

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RETAIL TENANCIES LIST

VCAT REFERENCE NO. R103/2012

CATCHWORDS

LANDLORD AND TENANT – s 119 of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Versus (Aus) Pty Ltd (ACN 105 954 845)
RESPONDENT	A.N.H. Nominees Pty Ltd (ACN 005 796 378)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	28 August 2014
DATE OF ORDER	29 August 2014
CITATION	Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd (Correction) (Building and Property) [2014] VCAT 1082

ORDER

1. Having found that Order 1 of the Tribunal's orders dated 22 April 2014 contains a material miscalculation of figures, the order is corrected pursuant to s 119 of *Victorian Civil and Administrative Tribunal Act 1998* so that the amount of \$30,707.82 is deleted and substituted with '\$33,926.76'.
2. Having found the Tribunal's *Reasons* dated 22 April 2014 contains errors from an accidental slip or omission or material miscalculation of figures, the *Reasons* are corrected pursuant to s 119 of *Victorian Civil and Administrative Tribunal Act 1998* as follows:
 - (a) In paragraph 148, the reference to 240% is deleted and substituted with '**253%**'.
 - (b) In paragraph 149:
 - (i) the percentage figure 240% is deleted and substituted with '**253%**';
 - (ii) the figure \$340 is deleted and substituted with '**\$353**'; and
 - (iii) the percentage figure 70.59% is deleted and substituted with '**71.67%**'.
 - (c) In paragraph 155:
 - (i) The figure of \$11,368.50 is deleted and substituted with '**\$11,035**'.
 - (ii) The figure of \$104,238 is deleted and substituted with '**\$104,273**'.

- (d) In paragraph 156:
- (i) the figure *\$11,368.50* is deleted and substituted with '**\$12,487**';
 - (ii) the word *in*, appearing after the words *no longer payable*, is deleted and substituted with the words '**after 14 June 2013 for**'.
- (e) In paragraph 157:
- (i) the figure *\$87,068* is deleted and substituted with '**\$85,949**'.
- (f) In paragraph 158:
- (i) the figure *\$87,068* is deleted and substituted with '**\$85,949**';
 - (ii) the figure of *\$11,368.50* is deleted and substituted with '**\$10,250**'; and
 - (iii) the figure of *\$75,699.50* is deleted and substituted with '**\$75,699**'.
- (g) In the table appearing under paragraph 160:
- (i) the percentage figure of *70.59%* is deleted and substituted with '**71.67%**';
 - (ii) the figure of *\$45,171* is deleted and substituted with '**\$43,512**';
 - (iii) the figure of *\$45,437* is deleted and substituted with '**\$43,768**';
 - (iv) the figure of *\$108,418* is deleted and substituted with '**\$110,077**';
 - (v) the figure of *\$109,058* is deleted and substituted with '**\$110,727**';
 - (vi) the figure of *\$87,068* is deleted and substituted with '**\$85,949**';
 - (vii) the figure of *\$75,670* is deleted and substituted with '**\$75,699**';
 - (viii) the figure of *\$21,350* is deleted and substituted with '**\$24,128**'; and
 - (ix) the figure of *\$33,388* is deleted and substituted with '**\$35,028**'.
- (h) In paragraph 161:
- (i) the figure of *\$30,314* is deleted and substituted with '**\$33,533**';
 - (ii) the figure of *\$21,350* is deleted and substituted with '**\$24,128**'; and
 - (iii) the figure of *\$8,964* is deleted and substituted with '**\$9,405**'.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant

Mr B Spaleta (director)

For the Respondent

Mr A Schlicht of counsel

REASONS

Introduction

1. On 11 July 2014, a directions hearing was listed to hear a number of extant issues, following the publication of my Orders and *Reasons* dated 22 April 2014, which dealt with the substantive matters comprising the proceeding. Those extant issues included the question of costs and interest.
2. Both parties indicated that each served the other with offers of settlement, which they contend are relevant to the question of costs. However, prior to considering the question of costs and interest, both parties made an application that the orders and *Reasons* be corrected pursuant to section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* (**‘the Act’**).
3. In essence, both parties contend that aspects of the calculations set out in the *Reasons* contain errors and that the correction of those errors will have a direct impact on the strength of their respective offers of settlement. Given those submissions, orders were made on 11 July 2014 requiring the parties to file and serve written submissions setting out what each party sought to be corrected pursuant to s 119 of the Act. In accordance with those orders, each party filed its written submissions. However, the Applicant requested that its s 119 application not be determined until it was given a further opportunity to be heard on the subject. Consequently, the proceeding was returned on 28 August 2014 to give the Applicant an opportunity to be heard on its s 119 application.

Section 119 of the Act

4. Section 119 of the Act states:

The Tribunal may correct an order made by it if the order contains –

 - (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) the material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
 - (d) a defect of form.
5. Section 119 is directed at correcting mistakes or omissions. It is not an avenue for appeal or to challenge findings made by the Tribunal on questions of fact or law: *Autodesk v Dyson (No 2)*.¹
6. As Senior Member Walker stated in *Cosgrove v Housing Guarantee Fund*:

The section cannot be used as a substitute for an appeal. It is there to fix a mistake that has been made and it must be a mistake such that, had it occurred to

¹ (1993) 176 CLR 300 at 303.

me at the time I would not have made it. I would have picked it up and fixed it at once.²

7. Both parties have filed written submissions setting out what each contends are a miscalculation of figures. My findings, based on those submissions and oral submissions made on 28 August 2014, are set out as follows.

Interest on overdraft

Applicant's submission

8. The Applicant contends that the amount of interest on the Applicant's overdraft as set out in paragraphs 156 to 158 of the *Reasons* has been miscalculated. The Applicant submits that the amount of interest stated for the period 1 January until 14 June 2012 has been incorrectly added. In its written submissions, it states:

46. In calculation of the applicants projected expenses the 2012, Senior Member Riegler applied the amount of bank loan interest of \$11,368.50, which is:

\$22,737 (for interest amounts to 2012)/2 (half a year (183 days)) = \$11,368.50.

47. Per paragraph 156. of the Order, the overdraft amount was paid in full on 14 June 2012, and not on 1 July 2012.

48. Thus, the interest amount has been materially miscalculated as the period:

1 January 2012 to 13 June 2012 = 165 days, and not 183 days.

49. The Result is a material miscalculation of figures resulting in an additional \$1119.00 in interest expense is being applied to be applicant 2012 expenses, which is incorrect.

50. The correct amount of interest expense to the period 1 January 2012 to 13 June 2012 and to be used in the calculation of the applicants loss of profit is \$10,250, and calculated thusly;

\$22,737 (interest 2012)/366 days x 165 days (1 Jan 2012 - 13 Jun 2012) = \$10,250.

9. I accept that the adding of days used to estimate the amount of interest payable under the overdraft facility is incorrect; and is to be corrected pursuant to s 119 of the Act. Accordingly, paragraphs 156, 157, 158, 160 and 161 are to be corrected to reflect a correction in that calculation.

Respondent's submission

10. The Respondent contends that the amount of interest on the Applicant's overdraft as set out in paragraphs 156 to 158 of the *Reasons* has been miscalculated. In particular, the Respondent contends that interest has been counted twice.

² [2006] VCAT 463.

11. I do not accept that this is the case. As the *Reasons* set out, the full year of interest accruing on the overdraft facility for the calendar year 2011 amounted to \$22,737. That was added to the aggregate expenditure for the calendar year 2011. On 14 June 2012, that overdraft facility was paid out. Therefore, the accrual of interest over approximately one half of the calendar year 2012 did not occur.
12. Accordingly, only the interest over the period 1 January until 14 June 2012 was calculated as part of the expenses for the calendar year 2012. The corrected amount of interest amounts to \$10,250. That meant that \$12,487 of the \$22,737 that was paid in 2011 was not payable during the 2012 calendar year. That amount was deducted from the total expenditure incurred in 2011 to reflect the lesser amount of interest payable. In 2013, no interest was payable for that calendar year. Therefore, the interest payable in 2013 of \$10,250 was deducted from the aggregate amount of expenses incurred in 2013.
13. Therefore, I do not accept the interest has been double counted.

Growth rate

14. The applicant contends that the *Reasons* contain a mistake because the Tribunal adopted a calculation to determine the growth rate which differs from what the Applicant contends was the prevailing growth rate as published by the Australian Bureau of Statistics.
15. I do not consider this to be a miscalculation. In my view, the criticism raised by the Applicant relates to findings of fact made by the Tribunal based on the evidence before it. The Applicant seeks to reopen the proceeding and adduce further evidence that was not before the Tribunal during the course of the hearing. In my view, this goes far beyond what is contemplated by s 119. As such, I do not consider that the Applicant has demonstrated any miscalculation of figures concerning the growth rate adopted by the Tribunal.

Gross Profit Margin

16. The Applicant contends that paragraph 149 of the *Reasons* contains a mathematical mistake. According to the Applicant, the *Gross Profit Margin* has been miscalculated. In its written submissions, it states:

41. Senior Member Riegler's calculation is materially incorrect for the following reasons:

- a) Senior Member Riegler rejected Tax Invoice No.27 containing the 3 items sold, and subtracted the total profit 17,304.61% achieved for those 3 items which were sold from the total profit of 32,230.51% achieved for 62 items sold, resulting in a profit of 14,925.90%, and then dividing 14,925.90% by **62 items**, instead of **59 items**. Senior Member Riegler did not subtract the 3 sold items he disregarded in Tax Invoice No. 27, but only disregarded the

profit achieved by the applicant from the sale of those 3 items.

b) It is submitted that no items should have been disregarded from the list of sold items as all items were sold and all mark ups achieved.

c) if however, the mark ups on 3 items sold are removed from the calculation, then;

(i) 3 items must be deducted from the total number of 62 items used in Senior Members calculation, that is:

$$\underline{62 \text{ items}} - 3 \text{ items} = \underline{59 \text{ items}}$$

(ii) Thus the **AVERAGE MARKUP** is:

$$\underline{32,230.51\%} - \underline{17,304.61\%} = \underline{14,925.90\% / 59 \text{ items}} = \underline{252.98\% (253\%)}$$

and

(iii) **the GROSS PROFIT MARGIN (GPM) equals 71.67%**

17. In simple terms, I find that the Applicant has identified a mathematical error in the Tribunal's calculations; namely, that in calculating the average markup, the Tribunal has mistakenly divided the sum of the aggregate number of items (59) by 62, rather than 59.

18. I accept this is a mathematical error that is to be corrected pursuant to s 119 of the Act. Accordingly, paragraphs 148, 149, 160 and 161 are to be corrected to reflect a correction in that mathematical equation.³

Asbestos

19. The Applicant contends that paragraph 47 of the *Reasons* misdescribes the asbestos in the premises. In my view, the 'description' of the asbestos in the premises is a finding of fact based on the limited evidence given during the course of the hearing. It is not appropriate to reopen the proceeding to hear further evidence in relation to the issue of asbestos. Accordingly, it is not open for the Applicant to disturb that finding under the slip rule mechanism of s 119 of the Act.

Occupier in the premises

20. The Applicant contends that paragraph 48 of the *Reasons* contains material mistake in the description and definition of the term *occupier*. In my view, insofar as paragraph 48 of the *Reasons* defines *occupier*, that constitutes a finding made by the Tribunal and it is not open for the Applicant to disturb that finding under the slip rule mechanism of s 119 of the Act.

³ The corrections are attached in Annexure 'A' and are identified by striking out the incorrect entry and substituting it with an underlined and highlighted amended entry.

Hearing dates

21. The Applicant contends that the order dated 22 April 2014 mistakenly failed to record the hearing days of 10 and 11 October 2013. I accept that this is an error arising from an accidental slip or omission and is to be corrected pursuant to s 119 of the Act.

Other corrections

22. Although not raised by either party, it would appear that paragraph 155 of the *Reasons* also contains an arithmetic miscalculation. The amount of interest to be added to the amount stated in the Applicant's *Sales and Expenses Spreadsheets* is stated to be \$11,368.50. That figure should be \$11,305, calculated as follows:

Total yearly interest assumed for 2011 (\$22,737) less amount stated in *Sales and Expenses Spreadsheets* (\$11,702) = \$11,305.

23. Given that miscalculation, the amount stated as the approximate projected expenses of \$104,238 is then to be corrected to \$104,273, calculated as follows:

Amount of expenses stated in *Sales and Expenses Spreadsheets* (\$50,238) plus the balance of the overdraft interest (\$11,305) plus the approximate amount of rent and outgoings not recorded in the *Sales and Expenses Spreadsheets* (\$43,000) = \$104,273.

24. It is noted that the corrections set out in paragraphs 22 and 23 above have no impact on the final amount awarded to the Applicant as these figures were merely set out as part of a *rudimentary calculation* to demonstrate consistency with *Mr Fettes' statement that he understood the Tenant's [Applicant's] liability in respect of fixed expenses for the calendar year 2011...*

Conclusion

25. Having regard to the corrections which I have found to exist in the Orders and *Reasons* dated 22 April 2014, revised orders and *Reasons* will be published, which shall include the corrections set out above.

SENIOR MEMBER E RIEGLER