VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP996/2020

CATCHWORDS

RETAIL LEASES-INJUNCTION–No serious question to be tried concerning the right of the landlord to forfeit the lease by re-entry–*Covid-19* legislation found not relevant to the right of the landlord to do so, there being no serious question concerning the proposition that the lease is not an eligible lease within the meaning of the *Covid-19* legislation.

RELIEF AGAINST FORFEITURE–found not to be a case regarded as exceptional as would justify the refusal of an order granting relief against forfeiture–relief against forfeiture granted.

APPLICANT	C B Buffet (Burwood) Pty Ltd (ACN: 169 973 880)
RESPONDENT	Delloyd Pty Ltd (ACN: 058 395 958)
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Injunction application
DATE OF HEARING	20 July 2020, 23 July 2020
DATE OF ORDER	4 November 2020
CITATION	C B Buffet (Burwood) Pty Ltd v Delloyd Pty Ltd (Building and Property) [2020] VCAT 1234

ORDER

1. On or before 4 pm on **9 November 2020**, the respondent must render to the applicant an invoice in respect of:
   (i) rent and outgoings for the period from 15 March 2020 to and including the period from 15 October 2020-14 November 2020 payable by the applicant in respect of premises at 380 Burwood Highway, Burwood East, Victoria under a lease entered into on about 8 July 2012 (the "**lease**");
   (ii) any interest payable under the lease on amounts of rent and outgoings in arrears; and
   (iii) the respondent's expenses attributable to the forfeiture of the lease (excluding the respondent's legal costs of this proceeding) (the "**invoice**").

2. On condition that the applicant pays by 4 pm on **13 November 2020**, in clear funds and without set-off, the amounts rendered by the respondent in the invoice, the applicant is relieved from forfeiture of the lease.
3. Upon payment of the invoice by the applicant pursuant to order 2, the respondent must immediately make arrangements for the applicant to have access to the premises at 380 Burwood Highway, Burwood East.
4. Liberty to the respondent to apply for costs of the proceeding. Payment of such costs within 7 days of any agreement, or otherwise within 7 days of any costs determination by the Victorian Costs Court is declared to be a further condition of this grant of relief, failing which the lease will stand forfeited.
5. Liberty to apply generally.

A T Kincaid
Member

APPEARANCES:

For Applicant: Mr C Twidale of Counsel

For Respondent: Mr J D S Barber of Counsel

REASONS

Introduction

1 This is an application for an interlocutory injunction restoring the applicant to leasehold possession of restaurant premises known as "China Bar Signature Buffet Burwood" in Burwood East, Melbourne (the "**premises**").

2 An alternative claim is made by the applicant for relief against forfeiture.

3 The matter first came before me on 30 June 2020. It was adjourned on mutual undertakings to 13 July 2020 to enable the applicant to serve an amended pleading.

4 On 13 July 2020, a question was raised as to who the occupier of the premises was. This arose from the use by the applicant's counsel of the word "licensee" to describe another business to which, it appeared, the applicant had granted certain rights and which, subject to the exact nature of the grant, may have been in breach of the lease. I granted an adjournment to allow the respondent to file material about this. The applicant also wished to file further material concerning the applicant's claimed entitlement to rely on the provisions of the statutory *Covid-19* regime for providing amelioration from rent obligations from 29 March 2020, as may be relevant to the applicant's alternative claim for relief against forfeiture. I adjourned the matter to 20 July 2020 for a half day's further submissions. Submissions were not completed then, and it was necessary for me to adjourn to 23 July 2020 to complete the hearing of the application.

5 The factual material relied on is contained in six affidavits sworn by a director of the applicant Mr Chi, and in three affidavits sworn by a director of the respondent Mr Tee.

Injunctions-general principles

Serious question to be tried

6 In order to establish an entitlement to interlocutory relief an applicant must first demonstrate that there is a serious question to be tried as to its entitlement to relief. In respect of this question, the applicant must make out a *prima facie* case in the sense of demonstrating that, in the circumstances, there is a sufficient likelihood of success at trial, in respect of the question, to justify the preservation of the *status quo* pending the determination of the parties' rights at trial. This does not mean that the applicant has to establish that it is more likely than not that it will succeed at trial. How strong the probability needs to be depends upon the nature of the rights asserted, and the practical consequences likely to flow from the relief sought.[1]

---

[1] *ABC v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at 68 [19], 82 [65].

Balance of convenience

7 An applicant must also establish that the balance of convenience favours the granting of an injunction. The Tribunal should take whichever course appears to carry the lowest risk of injustice should it turn out to have been wrong, in the sense of granting an injunction to a party who fails to establish its right at trial or failing to grant an injunction to a party who succeeds at trial.[2]

8 In determining the balance of convenience, the Tribunal is entitled to consider the strength of an applicant's cross-undertaking as to damages.[3] Whether an applicant's assets would be sufficient to meet the damages that might be awarded to a respondent pursuant to such an undertaking is clearly a factor relevant to the grant of interlocutory relief.[4]

9 The Tribunal will also ask when considering the balance of convenience, whether the applicant has shown that it is likely to suffer injury, if the injunction is not granted, for which damages will not be an adequate remedy.

Background

10 In 2008, as a director of a company related to the applicant, Mr Chi bought an Italian restaurant business operating at the premises for about $800,000, and signed a lease with the then owner of the premises. Mr Chi alleges that he subsequently spent about $1.4 million renovating the premises to allow for the operation of a buffet restaurant serving Chinese food.

11 By an undated lease commencing 8 July 2012, the applicant leased the premises from the respondent for a term of 5 years, with options in regard to two further terms of 5 years each, and one further term of 2 years 6 months, with a final lease expiry date of 7 January 2030 (the "**lease**").

12 In mid-2017, the applicant signed a Renewal and Variation of Lease Agreement in respect of the first further term of 5 years under the lease, taking the term of the lease to 7 July 2022.

13 Mr Chi alleges that in 2018 he spent a further $400,000 renovating the premise, and that, prior to the *Covid-19* pandemic, the revenue of the business was $80,000-$120,000 gross per week.

14 Being a buffet style restaurant, the applicant says that it suffered a decline in business "from around January 2020" due to the *Covid-19* pandemic.

15 It is noteworthy that in late January 2020 the first Australian cases of Covid-19 were reported, mainly incoming travellers from China. The first Australian death from *Covid-19* was reported on 1 March 2020, and that

---

2 *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89.

3 *NT Consulting Services Pty Ltd v Own Investments Pty Ltd and Ors* [2013] VSC 508; see also *Frigo v Culhaci* [1998] NSWSC 393 and *J Aron & Co v Newman Yandal Operations Pty Ltd* (2003) 47 ACSR at [16] and [17] both relied on by MRN.

4 See discussion in *Williams Civil Procedure Victoria* at I 38.01.310.

WHO declared the pandemic on 11 March 2020. News reports at the time indicated, however, that by early February 2020 Chinese restaurant businesses in Melbourne had substantially lost their customer base, and by mid-February 2020 many well-known Chinese restaurants in Melbourne had been forced to close.

16 Mr Chi states that gross revenue of the applicant declined to about $20,000 gross per week due to *Covid-19*, which was insufficient to meet the payroll liabilities of the applicant.

17 He states that in "early February 2020" the business was closed.

18 On 13 March 2020 the applicant received from the respondent a notice of default under the provisions of the *Property Law Act 1958* (the "**notice of default**").

19 The notice of default claimed the following amounts:

$39,830.48	Rent due 15/2/20 for period to 14 March 2020.
$5,580.30	Council rates due 15 February 2020
$9,815.93	Water rates due 15 February 2020
$326.00	Penalty interest due on monies outstanding for longer than 7 days after becoming due and payable.
$1,287.00	Landlord's legal costs
$56,839.71	

20 Whitehorse City Council served a Notice dated 12 March 2020 on the applicant on 13 March 2020. It required the applicant to take cut grass and weeds growing around the premises, to comply with the requirements of the Local Law.

21 On 27 March 2020 the respondent took possession of the premises due to the non-payment of rent and other outgoings claimed in the notice of default.

22 On 29 March 2020 the Federal Cabinet National Cabinet announced a set of principles by which there should be a moratorium on evictions of commercial and residential tenants over the next six months for tenants who are unable to meet their commitments due to the impact of the *Covid-19* pandemic. The principles were formalised on 3 April 2020, and were subsequently contained in what was called the *National Cabinet Mandatory*

Code of Conduct-SME Commercial Leasing Principles During Covid-19" (the "**Code of Conduct**").

23 These principles subsequently became the subject of legislation in Victoria (the "**Covid-19 legislation**"), comprising:

(a) *COVID-19 Omnibus (Emergency Measures) Act 2020* (the "**Act**"), which came into operation on 25 April 2020;

(b) *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (the "**Regulations**"), made 1 May 2020 under section 15 of the Act, but taken to have come into operation on 29 March 2020; and

(c) *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (*the "**Rules**"), which came into effect on 9 April 2020.

24 In summary, the Regulations provide that where a tenant has an "eligible lease" as defined in section 13 of the Act, it is entitled to avail itself of a rent relief regime as described in the Regulations. When promulgated, the Regulations were to expire on 29 September 2020, but they have since been extended.

25 One of the requirements for qualification as an "eligible lease" is that the lease is in effect on the day the first regulations made under section 15 of the Act came into operation.[5] That date was 29 March 2020. The respondent submits that the lease, having been brought to an end on 27 March 2020, does therefore not qualify as an eligible lease. The respondent therefore submits that this consideration is a relevant one when considering the applicant's alternative claim for relief against forfeiture, and the liabilities the applicant will have to meet as the usual condition of granting relief.

26 By letter emailed on 2 April 2020, the applicant's solicitors sought resumption of possession of the premises on the basis that the applicant would pay all outstanding rent and outgoings to that date, but indicating that it would need a remission or reduction of rental going forward in line with the principles expounded in the Code of Conduct.

27 By letter emailed on 3 April 2020, the respondent's solicitors replied that "to obtain relief against forfeiture the applicant would need to pay by 4 pm that day all monies outstanding to date. Given that the rent for period 15 March 2020 to 14 April 2020 had by then fallen due, the amount demanded by the respondent by an accompanying invoice was $88,639.01.

28 On 29 April 2020 solicitors for the applicant wrote to the respondent's solicitors seeking the return of possession based on the spirit of the Code of Conduct. Failing its being restored to possession by 6 May 2020, injunctive relief and relief against forfeiture were threatened by them.

---

5 See section 13(1) of the Act.

29 On 30 April the respondent's solicitors responded to the effect that the Code of Conduct, even if it were law as suggested by the applicant, only applied after 3 April 2020, and that at that date no lease was on foot.

30 There is no record of any correspondence between the parties between 30 April 2020 and 11 June 2020. By letter emailed on 11 June 2020 the lawyers for the applicant, having recited that the applicant had received word that the respondent was attempting to re-release the premises, demanded an undertaking that the respondent not do so. This injunction application was subsequently filed on 25 June 2020.

31 By his second affidavit sworn 29 June 2020 Mr Chi of the applicant offered to pay the $55,226.71[6] thought to be due under paragraph 3 of the notice of default within 7 days of being allowed to resume occupation. By its third affidavit sworn 10 July 2020. the applicant offered to pay the $88,639.01 demanded by the respondent's email dated 3 April 2020.

32 Since April 2020 the respondent has been attempting the re-lease the premises in order to mitigate its alleged loss caused by the applicant's repudiatory breach of the lease. On 23 July 2020, when I last heard the matter, no such re-letting had occurred.

33 The respondent has since identified a new tenant who wishes to lease the premises for an initial term of 5 years, and the other terms of the proposed lease are under negotiation.[7] It was necessary for me to grant an injunction on 15 October 2020, restraining the respondent from re-leasing the premises or otherwise parting with possession until 30 October 2020, the date by which I indicated this decision would be published.

34 As a condition of that injunction, I ordered the applicant to pay $55,226.71 by 16 October 2020. This was the amount considered to be due to the respondent under paragraph 3 of the notice of default.

35 This means that the applicant has not yet been paid the balance of the respondent's invoice dated 3 April 2020, being $33,403.30 for the rental period 15 March 2020 to 14 April 2020. The applicant has not paid any rent for the period thereafter.

No serious question to be tried that the respondent's notice of default was defective

36 The applicant submits that the notice of default was defective. On 22 June 2020, in draft Points of Claim provided to the respondent's solicitors, the applicant alleged this for the first time.

37 In the Amended Points of Claim dated 3 July 2020, the applicant states:

---

6 This calculation of the sum of the amounts in paragraph 3 of the notice of default appears to have been in error.

7 See affidavit of Mr Hannan sworn 14 October 2020 at [12].

8. The [notice of default] did not comply with section 146(1)(a) of the *Property Law Act 1958* in that the particular breach or breaches were not specified sufficiently or at all.

PARTICULARS

i. The [notice of default] alleged that the [applicant] had breached a covenant of the lease in which the [applicant] was to pay interest on moneys outstanding for longer than seven (7) days after becoming due and payable (the "**First Allegation**").

ii. Further, the [notice of default] alleged that the [applicant] had breached a covenant of the lease in which the [applicant] was to pay the [respondent's] legal costs for any breach of Lease or exercise or attempted exercise by the [respondent] of any right or remedy against the [applicant] (the "**Second Allegation**")

iii. To substantiate the [First Allegation and the Second Allegation] the [respondent] stated in the written notice (the "**Evidence**") that the [applicant] had failed to pay the sum of:

(a) $39,830.40 including GST for one month's rent in advance due 15 February 2020;

(b) $5,580.30 including GST for council rates due 15 February 2020; and

(c) $9,815.93 including GST for water rates due 15 February 2020

iv. the Evidence does not support the First Allegation, as it is not alleged that the [applicant] had not paid interest on the three aforesaid amounts after those said amounts became due and payable.

v. Further, or alternatively, the Evidence does not support the Second Allegation, as it is not alleged that the [applicant] has not paid the [respondent's] legal costs for any breach of Lease or exercise or attempted exercise by the [respondent] of any right or remedy against the Tenant.

38 In summary, the applicant submits, unlike the alleged breaches of covenant by the applicant in respect of the failure to pay rent and rates, no prior breaches are alleged in respect of the tenant's obligations to pay penalty interest on monies outstanding from more than 7 days and legal costs arising from the defaults the subject of the notice of default; such monies are simply claimed by paragraphs 2(d) and 2(e) of the notice of default. I consider that in relation to these claims made in the notice of default, these submissions have some merit, particularly as both under clause 2.1.7 of the lease in respect of the payment by the applicant of interest, and clause 2.18 of the lease in respect of payment by the applicant of the respondent's reasonable expenses and legal costs, the applicant is obliged only to make such payments "within 7 days of a request" by the respondent.

39 For example, in relation to the payment of penalty interest, there is no obligation on the respondent to pay, as alleged in paragraph 2(c) of the notice of default, "penalty interest on any monies outstanding for longer than seven (7) days after becoming due and payable"; rather, I consider, the obligation under clause 2.1.7 of the lease is to pay such interest only after 7 days of a subsequent request to do so by the respondent. It is only where there is a failure to do so, that a breach of the respective provisions of the lease will have occurred.

40 The fact that any such "requests" pursuant to the provisions of the lease were made by the respondent is not referred to in the notice of dispute.

41 It may be that in respect of leases containing terms identical to those in the subject lease, a difficulty will be encountered in respect of the notorious practice of also claiming the legal costs associated with the preparation of the very notice of default in which they are claimed and where, logically, no such prior "request" for payment could have been made.

42 There is a long line of authority, however, to the effect that a notice of default which requires a tenant to do something which the tenant is not liable to do, but which otherwise properly refers to breaches by the tenant that have otherwise occurred, is good.[8]

43 I find that insofar as the notice of default demands payment by the applicant of outstanding rental and rates due 15 February 2020, there is no serious question to be tried in regard to the efficacy of the notice of default.

No serious question to be tried whether the re-taking of possession was unconscionable

44 Secondly, the applicant submits that re-entry by the respondent was unconscionable, and should therefore be restrained.

45 Section 77(1) of the *Retail Leases Act 2003* provides:

> (1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.[9]

46 Section 77(2) of the Act provides examples of conduct that might amount to unconscionable conduct.[10] It provides:

> (2) Without limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection (1), the Tribunal may have regard to—

---

8 See *Pannell v City of London Brewery Company* [1900] Ch 496 at 499-500, 504; *Shepherd v Lomas* [1963] 1 WLR 962 at 970-971; *Gair v Smith* [1964] VR 814 at 817; *Australian Fearless Sports Pty Ltd v Casey Shopping Centre Pty Ltd [*2017] VCAT 1808 at [48] per SM Farrelly.

9 Section 21(1) of the *Australian Consumer Law* is in similar terms, although directed towards transactions involving the supply or acquisition of goods or services.

10 Section 22(1) of the *Australian Consumer Law* also without limitation, sets out matters to which the court may have regard for the purpose of determining whether there has been a contravention of section 21(1) of the *Australian Consumer Law*.

(a) the relative strengths of the bargaining positions of the landlord and tenant; and

(b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests; and

(c) whether the tenant was able to understand any documents relating to the lease; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant or a person acting on the tenant's behalf by the landlord or a person acting on the landlord's behalf in relation to the lease, for example—

  (i) concerning trading on Sundays or days that are public holidays where the premises are located; or

  (ii) to agree to a lease term of less than the minimum period provided by section 21; and

(e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord; and

(f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and

(i) the extent to which the landlord unreasonably failed to disclose to the tenant—

  (i) any intended conduct of the landlord that might affect the tenant's interests; and

  (ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant; and

(j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant; and

(k) the extent to which the landlord acted in good faith; and

(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and

(m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

(n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.

47 In *Director of Consumer Affairs v. Scully* [2013] VSCA 292, the Court of Appeal considered a claim for damages for unconscionable conduct pursuant to s.8(1) of the *Fair Trading Act 1999*. SM Walker of the Tribunal considered that decision in *Meadsview Pty Ltd v Fenton,*[11] in which he said:

> [75] In a judgment with which the other members of the Court agreed, Santamaria JA said that it was undesirable to attempt a comprehensive definition of the word 'unconscionable' as it appeared in s 8(1) of the Act and in cognate provisions. However, he made a number of observations in paragraphs 38 to 49 of the judgment, which may be summarised as follows:
>
> (a) The word "unconscionable" is intended to have its ordinary meaning and is not to be confined to notions of unconscionability that have developed in courts of equity;
>
> (b) Conduct is to be distinguished from the consequences that the conduct may have on the lives of other people. It is the conduct that must be unconscionable;
>
> (c) Equity's exploration over the years of the manifold and novel ways in which the strong can exploit the weak, in trade and commerce or otherwise, will usually be of assistance in assessing whether it should be said that conduct has been unconscionable;
>
> (d) The matters referred to in s 8(2) help illuminate its meaning, but presence of one or more of those matters, without more, does not mean that conduct has been unconscionable;
>
> (e) Section 8(2) makes it clear that qualities of unreasonableness and unfairness in the circumstances it specifies are not to be regarded as automatically rendering conduct unconscionable, but rather are matters to which regard is to be had in determining whether conduct is unconscionable. They are indicia of unconscionability;
>
> (f) The task of statutory construction must begin with a consideration of the statutory text. To treat the word "unconscionable" as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance. That approach should not be adopted unless the statute clearly so requires;

[11] [2018] VCAT 1249 at [75].

(g) The Act applies to conduct 'in trade or commerce, in connection with the supply or possible supply of goods or services';

(h) Section 8(1) [as does section 77 of the *Retail Leases Act 2003*] uses the phrase 'in all the circumstances'. The characterisation demanded by the provision is one that is to be made 'in all the circumstances'. Consideration of 'all the circumstances' can cast a different complexion on things;

(i) It is necessary to show at least 'some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party';

(j) It is a noticeable feature of all the cases, thus far, in which conduct has been held to be 'unconscionable' that the conduct has been found to be unethical in some manner or other.

48 Against this background, by its Amended Points of Claim dated 3 July 2020, the applicant states:

13. In or around 2017 the [respondent] gave notice to the[applicant] of its intention to develop the [premises] and build a 14-floor apartment building (the "**Development**") which required the [applicant] to provide exclusive possession of the [premises] to the [respondent]

PARTICULARS

The [applicant] refers to paragraph 12-15 of the affidavit of Mr Chi sworn 25 June 2020

14. By agreement made on or about mid-January 2019, the [respondent] agreed to compensate the [applicant] for its loss of income occasioned by the Development, fixed in the amount of $1,170,000 plus GST, to be paid prior to the commencement of the Development, plus an agreed $15,000 per week, in credit towards future rent, in the event that the development took longer than 78 weeks.

PARTICULARS

The [applicant] refers to paragraph 17 of the affidavit of Mr Chi sworn 25 June 2020.

15. By reason of the matters aforesaid, and the [respondent's] re-entry [into] possession of the [premises] on 27 March 2020, the [respondent] has engaged in conduct that is, in all the circumstances, unconscionable within the meaning of section 77 of the [*Retail Leases Act 2003*] and/or section 21 of the [*Australian Consumer Law*].

49 I have reviewed the evidence of Mr Chi relied on by the applicant, contained in paragraphs 12-17 of his first affidavit. The most that can be concluded from those paragraphs, in my view, is that the "agreement" alleged by Mr Chi of which, incidentally, there is no note or memorandum, appears to have been no more than agreement in principle between the

parties as to the amount of compensation that would be payable by the respondent if and when it proceeded with a development of the type generally discussed.

50 Mr Tee of the respondent, by his second affidavit sworn 9 July 2020, states that the discussions between the two gentlemen amounted to nothing more than this, and that he always stressed to Mr Chi that the respondent was considering its options and that, although a planning permit to develop the premises into apartments had been obtained, no decision to redevelop the site had then been made, and currently has no intention of doing so given current economic conditions.

51 I note that clauses 22 of the lease contains detailed provisions that apply where the respondent "intends to redevelop the premises". No such notice was ever served by the landlord. This supports the landlord's account that its plans for possible redevelopment of site on which the premises are located were never more than tentative.

52 The proposition that notwithstanding that the applicant was in substantial arrears in respect of rent and outgoing liabilities due on 15 February 2020, the general nature of the parties discussions concerning the respondent's possible development plans for the site meant that the retaking of possession was conduct of a type contemplated by the unconscionability provisions to which I have referred is not, I consider, remotely sustainable. I find on the evidence that there is no serious question to be tried concerning the alleged unconscionable conduct of the respondent re-taking possession on 27 March 2020.

No serious question to be tried concerning the *Covid-19* legislation preventing re-entry

53 Thirdly, the applicant alleges by its Amended Points of Claim that the respondent was not entitled to re-enter other than by having first complied with the provisions of the Act and the Regulations.

54 Regulation 9(2) of the regulations provides:

> A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease to whom subregulation [9(1)] applies.

55 I have referred to the requirement that an eligible lease under the Act, being a lease that therefore has the protection of the rent relief provisions of the Regulations, is one that was in effect on 29 March 2020. I have found that there is no serious question to be tried concerning the right of the respondent to bring the lease to an end by re-entry on 27 March 2020, and I find as a consequence that there is no serious question to be tried concerning the right of the applicant to the protections against ejectment provided by the *Covid-19* legislation.

No injunction

56 It follows that there is no basis for my granting an injunction, as there is no serious to be tried in regard to any of the matters relied on by the applicant as disentitling the respondent from taking possession when it did.

57 It becomes unnecessary for me to consider the balance of convenience.

58 The respondent also submitted that there is no serious question as to the proposition that the effect of the management agreement exhibited to the applicant's fifth affidavit sworn 20 July 2020, and of which agreement the respondent claims to have been ignorant until 13 July 2020, is that the applicant is in breach of clause 4.7 of the lease. It followed, the respondent submitted, that were I to grant an injunction, it would be futile because the respondent would serve a further default notice on the applicant "the day after" based on the claimed breach. The argument goes to discretionary considerations. Given that I have found that there is no basis for an injunction, it is also unnecessary for me to consider this further submission.

Principles of relief against forfeiture

59 The applicant claims relief against forfeiture of the premises.

60 The approach taken by the Courts and this Tribunal relief against forfeiture for non-payment of rent, and the circumstances in which it will not usually be given are well known. In *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd*[12] Ormiston J stated:

> …The tenant offered to pay rent in arrears, and in those circumstances relief against forfeiture for non-payment of rent should be granted usually as of course, save in exceptional circumstances. This principle, with two variations, has been accepted for years, and is said to flow from the view that the right of re-entry for non-payment of rent is primarily a security for rent: cf. *Gill v Lewis* [1956] 2 QB 1; *Lo Giudice v Biviano (No 2)* [1962] VR 420, especially at p 425, per Adam J.; *Platt v Ong* [1972] VR 197 and *Direct Food Supplies (Victoria) Pty ltd v DLV Pty Ltd* [1975] VR 358, at p 359, per Starke J
>
> [Both *Platt* and *Direct Food Supplies*] prefer and apply a more general test expressed by Hodson LJ in *Gill v Lewis* at p 17, namely "that there may be cases where the Court will refuse relief because the conduct of the applicant is such as to make it inequitable that relief should be given…". Particular examples have been given in the cases of tenants using premises for illegal purposes. Again, it is unnecessary to resolve any differences on this issue, for, subject to one matter, none of the other breaches [of the tenant] is of a kind which ought to deny relief. That one matter is that 'I [also] consider it appropriate to make relief conditional upon the tenant undertaking to perform other covenants of which it was in breach at the time of re-entry: cf. *Public Trustee v Westbrook* [1956] 1 WLR 1160, at p 1163 and *Platt v Ong* , at pp 200-1.

12 [1989] VR 544.

> …The power to refuse relief is clearly reserved for cases of consistently lengthy defaults which may fairly lead to an inference that, even if relief be given, there is a reasonable likelihood that rent will not be paid in the future, at least for some considerable time after the due date for payment.
>
> The only other way in which a landlord could deny the applicant relief in this case was by showing that it was or would soon become insolvent because its business was badly run. I concede that is a possibility on the evidence, but the material falls long short of satisfying me of either proposition. Of course, if the tenant continues to pay late and the lease had to be forfeited again, that may provide circumstances leading to an opposite conclusion in the future.

61 In *Jam Factory*, a lease was granted by the plaintiff and assigned to the first defendant on 20 January 1987. The lease was forfeited by the first defendant by re-entry on 13 and 14 May 1988, for the tenant's failure to pay rent due for the months of April and May 1988. The Court found that on only two occasions, rent was paid on the first day of the month, when due, and that each of the other payments of rent was made between three and 21 days late. Moreover, the court found, several cheques were not paid by the tenant's bank when presented, and on one occasion a cheque was returned "unpaid" three times before the tenant proffered a bank cheque. In August 1987 and January 1998 cheques had to be presented twice. The rent falling due on 1 April 1988 had not been paid at the time the landlord issued a writ for recovery on 13 May 1988, as a cheque for the correct amount had not bene honoured by the tenant's bank. Likewise, in respect of the rent and outgoings for May 1988, the tenant's cheque had not bene honoured before re-entry.[13]

62 The Court found that the worst that could be said of the tenant was that its approach to its obligations to pay rent and outgoings was desultory. In many respects, it found, that tenant did not deserve to be relieved against the forfeiture, but is acts did not display a deliberate denial of the landlord's rights nor, it was found, were the earlier breaches of the obligation to pay rent of a kind that could place that case in the "exceptional" category. That was a case, it was found, which fell into the general category where relief should be granted.[14]

63 In *World by Nite Pty Ltd v Michael*[15] also illustrates the circumstances in which the Court is prepared to find that consistently late payments of rent, as occurred in that case, do not bring the breaches into the "exceptional" category so as to deny relief against forfeiture. The landlord re-entered on 20 January 2003, relying on the tenant's failure to pay rent for December 2002. It was found that the tenant had defaulted in payment of rent and

---

13 Ibid at pp 588-589.

14 Ibid at p 591.

15 1 Qd R 338. Also citing *Jam Jactory*, with approval, in respect of the circumstance in which the power to refuse relief will be exercised, at p 344.

other required payments for six of the eight during the year before re-entry. Notwithstanding this, relief was granted. The court stated:

> There could have been no doubt about the [landlord's] insistence on timely payments. They issued at least seven notices to remedy breaches of covenant before they re-entered. It is not suggested, however, that although the [tenant] was short of money [in 2002], it is on the brink of insolvency. The reasons for the [tenant's] default have bene explained in [an affidavit of the tenant]. It cannot be said, on my assessment of the evidence before me, that there is a reasonable likelihood that the rent will not be paid in the future, and no interests of third partied have intervened.[16]

64 In *Lontav Pty Ltd v Pineross Custodial Services Pty Ltd*[17] his Honour Hargrave J granted relief against forfeiture in respect of a lease that was forfeited by re-entry in April 2011. The first term of the lease was to expire on 30 September 2011, but there were three further terms of five years each, with the result that if the lease remained valid and subsisting, there were prospective further terms amounting to 15 years. For the reasons he gave, his Honour was not satisfied that it is reasonably likely that the rent would not be paid in the future. Included in his discretionary considerations were the fact that the forfeiture would cause demonstrated loss to the tenant who would lose whatever goodwill it had built up in the business, and that there was a potential further 15 years for the lease to run if all options were exercised.

Discussion and findings

65 I am not satisfied, in this case, that there is sufficient evidence as may fairly lead to the inference that, even if relief be given, there is a reasonable likelihood that rent will not be paid by the applicant in the future. In this respect, the respondent relies on three notices of default, as follows:

(a) a notice of default dated 7 August 2018 in respect of the payment of rent for the months of June 2018 and July 2018;

(b) a notice of default dated 18 April 2019;

(c) a notice of default dated 5 June 2019.[18]

66 When it is considered that the tenant has occupied for the premises pursuant to the lease for the period 8 July 2012, and taking guidance from the decisions to which I have referred, I find that these matters are not capable of amounting to consistently lengthy defaults by the applicant in the payment of rent as may support such an inference.

---

16 Ibid at pp 344-345.

17 [2011] VSC 278

18 See Exhibits "LT1"-"LT3" to the affidavit of Mr Tee sworn 29 June 2020. Exhibits 'LT2" and LT3" appear only to exhibit the covering letter by which a notice of default was served on the applicant.

67 Having regard also to the applicant's substantial financial investment in the premises, and the balance of the term for a period of a little less than 10 years, I consider that this is not an exceptional case in which relief against forfeiture should be refused. The question arises, though, as to the basis on which I should grant relief.

68 With respect to the payment of rent and other liabilities, if relief is granted, the respondent submits, and I agree, that the applicant has made no offer to pay the amounts falling due from 15 March 2020 and which are presently outstanding, and only that the applicant:

> intends to source payment of future rent from the turnover of the business, once the business is allowed to operate legally. If there is any shortfall, the applicant will seek loans from its investors and shareholders as it had done previously.[19]

69 The respondent submits that there is no evidence of the ability of the applicant to obtain loans from "investors and shareholders". It also submits that as to the future rent, the applicant may not be able to pay it for months or years as its capability of doing so, being linked to the applicant's turnover, would require the applicant promptly to operate at the same level as the period prior to the onset of the *Covid-19* pandemic.

70 It may be supposed from the above statement of Mr Chi that the applicant intends to seek relief from its obligation to pay rent and outgoings pursuant to the *Covid-19* legislation, such that the amount of rent payable by the applicant until its business starts operating again will be a matter for determination, failing agreement between the parties. I have concluded that this is not the case, for the reasons that follow.

71 The applicant relies on Mr Chi of the applicant being eligible for benefits under the *JobKeeper Scheme.* Part of the Victorian government's response to the *Covid-19* pandemic is that the Rules established this scheme, administered by the Australian Taxation Office. Under the *JobKeeper Scheme*:

(a) a qualifying entity whose business that has suffered a substantial decline in turnover can be entitled to a *JobKeeper* payment of $1,500 per fortnight for each "eligible employee", which the business must pay in salary or wages to the relevant eligible employee;[20]

(b) a qualifying entity whose business has suffered a substantial decline in turnover can also be entitled to a *JobKeeper* payment of $1,500 per fortnight for each "eligible business participant", who is not an employee but is "actively engaged in the business carried on by the entity"[21]

---

19 See paragraph 6 of the second affidavit of Mr Chi sworn 29 June 2020.
20 See Division 2 of the Rules.
21 See Division 3 of the Rules.

72 I accept the evidence of the applicant's director Mr Chi to the effect that the applicant is enrolled in the *JobKeeper Scheme,* and that Mr Chi is an "eligible business participant" engaged in the business of the applicant and entitled to receipt of the *Jobkeeper* payment. I also accept for present purposes that the applicant qualifies for the *JobKeeper Scheme*, as "carrying on business" in Australia on 1 March 2020 notwithstanding the respondent having taken possession of the premises on 27 February 2020.[22]

73 However, in regard to the applicant's obligation to pay rent and other amounts in arrears as a condition of the granting of relief against forfeiture, I find that there is no serious question as to whether the applicant is entitled to take advantage of the rent relief provisions contained in the *Covid-19* legislation. I accept the respondent's submission that the lease is not an "eligible lease" within the meaning of section 13 of the Act because, for the reasons I have found, there is no serious question as to whether it was in effect on 29 March 2020. The applicant will therefore not, in my view, be entitled to any rent relief or relief from and liabilities under the *Covid-19* legislation.

74 The applicant's application for relief against forfeiture is therefore granted on the basis that all rent and outgoings that would otherwise have been paid by the applicant to the respondent to date, had the respondent not taken possession when it did, must be paid by the applicant as a condition of granting relief.

75 This condition will also put to the test the applicant's assertion on affidavit that it is capable of drawing on the capacity of "investors and shareholders" to fund liabilities to the respondent under the lease that are not otherwise met by turnover.

76 Making the payment by the applicant of a sum certain as a condition of relief is not possible, as there is no material before me that assists me to make the calculation. I have therefore made orders as attached, that requires the respondent firstly to provide to the applicant an invoice of outstanding amounts under the lease, and for payment by the applicant thereafter.

A T Kincaid
Member

---

[22] See Regulation 7 of the Rules.