# Civil and Administrative Tribunal
## New South Wales

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| **Medium Neutral Citation:** | **Ninyo Pty Limited v Chepurin [2016] NSWCATCD 50** |
| **Hearing dates:** | 5 April 2016 |
| **Decision date:** | 11 May 2016 |
| **Jurisdiction:** | Consumer and Commercial Division |
| **Before:** | D Bluth, Senior Member |
| **Decision:** | 1. The respondent is ordered to pay to the applicant the sum of $11,038.78 within 7 days of the publication of this Decision. |
| **Catchwords:** | Make good obligations |
| **Category:** | Principal judgment |
| **Parties:** | Ninyo Pty Ltd (applicant)<br>Oleg Chepurin (respondent) |
| **Representation:** | Solicitors: Sparke Helmore (respondent) |
| **File Number(s):** | COM 16/06529 |
| **Publication restriction:** | Nil |

## REASONS FOR DECISION

1 The applicant Ninyo Pty Ltd (formerly Chairhound Pty Ltd) is the former lessee of Shop [***], Bondi Junction (the premises) and operated a hairdressing salon from the premises.

2 Heavenly Hair and Body (Heavenly Hair) entered into a lease with Oleg Chepurin (respondent) in 2010 for a term of five years terminating on 11 September 2015 registered lease AF846079M (the Lease).

3 The respondent and Heavenly Hair had entered into an earlier lease in 2005 (the Initial Lease) and Heavenly Hair had exercised the option. The Initial Lease and the Lease were on the same terms other than the rent and the commencing and terminating dates.

4 The applicant purchased the business of Heavenly Hair and took an assignment of the Lease in around September 2015. A Deed of Consent to Assignment of Lease was

entered into by Heavenly Hair as assignor, the applicant as assignee and the respondent as the lessor (Deed of Consent to Assignment of Lease).

5 Pursuant to the terms of the Lease, and in accordance with the Deed of Consent to Assignment of Lease the applicant provided to the respondent a bank guarantee for the sum of $15,070.13 for the purposes as stated in the bank guarantee for "all the assignee's obligations of the lease of Shop 4, 200 Hollywood Avenue, Bondi Junction".

6 The applicant did not exercise the option in the Lease and vacated the premises on the last day of the Lease namely September 11, 2015. The applicant made a request to the agent for release of the bank guarantee on the basis that the applicant had complied with all of its obligations under the lease.

7 On September 24, 2015 the applicant received notice that the bank guarantee was being cashed in for the full amount and accordingly lodged an application with the Small Business Commissioner. The applicant received further communication that the bank guarantee had been cashed and the works that the respondent says were required to make good were completed with the funds from the bank guarantee.

8 On 7 October 2015 the applicant received from the agent the balance of the amount of the bank guarantee namely $4,745.45. The parties went to mediation on 24 November 2015 with the NSW Small Business Commissioner. Mediation was not successful and a certificate has been provided. The applicant then filed its Application for Original Decision seeking return of the balance of the bank guarantee, interest and costs amounting to $11,038.78.

9 The parties are in dispute as to the obligations of the applicant as lessee to restore the premises upon vacating after expiry of the Lease. The respondent maintains that the applicant is required to restore the premises in accordance with the terms of the Lease and has expended monies from the bank guarantee to do so (the restoration works).

10 As it is the respondent that has activated the claim on the bank guarantee in accordance with what it says to be its rights under the Lease, the Tribunal will first look at the submissions from the respondent.

**Respondent's submissions**

11 The respondent says that the obligation of the applicant is to restore the premises to the state they were in back in September 2005, being the date that Heavenly Hair entered into occupation of the premises pursuant to the Initial Lease. Consequently, the applicant is required to complete the restoration works.

12 Clause 12.1 of the Initial Lease stated that the lessee may do works subject to the approval of the lessor. The lessee, being Heavenly Hair carried out certain works to convert the premises to a hairdressing salon. Those works included the installation of the following:

(a) mirror units;

(b) wash basins;

(c) individual treatment rooms with additional internal walls;

(d) vinyl flooring, and

(e) shelving for stock.

(f) (the Works)

(g) The Works were approved by the respondent. It is the Works for which the respondent requires the applicant to dismantle and to restore the premises pursuant to the make good obligations.

13 Clause 12.1 (d) of the Lease states as follows:

> *(Reinstatement) if required by the lessor the lessee must on the expiration or sooner determination of the term reinstate the premises to the condition which they were before the works were effected.*

14 The submission from the respondent then points to clause 4 of the Deed of Consent to Assignment of Lease which states that the assignee being the applicant will from the assignment date and at all times during the remainder of the lease and any renewal:

> *(b) comply with all of the tenant's obligations set out in the lease.*

15 The respondent submits that these obligations of the applicant include the obligation under clause 12.1 (d) to do the restoration works even though the Works were undertaken by Heavenly Hair. This is because the applicant is the successor to Heavenly Hair, as the lessee under the Lease.

16 In the alternative, the respondent submits that the applicant was required to remove the lessee's property from the premises. Clause 16.9 of the Lease states as follows:

> *Remove trade fixtures*
>
> *(a) Lessee's property: subject to clause 12.1 (e), the lessee must at or prior to the terminating date or as soon as the termination of this lease:*
>
> > *(i) remove from the premises all of the lessee's property and if notified in writing by the lessor, any fixtures and fittings the cost of which have been paid or subsidised by the lessor.*

…

17 The respondent notes the existence of Clause 12.1(e) in the Lease which states:

> (e) *(**Transfer of Works**): If the Lessor does not require the Lessee to reinstate the Works as referred to in this clause, then on the date of expiry or termination of the Lessee, the Lessee agrees to (and is deemed to) transfer and assign to the Lessor, in consideration of the payment by the Lessor to the Lessee of 1.00 (payable on demand by the Lessee, the Lessee's right, title and interest in and to the Works, free of all encumbrances and security interests.*

18 The submission from the respondent is that the transfer of the ownership of the Works did not take place on the expiration of the term of the Initial Lease and that the works remained in the ownership of Heavenly Hair. This was carried over into the Lease. After the assignment of the Lease, then the ownership of the Works passes to the applicant as Lessee. Pursuant to Clause 16.9 the respondent requires the removal of the lessee's property and to reinstate the premises.

19 *Lessee* and *Lessee's property* are defined terms within the Lease in clause 1.

> *Lessee means and includes the lessee named in this lease and in the case of a natural person the executors, administrators, successors and permitted assigns of the lessee and in the case of the lessee …*
>
> *Lessee's property: (a) means all fixtures, fittings, plant, machinery, utensils, shelving, partitions, signage, counters, safes and other articles of the nature of trade or lessee's fixtures brought onto the premises by the lessee and any other property of the lessee; …*

20 Finally, the respondent says that pursuant to the Term Sheet relating to the acquisition of the business of Heavenly Hair, the applicant acquired all the fixtures, furnishings and equipment that were then in the premises which would include the Works.

21 The respondent's submissions are then, in summary, that notwithstanding the fact that the applicant is the assignee and did not do the Works, the applicant is still obligated pursuant to clause 12.1 (d) to reinstate the premises to the state the premises were in before the Works were effected. Alternatively, pursuant to clause 16.9 of the Lease, on the request of the respondent, the applicant is required to remove from the premises all of the lessee's property which includes the Works.

**The applicant's submissions**

22 The applicant points to clause 26 .8 of the lease described as the "whole of agreement clause", that is, the Lease is the only agreement between parties, there being no other relevant documents such as the Initial Lease, for example.

23 The applicant then says that any reliance on the Initial Lease is not appropriate in light of clause 26.8. Further, the applicant on the assignment had not received any condition report nor information in the Lease about the condition of the premises or the Works that had previously been done by Heavenly Hair.

24 The applicant points to the effect of clause 12.1 (e) of the Lease, which is the same clause as in the Initial Lease, that upon the expiry of the term under the Initial Lease on 11 September 2008, as the respondent had not made the request to the lessee to reinstate the Works, then there is a deemed transfer of those Works to the respondent free of all encumbrances and security interests. The effect of the deemed transfer is that the Works are the property of the respondent and not the applicant's property. Therefore the applicant is not required to remove or make good by way of restoration or reinstatement.

25 The applicant then says that because the respondent had inappropriately cashed in the bank guarantee, the respondent is liable to the applicant for the balance of the bank guarantee not returned, namely $10,324.60 plus interest and costs related to the Application. The total amount being sought is $11,038.78.

**Resolution by the Tribunal**

26 As noted, the applicant is the assignee pursuant to a Deed of Consent of Assignment of Lease. Under the terms of the Deed of Consent to Assignment of Lease, the applicant is obliged under clause 4 to be responsible from the assignment date and at

all times during the remainder of the Lease with all of the tenant's obligations set out in the Lease. Leaving aside the fact the Deed of Assignment is silent on the actual assignment date, that is no assignment date was stated and consequently the Deed may be void, the main issue to be resolved is what are the obligations of the applicant under the Lease taken up by the applicant and do those obligations extend to the restoration works.

27 The Lease is a new lease even though it is on the same terms as the Initial Lease. Consequently, clause 12.1 relating to Works must relate to Works that are done during the currency of the Lease, that is after September 2010 and not before. The applicant says that it has done no works, the applicant says as far as it is aware, Heavenly Hair the former lessee had done no works since 2010. The respondent only refers to Works undertaken by Heavenly Hair in 2005 pursuant to the Initial Lease.

28 Therefore, it is the Tribunal's view that clause 12.1 (d) regarding reinstatement is of no effect because the term 'the Works' referred to within clause 12.1 (d) must relate to the Works as defined in clause 12.1 (a) being Works undertaken during the currency of the Lease. There are no such Works. They are not Works undertaken pursuant to the Initial Lease. The two leases stand apart.

29 In relation to the second submission of the respondent, the Tribunal notes that the lessee's property referred to in clause 16.9 (a) relates to clause 12.1 (b) in that it is linked to those Works undertaken by the lessee and approved by the lessor under clause 12.1(b). As mentioned, those works are not works undertaken by the current lessee, being the applicant, nor by Heavenly Hair being the former lessee under the Lease, but in fact Works that were done by Heavenly Hair pursuant to the Initial Lease. Clause 12.1 (e) states that on expiry of the Initial Lease, if the lessor being the respondent has not required the lessee to reinstate those Works then there is a deemed transfer to the respondent of those Works.

30 Consequently, these Works cannot be considered as lessee's property under clause 16.9. The Tribunal is of the view that the Term Sheet is irrelevant, as the respondent was not a party to the transaction. What is relevant is the construction of the terms of the Lease. Pursuant to clause 12.1(e) of the Initial Lease the Works became the property of the respondent and are not the Lessees property under clause 16.9.

31 Therefore, if the applicant has removed all of its movable items, then the applicant is not required to do the restoration works transferred to the respondent "free of all encumbrances and security interests". If the respondent had wished to maintain its position regarding reinstatement of the premises and removal of the works, then it should have done so in the Lease itself, which would have been an indicator to any potential assignee. Alternatively, it might have done so as a term of the Deed of Consent to Assignment of Lease, though query what right it might have had at that particular time to impose such a condition if it was not within the terms of the Lease itself.

32 Nevertheless, the respondent has no right to require the applicant to reinstate the

premises to the state the premises were in before the Works were undertaken. The respondent cannot require the applicant to do the restoration works. The applicant has complied with its obligations under the Lease. The respondent has inappropriately and without a right claimed the bank guarantee.

33 Consequently, the respondent is required to refund to the applicant the sum of $10,324.68 being the difference between the amount of the bank guarantee claimed and was returned to the applicant on 7 October 2015 plus interest and costs claimed. The total amount of refund is $11,038.78.

The money should be refunded within 7 days of the publication of the Decision.

**D Bluth**

**Senior Member**

**Civil and Administrative Tribunal of NSW**

**11 May 2016**

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 10 August 2016