice was given on 6 May 2017 requiring the

Model Railroad to vacate the upstairs premises and bringing the agreement to an end. After a dispute and a meeting between the parties, there was a letter of an agreement entered into which was signed by both parties.

- 9 That agreement, in my view, dictates what is the relationship now between the parties and any previous agreement that was between the parties becomes null and void as a result.
- 10 The letter of agreement dated 12 October 2017, reads as follows:

With this letter, the Maltese Cultural Association of Victoria incorporated, and the US Model Railroad Club of Australia agrees to the following conditions to the use of the hall only on the first floor of the Maltese Cultural Centre of 27 Talmage Street, Albion.
- 11 The two parties agreed that the US Model Railroad Club of Victoria pays the annual membership of \$250 to the centre and \$100 per calendar month for the running cost of the Maltese Cultural Centre, also be directly credited to the Commonwealth account. The length of the sublease will be determined by the owners, VicTrack.
- 12 I note that VicTrack did not make a determination in relation to the length of what was referred to as the sublease. The fact that the term 'sublease' is used, in my view, does not make what would otherwise be a contractual arrangement into a lease.
- 13 A lease, as I have previously stated, must have certainty. One of the certainties I mentioned before is 'certainty of the premises'. The other certainty is 'certainty of term'.
- 14 This is very different from a rental being determined by the President of the Real Estate Institute. This requires something to be done after the document has been entered into by an unspecified method. The parties could not know whether the term was to be one day or a hundred years.
- 15 In my view, this document cannot be a lease. There is too much uncertainty in what would be the essential terms of the lease.
- 16 I note the Model Railroad did not have exclusive use of the upstairs premises, which also mitigates against there being a lease.
- 17 Further, I note that the head lease between the Association and VicTrack did not permit the signing of the lease or subletting. I refer to clause 17.1 of that lease:

The tenant must not give up possession of the premises including signing the lease, subletting the premises or grant it to any person or license or concession in respect to the premises without prior written consent of VicTrack subject to clause 17.2.
- 18 The assignment must be done in a form and in a manner approved by VicTrack and any permitted use pursuant to clause 17.4 must also be at the discretion of VicTrack.

- 19 I now return to what I said previously about the permitted use, the conduct of Maltese Social and Cultural activities. Here, clearly the hobby of Model Railroad is not Maltese and Cultural activities.
- 20 There has been no evidence provided to suggest it is. Therefore, clearly it does not come within the terms of the lease itself.
- 21 Thus, I reiterate that there was at most a contractual agreement between the parties. There was no lease.
- 22 I note that as of September 2018, the Model Railroad was locked out of the upstairs premises and as a result the upstairs premises have been retaken by the Association.
- 23 I also note that there was no rent paid from January until April 2018 when a cheque was tendered by the Model Railroad but the tender was refused.
- 24 In my view, that cheque cannot be taken as a tender because it was a cheque signed by the Model Railroad people. It was not cash or bank cheque that would be required for a tender in those circumstances.
- 25 The \$850 rent was paid into the account of the Association in or about August 2018. I heard evidence that the Association did not know where the money came from until today. It is only apparent today that they knew where the money came from.
- 26 As there was no lease between the parties, the question then is: “Was there a breach of contract by the Association which can require damages to be paid to the Model Railroad?” The Model Railroad is asking for \$15,000 damages. I am told this is made up of a number of matters. It is electricity, work that was done to the building from which a certificate has been given. It is basically Model Railroad tracks and wood and they are fixed to the floor without the permission of the Association that require to be removed. It has been conceded that the tracks and wood could easily be removed. However, it is said that the Model Railroad has nowhere else to put them and they would be of no use to them at the moment.
- 27 In my view, having no period of a licence or agreement to occupy the upstairs premises, it was permissible for reasonable notice to be given and the contract to be determined when the Association thought fit. The Association decided that this was appropriate and on 29 May 2018, gave the appropriate letter.
- 28 It was 30 days after that time, that letter required the Model Railroad to vacate the upstairs premises by 29 June 2018. They did not vacate by that date. I understand it was in about August sometime that the Association retook possession of the upstairs premises.
- 29 I find that the notice given by the Association to vacate the upstairs premises was reasonable in terms of the contract and reasonable in relation to the use between the parties. Therefore, I find that as such, the application must fail. There has been no breach in contract between the parties and that

the Association was entitled to retake the upstairs premises. Therefore, the Model Railroad's application will be dismissed.

COUNTER-CLAIM

- 30 I note that there is a counter-claim before me whereby the respondent seeks \$850 but that was before there was knowledge that the money was paid into the account of the respondent. Mr Harris of Counsel, who appears for the respondent, informed me at the outset of the proceeding that the claim was now \$900 but he has since further informed me that his client is not seeking any monetary order.
- 31 There is also a claim for interest and no mention has been made of that at this stage. There is also a claim for a declaration. I do not believe I need to make orders in relation to either of these matters, bearing in mind the facts and circumstances of this case.
- 32 Therefore, there does not appear to be anything in the counter-claim, subject to what Mr Harris may have to say, that I have to make an order about.
- 33 Therefore, I think the only appropriate orders are to dismiss the claim and strike out the counter-claim.

Robert Davis
Senior Member