VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP194/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Whether effective notice has been given – whether attempt to re-enter by the landlord constitutes an election to forfeit the lease – whether payments received by the landlord may be applied as the landlord sees fit – whether payment of lesser amount than demanded in a notice of default is sufficient to remedy the breach.

APPLICANT	Jo Vegas
LANDLORD	Andrew Pernell Nominees Pty Ltd (ACN 126 438 766)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	15 and 17 June 2015
DATE OF ORDER	19 June 2015
CITATION	Vegas v Andrew Pernell Nominees Pty Ltd (Building and Property) [2015] VCAT 987

ORDER

1. The Applicant's application for an injunction restraining the Respondent from re-entering the demised premises located at 1/433 Brunswick Street, Fitzroy in the State of Victoria is dismissed.
2. I find and declare that the undated lease between the parties, commenced on 7 January 2013, was lawfully forfeited by the Respondent on 9 April 2015.
3. Subject to any application by the Applicant for relief against forfeiture, the Applicant must vacate and give up possession to the Respondent of the demised premises located at 1/433 Brunswick Street, Fitzroy in the State of Victoria.
4. Order 3 of these orders is stayed for a period of 21 days or, in the event that an application for relief against forfeiture is made by the Applicant within 21 days from that the date of these orders, such further period as the Tribunal deems fit.
5. Costs reserved with liberty given to the parties to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Ms J Vegas, in person
For the Landlord	Mr K Mihaly of counsel

REASONS

INTRODUCTION

1. The Applicant is the tenant of premises located in Fitzroy and owned by the Respondent. She occupies those premises pursuant to an undated retail premises lease, which commenced on 7 January 2013, and operates a hairdressing salon from those premises.

2. During 2014 and 2015, the Applicant fell into arrears of rent and outgoings. Consequently, on 3 February 2015, the Respondent served the Applicant with a notice of default of the same date (**'the February Notice'**).

3. The February Notice stated, in part:

> **NOW TAKE NOTICE:**
>
> 1. The Tenant has defaulted in the payment of rent and outgoings as they have fallen due and attached to this Notice is a statement of the current position in relation to the outstanding rent and outgoings showing a balance owing as at the date of this Notice of $7,636.74.

4. Following receipt of that notice, the Applicant filed an application in this Tribunal seeking an injunction to restrain the Respondent from acting upon the February Notice and re-entering the Premises. That injunction application first came before the Tribunal on 23 February 2015, at which time an interim injunction was granted to maintain the status quo until such time as the application could be heard on an interlocutory basis.

5. On 4 March 2015, the Applicant appeared in person. Mr Mihaly of counsel, appeared on behalf of the Respondent. On that day, the Applicant sought an adjournment, based on two grounds; namely:

   (a) she needed time to consider an affidavit sworn on behalf of the Respondent in opposition to her application; and

   (b) she needed time to engage legal representation.

6. Accordingly, the hearing of the injunction application was adjourned to 11 March 2015.

7. On 11 March 2015, the Applicant again appeared in person. Mr Mihaly also appeared on behalf of the Respondent. At the conclusion of that hearing, an order was made granting an interlocutory injunction to restrain the Respondent from acting upon the February Notice. The principal issue that arose during the course of that hearing was whether the February Notice was valid. In that regard, the Applicant contended that the amount claimed in the February Notice was incorrect, although she conceded that some rent and outgoings were in arrears. In particular, she admitted that $6,163.09 represented the correct amount of arrears in rent and outgoings. Nevertheless, the Applicant contended that unless the February Notice specified the correct amount of arrears, it was invalid and could not be relied upon.

8. A final hearing of the injunction application was then listed for 22 May 2015, at which time the validity of the February Notice was to be determined.

9. The orders made on that day expressly provided that the interlocutory injunction only extended to prevent the Respondent from acting upon the February Notice. Order 3 stated:

> 3. For the avoidance of any doubt, the injunction granted pursuant to Order 2 of these orders is limited to the Respondent's right of re-entry and forfeiture exercised in reliance upon its notice of default dated 3 February 2015 and does not otherwise restrain the Respondent from exercising any right of re-entry and forfeiture under the lease between the parties in relation to any other breach of covenant.

10. Order 3 was made after receiving submissions from the Respondent that it should not be restrained from exercising its rights under the lease, in the event that it chose to re-issue a fresh notice of default or where it relied upon another basis as a ground to re-enter and forfeit the lease.

11. Given the proviso set out in Order 3 dated 11 March 2015, the Respondent served another notice of default dated 13 March 2015 (**'the March Notice'**). That notice sought to obviate the argument that plagued the February Notice by asserting that the amount of arrears was an amount less than the amount admitted by the Applicant at the hearing on 11 March 2015. The March Notice stated, in part:

> NOW TAKE NOTICE:
>
> 1. The Tenant has defaulted in the payment of rent and outgoings as they have fallen due and attached to this Notice is a statement of the current position in relation to outstanding rent and outgoings as admitted by you showing a balance owing as at the date of this notice of $6,160.14.

12. Pursuant to the March Notice, the Applicant had 14 days in which to remedy the breach, by the payment of $6,160.14. According to the Respondent, $6,160.14 was not paid within the 14 day period or at all. Consequently, the Respondent attempted to regain possession of the premises on 9 April 2015. In particular, the Applicant gave evidence that on the morning of 9 April 2015, she heard someone at the front entrance of the premises. She investigated and discovered that the leasing agent of the Respondent and a locksmith had gained entry into the premises. After confronting those persons, she contacted her solicitor, who advised her to contact the police. Shortly thereafter, the Applicant's solicitor arrived at the premises and after some further discussion, the leasing agent and the locksmith left the premises.

13. As a consequence of the events which occurred on 9 April 2015, the Respondent filed a counterclaim in this proceeding on 27 April 2015, seeking an order that the Applicant vacate and give up possession of the premises.

14. The Respondent contends that the attempted re-entry on 9 April 2015 constitutes its election to forfeit the lease in reliance upon the March Notice. It contends that the lease is now that an end.

15. By consent of the parties, the final hearing of the Applicant's injunction application and the Respondent's application for a possession order was adjourned from 22 May 2015 to 15 June 2015.

16. However, on 12 June 2015, the Applicant wrote to the Tribunal seeking a further adjournment of that hearing date. The adjournment was sought on the ground that the Applicant was unable to procure alternative legal representation to the solicitors previously engaged by her, given that her intended choice of alternative solicitor had belatedly advised her that he had a conflict of interest and was unable to act on her behalf. The application for a further adjournment was refused, with oral reasons given on that day. It was refused principally because the purported engagement of an alternative solicitor had been made too close to the hearing date and no reasonable explanation was proffered as to why the Applicant's former solicitors could not act, apart from her stating that she did not think that they had sufficient expertise in retail tenancy disputes. In essence, I formed the view that the situation which the Applicant had found herself in was largely of her own making. It could have easily been avoided had appropriate steps been implemented by her, such as arranging for her solicitors to appear on her behalf.

THE ISSUES

17. In my view, the Applicant's application to restrain the Respondent from acting upon the February Notice has become superseded by the March Notice. In particular, even if the Applicant was able to establish that the February Notice was invalid, that finding would not invalidate the March Notice. In other words, the Applicant's application relates to restraining the Respondent from acting upon the February Notice but does not seek to impugn the March Notice. Therefore, if the March Notice is held to be valid and as a consequence, the lease has been forfeited, then a finding that the February Notice was invalid becomes superfluous.

18. Accordingly, the critical issues in this proceeding are:

    (a) whether the March notice is valid; and

    (b) whether the lease has been forfeited in reliance upon that March Notice.

IS THE MARCH NOTICE VALID?

19. The Respondent submits that the Applicant cannot contest the validity of the March Notice because she has previously admitted that the amount stated to be in arrears as at the date of the February Notice exceeds the amount claimed in the March Notice. Mr Mihaly submitted that no other ground has been raised by the Applicant to impugn the Respondent's right to act upon the March Notice. Therefore, the only issue before the Tribunal is whether the lease has been forfeited in reliance upon that March Notice.

20. The Applicant contends that the March Notice does not accurately state what is owed under the lease as at the date of that notice. In essence, she recants her admission made at the hearing on 11 March 2015 that the amount of arrears of rent and outgoings owed under the lease as of that date was $6,163.09.

21. After hearing submissions from both parties, I granted leave to the Applicant to recant her admission. Accordingly, that put into issue the validity of the March Notice. In that regard, the Applicant made no complaint as to the form of the March Notice or service of that notice. As was the case in respect of the February Notice, the Applicant submitted that the March Notice was invalid because it

sought to demand an amount in excess of what was actually owed under the lease as at the date of that notice. According to the Applicant, the amount of arrears of rent and outgoings did not exceed $4,500.

22. The Respondent relied upon two affidavits filed in the proceeding, both sworn by Adele Pernell, the director of the Respondent. Those affidavits set out in some detail what has been charged to the Applicant under the lease in respect of both rent and outgoings and what has been received from the Applicant. The summary of receipts and charges span over the period from the commencement of the lease up to and including the month of February 2015. In particular, the Respondent contends that (at least) $59,023.07 was payable under the lease from its commencement until February 2015. Details of that amount are set out in a schedule attached to the March Notice as follows:

Description	**Period**	**Invoice**	**Liability**
Rent	7/2/13 to 6/2/15	$56,286.96	$56,286.96
Council rates	7/1/13 to 30/06/13	$4,063.17	$291.93
Council rates	1/7/13 to 30/6/14	$5,409.90	$811.49
Council rates	1/7/14 to 31/12/14	$3,208.95	$481.34
Water rates and usage	7/1/13 to 31/3/13	$165.05	$21.86
Water rates and usage	1/4/13 to 30/6/13	$358.15	$53.72
Water rates and usage	1/7/13 to 30/9/13	$412.05	$61.81
Water rates and usage	1/10/13 to 31/12/13	$351	$52.65
Water rates and usage	1/1/14 to 31/3/14	$348.25	$52.24
Water rates and usage	1/4/14 to 30/6/14	$371.45	$55.72
Water rates and usage	1/7/14 to 30/9/14	$462.72	$69.41
Water rates and usage	1/10/14 to 31/12/14	$360.11	$54.02
Insurance	7/1/13 to 31/8/13	$2,847.86	$277.33
Insurance	10/10/14 to 10/10/15	$3,018	$452.70
Total			**$59,023.07**

23. The reason why the *Liability* column of the above table represents only a proportion of the invoice amount is that the lease, at least on one view, states that the Applicant's liability in respect of outgoings is 15% of the gross amount charged against the building, of which the premises form a part. Although the Respondent disputes that the 15% relates to all of the outgoings, that concession was made for the purpose of calculating the amount of arrears set out in the March Notice.

24. It is common ground that the terms of the lease require the Applicant to pay a proportion of outgoings in respect of council and water rates and insurance.

Outgoings

25. The Applicant disputes that the amounts set out in the above table reflect the correct charges made by the municipal authority, water authority or insurance provider.

Insurance

26. The Applicant submits that the Respondent cannot charge for reimbursement of the insurance premium for the period October 2014 to October 2015 because that period has not yet expired. I do not accept that submission. In my view, the premium paid reflects the period of insurance, which, in turn, reflects the period of tenure under the lease. The premium, like rent, is paid in advance. Clause 5.2 of the lease states:

> In relation to building outgoings, the parties agree –
>
> 5 .4 .1 the landlord must pay the building outgoings when they fall due for payment but may require the tenant to pay when due a building outgoing for which the tenant receives notice directly and to reimburse the landlord within 7 days of a request all building outgoings for which notices are received by the landlord.
>
> 5.4.2 the tenant must pay or reimburse the landlord the proportions specified in Item 10.

27. In my view, the premium for the building insurance is an outgoing which the Respondent is, in the first instance, required to pay and then entitled to be reimbursed, pursuant to clause 5.4.1 and 5.4.2 of the lease. Copies of the insurance provider's or the insurance broker's invoices was tended in evidence. It is not contested that the Respondent paid the insurance premiums set out in those invoices.

Rates

28. I do not accept the Applicant's evidence that the amounts set out in the above table exceed what the Applicant was liable to pay under the lease in respect of rates and water usage. In that regard, copies of all invoices, including the invoices produced by the municipal authority and water authority were tendered in evidence. They are also exhibited to the affidavit of Ms Pernell sworn on 4 March 2015. In addition, covering invoices prepared by the Respondent and emailed to the Applicant, which set out the Applicant's proportionate liability, have also been exhibited to that affidavit. In some instances, the covering invoices produced by the Respondent reflect a higher amount to what is set out in the above table. This is because the Respondent has previously taken the position that, in respect of water usage, the Applicant is liable for 50% of the original outgoing amount. Nevertheless, for the purpose of the March Notice, only 15% of the original outgoing amount was claimed. No doubt, this was to avoid any dispute as to whether 15% or 50% of the original outgoing amount was due and payable.

29. I have reviewed each of the invoices which make up the outgoings referred to in the above table in order to verify whether the amounts set out in the above table are correct, based on the Applicant's period of tenancy and on her proportionate liability of 15%. I found only one mathematical error. It related to the amount claimed for *Water Rates and Usage* over the period 7 January 2013 to 31 March 2013, although the error works in the Applicant's favour as my calculation showed that $2.90 was under-charged.

30. Therefore, I find that the schedule attached to the March Notice accurately reflects what outgoings were due and payable up to the period 6 February 2015.

Rent and rent receipts

31. In her affidavit sworn on 23 February 2015, Ms Pernell lists the payments received from the Respondent from January 2013 to 3 February 2015. The amount and date of each payment is recorded in that list. She gave evidence that she prepared that list by reference to the Applicant's trading account bank statements. Copies of those banks statements were tendered in evidence. The amounts in the list correspond to the entries in the bank statements.

32. However, the Applicant contended that the amount of rent receipts recorded by the Respondent is incorrect. In particular, she pointed to two errors:

    (a) First, she said that one month rent had not been counted because the bank statements show a deposit of $2,290.34 on 23 January 2013. However, no rent was payable for that month because the lease provided for the first month of January 2013 to be rent-free. Therefore, she argued that the rent-free month had not been taken into account.

    (b) Second, she argued that the record of rent receipts had incorrectly attributed the deposit of $2,290.34 on 23 January 2013 as a payment of the security deposit required under the lease, when in fact, the payment was for rent.

33. I do not accept that the rent-free period of one month has not been taken into account. The schedule attached to the March Notice calculates rent liability from February 2013. No claim is made for January 2013 rent.

34. Further, I do not accept that the deposit entry of $2,290.34 on 23 January 2013 represents payment of rent. Ms Pernell gave evidence that in December 2012, a payment of $2,290.34 was made to the leasing agent, prior to the Applicant taking possession. She said that the lease expressly provided for two months rent to be paid as security deposit but that the Applicant was given dispensation and only required to pay one month rent on the proviso that the balance of the security deposit was paid within six weeks after she took possession. Ms Pernell said that the balance of the security deposit was never paid. She also said that the payment to the leasing agent was the only payment ever made in that manner, as all future payments were by electronic transfer directly into the Applicant's trading account.

35. Ms Pernell's evidence is not completely at odds with the evidence given by the Applicant. Although the Applicant initially contended that the lease only provided for the payment of one month security deposit, she subsequently conceded that there was an agreement reached between her and the leasing agent to allow her to occupy the premises on condition that the balance of the security deposit would be paid within 6 months. The Applicant also confirmed that $2,290 was paid to the leasing agent in December 2012 as security deposit.

36. The bank statements tendered in evidence show that $2,290.34 was deposited into the Applicant's trading account on 23 January 2013. According to Ms Pernell, that amount was the amount given to her by the leasing agent and referred to above.

The bank statement then shows a series of electronic transfer payments made on 20, 26 and 27 March 2013, which add up to $2,800. Those payments (and all subsequent payments) make reference to the Applicant's surname, as the transferor, in one form or another. However, the bank statements do not show any payment being made during February 2013.

37. Although the Applicant initially gave evidence that she had paid two months rent by way of security deposit, that evidence conflicted with her later evidence that an agreement was reached to pay the second instalment of the security deposit within six months after taking possession. Moreover, the Applicant was not able to produce any bank statements or other documentation to verify that two months rent had been paid by way of security deposit. By contrast, the bank statements produced by the Applicant corroborated Ms Pernell's version of events.

38. Therefore, I find that the schedule attached to the March Notice accurately reflects what rent was due and payable up to the period 6 February 2013.

Finding

39. Having regard to all of the documentation which has been produced during the course of this hearing, I find that the amount that was due and payable as of the date of the March Notice was, at least, $59,023.07, as stated in that notice.

40. I further find that the amount paid by the Applicant towards rent and outgoings up to 13 March 2015 was $52,862.93, leaving a shortfall of $6,160.14. That being the case, I find that the March Notice accurately sets out what was owed under the lease at that time and that the notice is valid.

41. Even if the amount of rent and arrears of rent and outgoings stated in the March Notice (or the February Notice) were held to be incorrect, the Respondent submits that this fact, of itself, would not invalidate either notice.

42. This is because the Applicant has conceded that as of the date of either notice, there were was an amount owing in respect of rent and outgoings, albeit that the amount was something less than $6,160.14.

43. Mr Mihaly drew my attention to a number of authorities which he argued stood for the proposition that an excessive demand, and a failure to comply with so much of the demand that was not excessive, was still capable of giving rise to entitlement to forfeit the lease. He referred me to the judgment of Nettle J in *Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd*,[1] where his Honour stated:

> 25 In the second place, it does not seem to me that the reasoning in *Gair v Smith* and *Legione v Hateley* turned on whether or not there were two separate and distinct obligations mentioned in the notices of rescission with which they were concerned. Rather, as I comprehend it, it was concerned with the more general conception of an excessive demand and a failure to comply with so much of it as is not excessive is capable of initiating the consequences which General Condition 6 provides.

[1] [2003] VSC 33.

44. I accept that, as a general proposition, a notice of default which overstates the amount of arrears in rent or outgoings may still constitute good notice entitling a landlord to forfeit a lease. However, it must still be proven that there are arrears of rent and outgoings. A tenant may remedy a breach of lease by the payment of a lesser amount of money than what is demanded in the notice of default if it is ultimately determined that the amount paid was all that was required to be paid. Moreover, even a payment, which ultimately is determined to be insufficient to fully remedy the breach, may still constitute grounds for relief against forfeiture; if it can be shown that the Tenant reasonably believed that the amount paid was sufficient to remedy breach.

45. In the present case, reliance upon *Burke and Riversdale Road Pty Ltd* is unnecessary, as I have determined that the amount stated in the March Notice accurately reflects what is required to be paid in order to remedy the breach of lease.

HAS THE LEASE BEEN FORFEITED?

46. The Respondent concedes that on and following 13 March 2015, the Respondent received a number of payments from the Applicant. Those payments are reflected in the Respondent's bank statement, which shows deposits having been made from the Applicant as follows:

(a) $2,479 on 13 March 2015;

(b) $2,479 on 18 March 2015;

(c) $479 on 13 April 2015;

(d) $2,000 on 13 April 2015; and

(e) $2,479 on 18 May 2015.

47. Mr Mihaly submitted that those payments were payments of rent only and were applied by the Respondent towards rent for February and the months that followed. He contended that the payment on 13 March 2015 represented payment of rent for February 2015, the payment on 18 March represented payment of rent for March 2015, the two payments on 13 April 2015 represented payment of rent for April 2015 and the final payment on 18 May 2015 represented payment of rent for May 2015. Therefore, only the first payment made on 13 March 2015 can be treated as a payment made in part satisfaction of the March Notice.

48. Moreover, Mr Mihaly submitted that even if the subsequent payment made on 18 March 2015 was also applied in part satisfaction of the March Notice, the full amount demanded under the March Notice was not paid prior to re-entry on 9 April 2015. Only $4,958 of the $6,160.14 would be counted as paid.

49. In my view, it was open for the Respondent to apply the payments made by the Applicant either towards arrears or ongoing rent payments. Clause 22.6 of the *Additional Provisions* of the lease expressly provides as such:

22.6 Application of money paid by the Tenant

The **tenant** agrees that all monies which are paid by the **tenant**, or on its behalf, to the **landlord** pursuant to this Lease may be applied by the **landlord** in or toward satisfaction of any interest, costs, rates and taxes, GST or other payments payable by the **tenant** in such order as the **landlord** may at any time elect notwithstanding any notice or stipulation delivered to the **landlord** with any such payment, and a certificate signed by the **landlord** or its solicitors or agents or any officer of the **landlord** as to the order that any such payments have been applied shall be conclusive proof of that order.

50. Even if that were not the case, I find that the payments made prior to 9 April 2015 were not sufficient to fully satisfy the March Notice, in any event.

51. Further, I find that the Respondent's conduct in attempting to regain possession of the premises on 9 April 2015 amounts to an unequivocal act evincing an election on its part to forfeit the lease.[2]

52. Accordingly, I find that the lease was lawfully forfeited on 9 April 2015.

ORDERS

53. Having regard to my findings set out above, I will order that the Applicant's application for an order restraining the Respondent from acting upon the February Notice be dismissed, given that the March Notice supersedes the effect of that notice. However, my finding that the lease has been forfeited may well prompt the Applicant to seek relief against forfeiture. Accordingly, I will stay the operation of my order for a period of 21 days, in the event that any such application is made.

54. The costs of this proceeding will be reserved with liberty given to the parties make application, should they so choose. In that regard, I remind the parties that under s 92 of the *Retail Leases Act 2003*, costs are not to be ordered unless the Tribunal is satisfied that it is fair to do so having regard to s 92(2) of that Act.

SENIOR MEMBER E. RIEGLER

[2] *Rosa Investments Pty Ltd v Spencer Shier Pty Ltd* [1965] VR 97 at 101.