VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP552/2016

CATCHWORDS

RETAIL TENANCY DISPUTE – Claim for outstanding outgoings; cost of repairs – liability for faulty air-conditioning – whether fair to order reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*.

FIRST APPLICANT	VIN Capital Pty Ltd (ACN 160 385 286)
SECOND APPLICANT	Sandamal Nanayakkara
FIRST RESPONDENT	Kushland Family Daycare Services Pty Ltd (ACN 155 549 303)
SECOND RESPONDENT	Mary Nayakate Riek
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	3 August 2016
DATE OF ORDER	4 August 2016
CITATION	VIN Capital Pty Ltd v Kushland Family Daycare Services Pty Ltd (Building and Property) [2016] VCAT 1321

ORDER

1. The First Respondent must pay the Second Applicant $6,943.83.
2. The claim against the Second Respondent is dismissed.
3. No order as to costs or reimbursement of fees.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Ms G Ariyathilake, company accountant
For the First Respondent	Ms N Dhol, company bookkeeper
For the Second Respondent	Ms M Riek, in person

REASONS

INTRODUCTION

1. The Second Applicant is or was the tenant of retail premises located in Thomas Street, Dandenong. He leases or leased those premises from Create Invest Develop Pty Ltd, which is the owner of that property. The Second Applicant is the director of the First Applicant (**'Vin Capital'**). Vin Capital is the entity under which the Second Applicant conducts its business activities.

2. On or about 16 July 2012, the Second Applicant, with the consent of the owner, subleased a part of the premises to the First Respondent (**'Kushland'**). The area sublet to Kushland was delineated by a wall and a common area, comprising a kitchen and restroom. The area occupied by Kushland covered approximately half of the total floor area of the premises. From that delineated area, it operated a retail business, being an agency responsible for organising or procuring home childcare for its customers.

3. The sublease is evidenced by two documents; namely, a document entitled *License Agreement* and another document entitled *Offer to Sub Lease*. Although the first document is entitled *License Agreement*, it is not contended that Kushland's occupancy was pursuant to anything other than a retail tenancy agreement. The document entitled *License Agreement* also names the Second Respondent as a party to that agreement and identifies her as *the Guarantor*. However, it appears that the document has been signed by the Second Respondent as the director of Kushland, rather than in her personal capacity as guarantor. Further, there are no terms within the *License Agreement* or the *Offer to Sub Lease* which impose any obligation on the Second Respondent to guarantee the obligations of Kushland. The only reference to there being a guarantee is in the heading of the *License Agreement*, which simply describes the Second Respondent as *the Guarantor*.

4. The sublease was expressed to commence on 1 August 2012 and expire on 1 December 2013. The rent was fixed at $2,475 per month inclusive of GST. In addition, the terms of the sublease provided that Kushland pay or contribute to 50 percent of all outgoings levied against or incurred by the Second Applicant under the Head Lease. These outgoings included council and water rates, office cleaning, electricity usage, and removal of waste.

5. Kushland occupied the premises from 1 August 2012 until 26 December 2013. During that period, it diligently paid all rent due under the sublease and all, or substantially all, of the invoices that were levied by either Vin Capital or the Second Applicant in respect of outgoings. In that regard,

Applicants would receive invoices from the owner of the premises for payment of various outgoings under the head lease. The Applicants would then generate their own invoice, which they sent to Kushland, representing 50 percent of the cost of those outgoings.

6. The First and Second Applicants contend that after Kushland vacated the premises, a final invoice was sent to Kushland in the amount of $10,051.18. That invoice is dated 28 January 2014 and includes charges which represent Kushland's contribution to outgoings which had not been paid (or indeed invoiced) during 2013 and other amounts relating to the cost of repairing the premises.

7. Kushland denies having received the invoice dated 28 January 2014 around that time. It contends that the first time it became aware of that invoice, and the claims made under that invoice, was when it received a letter from the Vin Capital's solicitors dated 17 July 2014. It says that when it received that invoice, it had no idea how those charges arose and why those charges were being pursued more than six months after it had vacated the premises. In particular, Ms Dhol, who is Kushland's bookeeper and who appeared on its behalf, gave evidence that the charges described in the 28 January 2014 invoice were never the subject of any invoice which Kushland received during its occupation of the premises. Unsurprisingly, the invoice was not paid, which ultimately led to the Applicants initiating this proceeding.

THE CLAIM

8. The amount claimed by the Applicants in respect of Kushland's tenancy is set out in the table attached to the originating application, a copy of which was handed to the Tribunal at the commencement of the hearing. The table totals $9,243.82 and includes an amount of $176.59, which the Applicants contend represents the balance outstanding of all invoices which they remitted to Kushland during its occupancy of the premises, together with other amounts which represent outgoings under the head lease but which were not included in those invoices and the costs associated with repairing or reinstating the premises following the sublease coming to an end.

9. The relevant parts of the table are:

Description	Amount claimed	Period in question
Council rates	$717.75	October to December 2013
Water rates/usage	$953.10	January to December 2013
Cleaning charges	$733	February to April 2013
Electricity	$3,442.89	April to December 2013

Description	Amount claimed	Period in question
Waste removal	$404.43	January to December 2013
Cost of repairs to reinstate the premises	$2,991.07	January 2014
Repair to air-conditioner	$2,300	2014
Balance of unpaid invoices raised during the sub-tenancy	$176.59	
SUB TOTAL	$11,718.83	
Less security deposit held	($2,475)	
TOTAL	**$9,243.83**	

10. In addition to the $9,243.83 claimed, the Applicants also seek an order that the fees paid by them and associated with the proceeding be reimbursed. These total $1,453.32 as follows:

    (a) $390, representing the fees paid to the Small Business Commissioner for convening two mediations;

    (b) $575.30 representing the Tribunal application fee; and

    (c) $487.90 representing the Tribunal daily hearing fee.

FINDINGS

Outgoings

11. Ms Ariyathilake, accountant for the Applicants, gave evidence on their behalf. She produced and drew my attention to a number of invoices substantiating the costs incurred by Vin Capital or the Second Applicant relating to the use and occupation of the premises. Fifty percent of those costs match the amount claimed by the Applicants in respect of outgoings for council and water rates, electricity usage and waste removal. She conceded that those costs, by and large, were not charged to Kushland during the calendar year 2013 but rather, a reconciliation of all expenditure was undertaken after the subtenancy ended, which then culminated in the invoice dated 28 January 2014 being generated. She provided no explanation as to why those charges were not progressively invoiced to Kushland during 2013, even though Vin Capital had progressively levied invoices for rent and some other outgoings during that year.

12. Ms Dhol conceded that those charges, by and large, related to use of the premises during the period that Kushland occupied the premises.

However, she said that Kushland had no idea that those charges were being incurred by the Applicants and this then led to confusion when she eventually received a copy of the invoice dated 28 January 2014, received in July 2014. Copies of the original invoices were not provided to her to enable her to reconcile what was or was not payable by Kushland. Consequently, the invoice was not paid.

13. Having perused and considered the supply invoices, I find that the amounts claimed in respect of council rates, cleaning charges, water rates, electricity usage and waste removal are consistent with what is being claimed. I further find that, on the balance of probabilities, those amounts have not been paid by Kushland, notwithstanding that under the terms of the subtenancy, those charges constituted outgoings which were payable by it.

14. However, no evidence was adduced to verify that Vin Capital has any standing to prosecute a claim against either of the Respondents. As was explained to me during the course of the hearing, Vin Capital is the corporate vehicle through which the Second Applicant operates its business activities. Nevertheless, Vin Capital is not a party to the sublease and in my view, has no right to claim compensation or damages under that sublease. Accordingly, I find that any amounts payable by Kushland are payable only to the Second Applicant.

15. Similarly, I find that the obligation to make payments under the sublease are obligations which rest solely with Kushland. I do not consider that the mere inclusion of the Second Respondent in the heading of the *License Agreement* is sufficient to constitute an agreement whereby she guarantees the obligations of Kushland. As I have already indicated, there are no terms whatsoever in either of the two documents tendered in evidence which set out any obligation to indemnify. Consequently, I find that any claim that either of the Applicants may have against the Second Respondent in respect of Kushland's obligations under the sublease is not maintainable.

16. Therefore, I find that Kushland alone is liable to pay the Second Applicant in respect of those outgoings incurred during 2013, which have not been paid. Those outgoings also include $176.59, which Ms Ariyathilake said constitutes the aggregate sum of outstanding amounts in respect of invoices that had previously been levied to Kushland during its occupation of the premises. Neither of the Respondents contended that this amount was not due and payable. Therefore, the total amount in respect of outgoings and outstanding amounts previously invoiced is $3,952.75. This amount takes into account the security deposit of $2,475 that was retained by the Applicants after Kushland vacated the premises.

Cost of repairs

17. Ms Ariyathilake gave evidence that the premises were damaged after Kushland vacated. She produced a number of photographs which showed holes in the plasterboard wall and wires protruding. She also produced a copy of an invoice from *Hire a Hubby* dated 13 January 2014. That invoice describes the following work: *Painting of 2 rooms and ceiling repair in previously sub-let area.* The total of that invoice is $2,991.07. Regrettably, no person from that firm was called to give evidence in order describe the condition of the premises or substantiate whether the photographs accurately reflected the condition of the premises at that time.

18. Ms Dhol and the Second Respondent denied that the condition of the premises upon Kushland vacating was anything like that depicted in the photographs. Ms Dhol said that she had no recollection of there being holes in the walls or the ceiling, as alleged, and that the premises were in a tidy state, save and except for fair wear and tear. She said that the premises were cleaned prior to Kushland leaving.

19. Ms Dhol said that after Kushland left the premises, another tenant occupied the premises. She said that the claim made against Kushland was made more than six months after it had vacated and anything could have happened during that period. Ms Ariyathilake responded by pointing to the date of the *Hire a Hubby* invoice which was 13 January 2014, being only two to three weeks after Kushland left the premises. She submitted that the date of that invoice was consistent with the damage having occurred during Kushland's occupancy.

20. In my view, the more likely scenario is that the damage was caused during Kushland's occupancy. That scenario is consistent with the date of the *Hire a Hubby* invoice dated 13 January 2014. Moreover, I found Ms Ariyathilake to be a credible witness who could reliably recollect the condition of the premises at the time that Kushland vacated. Further, Ms Ariyathilake indicated that she actually observed the condition of the premises and was aware of the repair work carried out. By contrast, I found that the Respondents' recollection of the condition of the premises was less clear, which is explicable by the fact that more than 2 ½ years has passed since they occupied the premises.

21. Consequently, I find that Kushland is liable to reimburse or pay the Second Applicant for the reasonable cost of making good repairs to the premises, save and except for fair wear and tear. In my view, this obligation arises under clause 10 of the *License Agreement* which states:

> 10. The Registered owner and/or his appointed agent may carry out essential maintenance works and repairs to the licensed

> premises from time to time without prior authority from the Licensor [the Second Respondent] and invoice the Licensor for the same and Licensor will in turn invoice the Licensee [Kushland] in accordance with Item 1 of the schedule annexed herewith. All such invoices will be payable immediately by the Licensee.

22. Accordingly, in the absence of any contrary evidence, I find that the amount of $2,991.07 represents a fair and reasonable price for the work carried out in order to repair damage caused to the premises as a result of Kushland's occupancy.

Air-conditioning

23. The Applicants further claim against the Respondents in respect of the cost of repairing the air-conditioning unit servicing the premises, and which comprise part of the landlord's installations. The cost of repairing the air-conditioning is $2,300, being an amount set out in an invoice from *ATA Electrics Pty Ltd*.

24. Ms Ariyathilake gave evidence that Kushland, or persons occupying the premises under its authority, had overloaded the air-conditioning unit and caused it to breakdown. No expert witness was called to verify this allegation. When pressed further as to what Ms Ariyathilake meant by the term *overloading the air-conditioning*, she said that it was used continuously during the night.

25. Ms Riek gave evidence that the air-conditioning unit stopped working not long after Kushland commenced occupation and despite repeated requests for it to be repaired, nothing was done. She said that she knew of no act or omission on the part of Kushland or anyone else occupying the premises under its authority that caused any damage to the air-conditioning unit. She said that all that was done was to operate the air-conditioning unit. She also said that she did not operate the air-conditioning continuously throughout the night and in any event, was never told not to do that.

26. I am not satisfied that any act or omission on the part of Kushland or anyone else occupying the premises under its authority caused the air-conditioning unit to breakdown. Further, even if it was not advisable to use the air-conditioning unit continuously during the night, I find this, of itself, is not the fault of Kushland. In particular, if that were the case, then in all likelihood the specification for the air-conditioning was inadequate to properly service the premises.

27. In the absence of any evidence satisfying me that Kushland or any person occupying the premises under its authority caused the air-conditioning unit to breakdown, I find that this aspect of the claim is unsustainable and should be dismissed.

CONCILIATION OF CLAIM

28. In conclusion, I find that Kushland is liable to the Second Applicant in the amount of $6,943.82, made up as follows:

Description	Amount
Council rates	$717.75
Water rates/usage	$953.10
Cleaning charges	$733
Electricity	$3,442.89
Waste removal	$404.43
Balance of unpaid invoices raised during the sub-tenancy	$176.59
Cost of repairs to reinstate the premises	$2,991.07
SUB TOTAL	$9,418.83
Less security deposit held	($2,475)
TOTAL	**$6,943.83**

REIMBURSEMENT OF FEES

29. The Applicants also seek an order that the fees which they paid prosecuting this litigation be paid by the Respondents. Section 115C of the *Victorian Civil and Administrative Tribunal Act 1998* states:

> …
>
> (2) Subject to subsection (3), a party who has substantially succeeded against another party in a proceeding to which this section applies is entitled to an order under s 115B that the other party reimburse the successful party the whole or any fees paid by the successful party in the proceeding.
>
> (3) Subsection (2) does not apply if the Tribunal orders otherwise, having regard to –
>
> (a) the nature of, and issues involved in, the proceeding; and
>
> (b) the conduct of the parties (whether occurring before or during the proceeding), including whether the successful party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse.

30. Section 115 creates presumption in favour of a winning party that the fees paid by that party be reimbursed by the losing party. However, the Tribunal still retains a discretion to refuse an order that a winning party's fees be paid by the losing party.

31. In my view, it would be unfair in the present case to order that the Respondents pay the Applicants' fees associated with this proceeding. I have formed this view because the disputation leading to this litigation was partly caused by the failure on the part of the Applicants to properly invoice Kushland during the period that it occupied the premises. No doubt, had invoices in respect of the outgoings been progressively invoiced, and copies of the supply invoices given to Kushland, much of the disputation would never have eventuated or progressed to a point where it now is.

32. Moreover, as I have already indicated, the claim as against the Second Respondent is without substance. It should never have been made.

33. Therefore, when weighing all those factors together, I am of the opinion that an order that the Respondents pay the Applicants' fees associated with this proceeding would not be a fair outcome and I refuse to make such an order. Further, I note that the fees sought also include fees which are not associated with this proceeding; namely, the fees associated with the two mediations before the Small Business Commissioner. In my view, s 115 does not go so far as to include such fees. Accordingly, I will make no order as to the reimbursement of fees.

SENIOR MEMBER E. RIEGLER