

BETWEEN

AAI Ltd

APPLICANT

AND

ZZS Ltd

RESPONDENT

Date of Order:

25 June 2013

Referee:

Referee Avia

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZS Ltd is to pay AAI Ltd \$3,605.81 on or before 9 July 2013.

Facts

[1] ZZS leased office space from AAI from 28 November 2011. Before that, another company of which FE [director of ZZS] was a director, JF Ltd, occupied the building. JF Ltd fell into arrears under the lease. JF Ltd was also placed in liquidation. To enable ZZS Ltd to take over JF Ltd's lease, ZZS Ltd agreed to cover JF Ltd's debt to AAI Ltd.

[2] JF Ltd and later ZZS Ltd were the means by which FE conducted his accounting business.

[3] ZZS Ltd's lease expired on 15 April 2012; however, ZZS Ltd continued to rent the premises. On 7 November 2012, ZZS Ltd told AAI Ltd it would vacate the premises, which it did in mid-November 2012.

[4] AAI claims \$3,318.98 from ZZS as follows:

- (i) Rent from 23 November 2012: \$556.78
- (ii) Operating expenses from 6 November to 6 December 2012: \$476.88
- (iii) Invoices for operating expenses dated 22 June, 17 August and 6 November 2012: \$2,285.32

[5] AAI Ltd also claims interest on the above amounts, including interest of \$13.24 for an outstanding unpaid portion of the 22 June invoice.

[6] FE agrees that the 17 August invoice of \$1,025.50 is owed.

Issues

[7] The issues to determine are as follows:

- (i) Was ZZS Ltd obliged to give AAI Ltd 20 working days' notice to end the lease?
- (ii) If so, are rent and operating expenses owed for that period?
- (iii) Are the June, August and November invoices owed?
- (iv) Can the sums FE says he paid towards the debt of the previous tenant be offset against any sum owed by ZZS Ltd?
- (v) Is interest owed at 15 per cent per annum?

Decision

Was ZZS Ltd obliged to give AAI Ltd 20 working days' notice to end the lease?

[8] If the lessee remains in possession of the property after the lease has expired, and if the landlord and tenant have not agreed on the duration of the lease, the tenancy is terminable at will by either party giving 20 working days' notice: s 210 of the Property Law Act 2007 (PLA).

[9] The parties did not agree on a term of occupancy after the term of lease had ended in April 2012. Therefore, the tenancy is terminable at will, obliging ZZS Ltd to give AAI Ltd 20 working days' notice to end the tenancy.

[10] FE says the parties agreed the tenancy would be a week-by-week tenancy as the rent was paid weekly. Regardless of whether the lease had reverted to a month-by-month or week-by-week lease after the expiry of the term, as the parties did not agree on another term of lease, the lease was terminable at will by the statutory notice period.

If so, are rent and operating expenses owed for that period?

[11] The parties agreed that operating expenses of seven per cent of the outgoings chargeable for the whole building and weekly rent would be paid (clause 3.1 "Variation of lease" and clause 3.1 "Succession of lease"). Further, if ZZS Ltd remained in possession of

the property in accordance with s 210, ZZS Ltd's obligations under the lease remain in place after the lease expires: s 211, PLA.

[12] Therefore, rent and outgoings must be paid until the end of the 20 working days' notice period. As notice was given on 7 November 2012, the 20 working days' notice period ended on 5 December 2012, and outgoings and rent must be paid until that date.

[13] In the absence of any evidence to the contrary, I accept AAI Ltd's evidence that rent was paid until 23 November 2012. This means one week and six days' rent is owed, being \$517.01. AAI Ltd believed that the 20 days' notice ended on 6 December, but my calculations differ by one day and the rent is reduced accordingly.

[14] In the absence of any evidence to the contrary, I find the calculations of the outgoings owed are correct. I accept it is reasonable to calculate the charges by taking an average of the monthly operating expenses for the previous 12 months. Although AAI Ltd claims operating expenses until 6 December 2012, expenses are owed until the end of the notice period, 5 December. However, as the date from which the expenses are calculated runs from 6 November for a month, the end date of that monthly cycle is 5 December. The date 6 December would have been the start of the next month cycle. Therefore, even though the end date is noted incorrectly, as the amount claimed reflects one month's operating expenses, the \$476.88 claimed is payable.

Are the June, August and November invoices owed?

[15] As outgoings are payable under the terms of the lease, ZZS Ltd owed the unpaid outgoings claimed in the invoices sent in June, August and November 2012. There is no reason for ZZS Ltd not to pay the invoices unless there is a right to set those operating expenses off against other payments made.

Can the sums FE says he paid towards the debt of the previous tenant be offset against any sum owed by ZZS Ltd?

[16] FE says that, under duress, he agreed to pay JF Ltd's indebtedness as a condition of ZZS Ltd taking over the lease. He says that AAI Ltd should have approached the liquidator about this issue rather than extract money from ZZS Ltd. As a result, he believes the \$3,500.00 paid for this should be offset against ZZS Ltd's indebtedness.

[17] AAI Ltd says if the money had not been paid, ZZS Ltd would not have been allowed to take the lease on the premises.

[18] Suppose that ZZS Ltd's payment on behalf of JF Ltd could be characterised as an unlawful preferential treatment of one creditor in a liquidation, I would not be inclined to grant ZZS Ltd relief by way of a set off for the following reasons. Firstly, I do not accept the agreement was made under duress. There were other reasonable alternatives open to FE: even if it was more convenient for him to stay on the premises, he could have set up business elsewhere. Further, it cannot be said that FE did not understand the effect of the agreement. Given FE is an accountant, it would be reasonable to expect him to know whether or not one company is obliged to answer for another's debts in a liquidation.

[19] Commercially speaking, the payment of a sum equivalent to JF Ltd's indebtedness was the price of FE's business remaining in the premises under ZZS Ltd. On this basis, consideration between the parties was exchanged.

[20] In summary, I do not find that the agreement to pay JF Ltd's indebtedness should be offset against what was owed at the end of the lease.

Is interest at a rate of 15 per cent per annum owed?

[21] As the lease states the default interest rate is 15 per cent, ZZS Ltd is obliged to pay interest at this rate on the outstanding debt. Therefore, the following interest is owed:

- (i) \$13.24 interest for unpaid portion of invoice dated 22 June 2013 until 16 November 2012, when \$234.40 was paid towards the invoice;
- (ii) \$1.95 interest on the sum of \$21.56 remaining unpaid on invoice dated 22 June 2012 from 17 November 2012 until the date of hearing;

- (iii) \$96.93 interest on the sum of \$1,025.50 (invoice dated 17 August 2012) from 7 November 2012 until the date of hearing. Interest charges incurred before 7 November were included in a later invoice;
- (iv) \$111.44 interest on the sum of \$1,238.26 (invoice dated 6 November 2012) from the day after the due date (18 November 2012) until the date of hearing;
- (v) \$34.85 interest on \$517.01 rent from 23 November to 5 December 2012 from the day after the 20 day notice expired, 6 December 2012 until the date of hearing.
- (vi) \$28.42 interest on \$476.88 operating expenses incurred from 6 November to 5 December. Without sufficient information about the due date and taking into account that the previous invoices show operating expenses were sometimes not charged for up to two months after the expense was incurred, I calculate interest from 31 January 2013 until the date of hearing.

[22] In light of the above, \$286.83 interest is owed on the outstanding payments.

Conclusion

[23] ZZS Ltd is obliged to pay AAI Ltd \$3,605.81, that being \$3,318.98 for the outstanding invoices, rent and outgoings until the expiry of notice, and \$286.83 being interest at 15% per annum.