VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE: BP1286/2015

CATCHWORDS

Retail lease – disturbance of surface of premises, by removing underground tanks and spreading soil, before tenancy begins – whether breach of implied covenant for quiet enjoyment – whether damages proved.

Representations by respondents that they will make good, or reimburse applicant for making good, the surface – whether a collateral contract – whether unconscionable conduct – whether damages proved – *Retail Leases Act 2003* ss 77, 80.

Disrepair of premises – water entry through roof and collapse of wall – whether a breach of landlord's covenant or of a term implied by law – whether damages proved – *Retail Leases Act 2003*, ss 52, 54.

APPLICANT:	Alea Pty Ltd
FIRST RESPONDENT:	Brian Hosking
SECOND RESPONDENT:	Lynette Hosking
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	30, 31 May 2017
DATE OF ORDER:	20 September 2017
DATE OF REASONS:	20 September 2017
CITATION:	Alea Pty Ltd v Hosking (Building and Property) [2017] VCAT 1425

ORDERS

The respondent must pay the applicant $2,982.27.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. L. Virgona of Counsel
For the Respondents:	Mr. T. Messer of Counsel

REASONS

Overview

1. The applicant Alea Pty Ltd ("Alea") is the tenant of premises at 430 Canterbury Road, Surrey Hills ("the premises") under a retail premises lease. Linden Wilcox is Alea's sole director. Alea has conducted a carwash and car detailing business at the premises. It had conducted that business at a site in Burwood Road, East Hawthorn, under the name "Bubbles Car Care & Café", but moved its business to, and took possession of, the premises in late 2013.

2. The respondents Brian Hosking and Lynette Hosking ("the Hoskings") were the owners of the premises at all times material to this proceeding, and became Alea's landlord. They no longer own the premises.

3. On 17 December 2013 Mr Wilcox, on behalf of Alea, signed a document in the form of a letter prepared by the Hoskings' managing agents which set out terms of a proposed lease of the premises to Alea for six years commencing on 23 December 2013 at a rental of $50,000.00 per year plus GST but with the first two months of the term being rent free. On the same day, 17 December 2013, Alea took possession of the premises. The parties later executed a formal lease which expressed the six year term to have commenced on 2 January 2014 and which specified that the *Retail Leases Act 2003* applied to it. Alea did not execute the lease until 11 February 2014. Alea has alleged, I think correctly, that the retail premises lease between the parties was entered into on 17 December 2013 when Alea took possession of the premises with the Hoskings' consent.

4. In this proceeding Alea has claimed compensation from the Hoskings for losses that it alleges it suffered as a result of two series of events. The first series of events began before 17 December 2013, the date upon which Alea took possession and the tenancy began. The second series of events occurred during the tenancy.

(a) Underground tanks and excavated soil

5. At some time in the past, well before 2013, the premises had been used as a petrol station. Two underground tanks had been installed beneath the surface of the premises. Above the tanks was a concrete surface which served as the petrol station's forecourt and driveway.

6. The first series of events which has led to this proceeding began on 9 December 2013. On that day an excavation contractor engaged by the Hoskings had removed the two tanks and had left them sitting on the surface of the premises. Two large holes had been left in the concrete surface. Soil, excavated during the removal of the tanks, had been heaped upon the surface.

7. Since November 2013 Mr Wilcox and Mr Hosking had been discussing a possible lease of the premises to Alea. Whether during those discussions, and before Alea took possession of the premises, Mr Hosking told Mr Wilcox of the existence of the underground tanks, and of his intention to remove them, is the main matter of factual dispute in this proceeding. Mr Wilcox maintains that Mr Hosking had not told him either of those things and that the first he knew of the existence of the tanks was when he saw them resting on the surface of the premises. Mr Hosking maintains that during their discussions he had told Mr Wilcox both of the existence of the tanks beneath the surface and of his intention to remove them.

8. Alea alleges that, upon Mr Wilcox having become aware of the excavated tanks and of the soil, Mr Hosking assured him, first, that before Christmas 2013 Mr Hoskings would take away the tanks, dispose of the soil and make good the concrete surface; next, when those things had not happened by Christmas 2013, that they would happen by mid-January 2014; and finally, when they had not happened by mid-January 2014, that the Hoskings would reimburse Alea for the cost of filling in one of the two holes and making good the concrete surface. Alea proceeded to fill in the holes and to make good the concrete surface, but the Hoskings have not reimbursed it for the cost of those works, which Alea alleges was $2,982.27.

9. Alea opened its business at the premises at the end of March 2014. It alleges that because of the Hoskings' failure to act in accordance with Mr Hosking's assurances there had been such delay in the premises having been made good after the excavation of the tanks that Alea suffered substantial loss of income because of loss of custom.

(b) Disrepair of the premises

10. On the premises was a building which incorporated a workshop and an office. The building had an asbestos fibre roof. There was an outhouse toilet.

11. Alea alleges that the roof was damaged in March 2014 by a wind storm which blew off a section of the roof. The Hoskings, so Alea alleges, did nothing about repair of the roof until a date in July 2014, when a handyman was sent to do some repairs. The repairs were ineffective, according to Alea, because another storm in late October 2014 resulted in water entry through the roof; part of the building was flooded and some of Alea's equipment and business records were damaged. According to Alea, the roof was not properly fixed until April 2016.

12. In the meantime, during July 2014 a wall of the building started to crack, and on 20 August 2014 the wall collapsed. The outhouse toilet, and the path leading to it, were left fully exposed to intruders. The toilet became vandalised. According to Alea, the condition of the water-damaged interior of the building, the

collapsed wall and the damaged toilet created inconvenience to it and embarrassment to its customers, and was a factor in loss of custom that it experienced. The toilet was repaired in April 2015. The wall was never replaced. Instead, in May 2015 the Hoskings' contractor built a corrugated iron fence to secure the boundary where the wall had been.

13. Alea alleges that by its failure to put the premises back in repair in a timely manner or at all the Hoskings have been in breach of their obligations, under the provisions of the lease and under s 52 of the Retail Leases Act, to maintain the premises in a condition consistent with their condition when the retail premises lease was entered into, and that the Hoskings are liable under s 54 of that Act to pay compensation for loss or damage that Alea has suffered because of their failure to rectify, as soon as practicable, defects in the premises. Alea alleges that the loss and damage that it has suffered because of that failure is the cost of repairing or replacing chattels damaged by the water entry and loss of income that has resulted from loss of custom.

(c) Outcome

14. For reasons I give below, I consider that Alea has made out its case that the Hoskings are liable to compensate it for loss arising out of both series of events, but, with the exception of the expenditure of $2,982.27, has failed to prove what loss or damage it suffered. So it succeeds only to the extent that I order the Hoskings to pay to it $2,982.27.

The Hearing

15. Four witnesses gave evidence for Alea:

    (i) Mr Wilcox;

    (ii) Norbert Graetzer, a friend and business associate of Mr Wilcox;

    (iii) Noel Perkins, an architectural draftsman who assisted Alea to obtain a planning permit for the conduct of its business at the premises; and

    (iv) Salvatore Cianci of Whitehall Partners Pty Ltd, accountants, who gave accountancy evidence.

16. Mr Hosking was the only witness for the respondents.

17. Except for Mr Cianci, each witness verified a written witness statement which stood as his evidence in chief, although Mr Wilcox elaborated orally on some parts of his. Mr Cianci had prepared a written report and adopted that report as his evidence in chief.

18. The parties, or one of them, had prepared a Tribunal Book of two volumes. The Tribunal Book contained the witness statements, Mr Cianci's report and numerous other documents. At the beginning of the hearing the parties agreed that there was no need for me to receive as separate exhibits any document that was in the Tribunal Book, but there was no agreement at that stage as to the precise use to which I could put the Tribunal Book. At the end of the evidence, Mr Virgona of Counsel for Alea asked me to receive the whole of the contents of the Tribunal Book as evidence, but Mr Messer of Counsel for the Hoskings submitted that I could and should receive in evidence only such documents as had been referred to by a witness in a witness statement or in the course of his oral evidence. Having noted what I considered to have been the thinness of Alea's evidence about quantum of damage insofar as it had been disclosed during the hearing, I apprehended that Alea might have conducted its case on the assumption that I would be receiving the entire contents of the Tribunal Book, and so I decided to receive the entire contents as evidence.

19. At the end of the evidence Counsel agreed that their final address should be made by written submissions. I directed that those submissions should be filed and served by 9 June 2017. They were.

20. One of the documents in the Tribunal Book was a witness statement by David Ryan of Gorman Kelly Commercial Real Estate Pty Ltd ("Gorman & Kelly"), managing agents for the Hoskings. Mr Ryan was not called as a witness. In his written submission Mr Virgona submitted that I should disregard the witness statement because Mr Ryan had not been called as a witness to verify it. Alea cannot have it both ways; having successfully asked me to receive the whole contents of the Tribunal Book as evidence, it could not expect me to disregard part of those contents. So I have had regard to Mr Ryan's witness statement and have treated it as part of the evidence, although I give less weight to it than I give to the evidence of others which was tested at the hearing.

21. Having reflected upon the evidence and upon those submissions I invited the parties to file and serve submissions about one further matter. Alea had filed Points of Claim. During the hearing it was permitted to file Amended Points of Claim. When making the allegations about the Hoskings' conduct concerning the underground tanks and the soil, the Points of Claim and the Amended Points of Claim described "representations" by Mr Hosking which were made "in trade or commerce", but neither the Points of Claim nor the Amended Points of Claim specifically alleged that the conduct or the representation had contravened s 18 of

the Australian Consumer Law (Victoria) ("the ACLV") by having been misleading or deceptive or likely to mislead or deceive. By an order made on 20 June 2017 I invited the parties to make submissions by 7 July 2017 on the issue of whether the facts alleged in the Amended Points of Claim, if made out, amounted to a contravention of s 18 and gave rise to a claim for compensation under s 236 of the ACLV, and as to whether I should, or should not, consider and determine that issue despite the Amended Points of Claim not having raised it explicitly. By the same order I enabled the parties to request a further hearing of the proceeding if such a request was made by 5 July 2017.

22. Neither party requested a further hearing. Each filed a submission by 7 July 2017. Predictably, Alea submitted that I should determine the issue of possible contravention of s 18 and should determine it in Alea's favour. Equally predictably, the Hoskings submitted that I should not determine such an issue at all, but if I did I should determine it in the Hoskings' favour. For reasons I give below I do not need to determine the issue.

The Lease

23. The lease which the parties executed on 11 February 2014 took the form of the Law Institute of Victoria copyright lease of real estate, May 2006 revision, with additional provisions set out in item 22 of the schedule to the lease.[1] As I have said above, the lease provided for a six-year term commencing on 2 January 2014, for a commencing rental of $50,000.00 plus GST, and for the first two months of the term to be rent free. It specified that the *Retail Leases Act 2003* applied to it.

24. Clause 6 of the lease set out the landlord's obligations. Clause 6.1 and 6.4 provided:

> 6.1 The landlord must give the tenant quiet possession of the premises without any interruption by the landlord or anyone connected with the landlord as long as the tenant does what it must under this lease.
>
> 6.4 The landlord must keep the structure (including the external faces and roof) of the building and the landlord's installations in a condition consistent with their condition at the start of the lease, but is not responsible for repairs which are the responsibility of the tenant under clauses 3.1, 3.2 and 3.3.2.

The Hoskings have not asserted that any repairs that were necessary to the roof or to a wall or to a toilet were the responsibility of the tenant Alea under any clause of the lease or otherwise.

[1] Tribunal Book (TB) pp 253-273.

25. Clause 8.2 of the lease provided that if the premises or the building on the premises were partly destroyed, but not substantially destroyed, the landlord was obliged to reinstate the premises or the building as soon as reasonably practicable. Alea has not asserted that the damage to the roof or to a wall or to a toilet resulted in the building having been "partly destroyed" within the meaning of clause 8.2.

26. Clause 9.2 of the lease provided:

> 9.2 The lease, together with the disclosure statement if there is one, contains the whole agreement of the parties. Neither party is entitled to rely on any warranty or statement in relation to:
>
> 9.2.1 the conditions on which this lease has been agreed,
> 9.2.2 the provisions of this lease, or
> 9.2.3 the premises
>
> which is not contained in those documents.

Moreover, special condition 2 of the lease, set out in item 22 of the schedule to the lease, provided:

> The premises are to be let "as is" and without any warranty given by the landlord as to the condition of the premises or the condition of the landlords chattels and fixtures.

I shall refer to that special condition as the "as is" clause.

27. On 17 December 2013, before the lease was executed, Mr Hosking and Alea respectively had signed and counter-signed the letter of that date, prepared by the Hoskings' managing agent Gorman & Kelly, which set out the terms of a proposed lease to Alea.[2] Mr Wilcox, as director, counter-signed it on Alea's behalf. At the foot of the third page of the letter were the words "Lease Preparation Costs: Each party will pay its own costs associated with lease preparation." Those words demonstrated that the parties intended that there should be a formal lease document which would set out more fully their respective obligations. On the same day, 17 December 2013, Alea obtained the keys to the premises and took possession.

28. The proposed lease set out in the letter had identified the premises, the six-year term, the rent, and the tenant's principal obligations, in the same way as did the lease which the parties later executed. The only material differences between proposed lease, as set out in the letter, and the executed lease were:

[2] TB p 127A and following.

(i) The proposed lease named only Mr Hosking as the landlord. The letter did not mention Mrs Hosking. Neither party has argued that the omission of Mrs Hosking as a named landlord has any significance in this proceeding. If I need to, I infer that Mr Hosking signed the letter of proposed lease with Mrs Hosking's authority.

(ii) The proposed lease specified a commencement date of 23 December 2013, whereas the executed lease specified a commencement date of 2 January 2014.

(iii) The proposed lease did not set out any provision like clauses 6.1 and 6.4 of the executed lease or set out any obligation of the landlord.

(iv) The proposed lease contained the "as is" clause but added a further sentence to it: "The tenant must satisfy itself as to their condition".

29. The signed and counter-signed letter of 17 December 20213 became an agreement between Alea and the Hoskings for a lease for a term of six years, on the terms and conditions set out in the letter. As an agreement for a lease, it became a "lease" as defined in s 3 of the *Retail Leases Act 2003*. So did the executed lease, once it superseded the agreement for a lease.

30. Section 7 of the *Retail Leases Act 2003*, so far as presently relevant, provides:

> **7 When retail premises lease is entered into or assigned**
>
> For the purposes of this Act, a retail premises lease is entered into or assigned when—
>
> (a) under the lease or assignment, the tenant enters into possession of the premises with the consent of the landlord;
>
> …..

There is no dispute that Alex entered into possession of the premises, with the Hoskings' consent, on 17 December 2013. So, despite the inconsistent commencement dates expressed in the proposed lease and in the executed lease, for the purposes of the Act the lease between the parties was entered into on 17 December 2013.

31. Two provisions in the *Retail Leases Act 2003* became terms of the lease. Section 52, so far as presently relevant, provides:

52 Landlord's liability for repairs

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—

(a) the structure of, and fixtures in, the retail premises:

……

Section 54, so far as presently relevant, provides:

54 Tenant to be compensated for interference

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damages) suffered by the tenant because the landlord or a person acting on the landlord's behalf—

(a) substantially inhibits the tenant's access to the retail premises; or

(b) unreasonably takes action that substantially inhibits or alters the flow of customers to the retail premises; or

(c) unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or

(d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or

(e) fails to rectify as soon as practicable—

(i) …..;

(ii) any defect in the retail premises or in the building or retail shopping centre in which the retail premises are located, other than a defect due to a condition that

would have been reasonably apparent to the tenant when entering into or renewing the lease or when the tenant accepted assignment of the lease;

…..

32. In this proceeding Alea has alleged that:

    (a) the Hoskings' conduct concerning the underground tanks, the excavated soil and the damage done to the concrete surface was a breach of clauses 6.1 and 6.4 of the lease and of s 52 of the Act; and

    (b) the Hoskings' delay in repairing the roof, the wall and the toilet was a breach of clause 6.4 of the lease and of s 52 of the Act and has rendered the Hoskings liable under s 54 of the Act for loss and damage that Alea has suffered.

33. In its Amended Points of Claim Alea makes other claims and relies on other causes of action, with which I shall deal below.

The Tanks and the Soil: Evidence and Findings

34. In November 2013 Alea had had to vacate, on very short notice, the premises which it had leased, and at which it conducted its car washing and detailing business, in Burwood Road, Hawthorn East. There was a "For Lease" sign on the premises at 430 Canterbury Road. Either directly or through the agent Gorman & Kelly Mr Wilcox arranged with Mr Hosking to meet him at the site. They met there on a date which the parties agree was in the first half of November. According to Mr Hosking, a man whose name he thought was Norman – but who in his evidence he acknowledged was Norbert Graetzer – accompanied Mr Wilcox at the meeting. Mr Wilcox gave evidence, and Mr Graetzer confirmed, that Mr Graetzer had been present "on a few occasions" during discussions between him (Mr Wilcox) and Mr Hosking, but Mr Wilcox did not specifically say that Mr Graetzer had been present at the initial meeting. I see no reason not to accept Mr Hosking's evidence that Mr Graetzer had been present at the initial meeting, and I find that he had been present.

35. Mr Hosking had been conducting a car dealership business at the premises until September 2013, when he closed the business. It had been about 20 years since the premises had been used as a petrol station.

36. Mr Hosking's evidence of the conversation between him and Mr Wilcox during their initial meeting was set out in paragraph 9 of his witness statement. In that paragraph he referred to Mr Wilcox as "Lynden." Part of his evidence in that paragraph was:

> During the conversation, we discussed the existence of the tanks; I said I would be removing them. I explained that I knew of the existence of tanks, but was not sure about their exact location. Lynden responded by querying the need to remove the tanks. He asked me if I was sure I wanted to do so as removal could get messy. I responded that I wanted to do the work now as it was the perfect time and would avoid disruption for a tenant in the future. I said that if there was any need to dig to find the tanks which caused disruption to the surface of the driveway, I would fill the holes and asphalt the surface. Lynden said he was interested; I told him to get back to Gorman & Kelly.

37. After learning from a previous owner of the premises the exact location of the tanks, Mr Hosking had temporary fencing erected around the premises and removed the "For Lease" sign.

38. Paragraphs 13 and 14 of Mr Hosking's witness statement were:

> Within a day or so of me removing the sign and fencing the Property, Lynden contacted me. H told me that his daughter had seen that the fence had been erected and the "For Lease" sign removed and asked what I was doing. I told him that I was removing the tanks as we had discussed. I said that if he wanted to lease the Property it was still available but he must contact the agent.
>
> In the days following, Lynden confirmed his interest in leasing the Property. He and I spoke on a number of occasions, often at the Property. During these conversations I told him I now knew of the exact location of the Tanks and that the works to remove them would not cause significant disruption to the driveway. I said to him that there was no longer a need for asphalt to be laid. Lynden identified the location of the oil tank as an ideal location for his triple interceptor[3] which would lower his cost of installation. Lynden asked me to leave that hole open to give him easier and more cost effective access to install the triple interceptor; I agreed to do so. I said that I would fill the hole from the removal of the petrol tank and concrete over that surface.

39. So Mr Hosking's evidence in chief on the point was, in summary, that:

    (a) he had told Mr Wilcox, both at their initial meeting and during later conversations, of the existence of the tanks and of his intention to remove them;

    (b) at first he had said that he would bear the responsibility for filling holes and asphalting the surface if that was necessary;

[3] Mr Wilcox gave evidence that a triple interceptor was part of the machinery for the operation of a car-wash.

(c) later, he had said that he would bear the responsibility for filling one hole and for concreting the surface.

40. In cross-examination Mr Hosking varied that evidence somewhat by saying that he had told Mr Wilcox that if the removal of the tanks did not enable a clean cut to the surface he would asphalt the surface and do any other remedial work.

41. The two tanks were excavated on 9 December 2013. According to Mr Hosking, the excavation was done neatly so there had been no need to asphalt the surface.

42. Mr Wilcox's evidence, however, was as follows:

(a) The first he knew of the existence of the tanks was when he drove past the premises and saw them and soil sitting on the surface. Mr Hosking had never told him that there were underground tanks or that he intended to remove them. When he saw them he parked his car and spoke to Mr Hosking at the premises. Paragraph 27 of his witness statement was:

> Coincidentally, Mr Hosking was present at the property. I clearly expressed my concerns with the state of the premises and how it would affect my ability to establish and run my business. Mr Hosking however gave me assurance that it "was all under control". I was told "no worries", and that everything would be "looked after and will be done over Christmas".

(b) On another occasion Mr Hosking told him that the tanks would be removed from the premises, and the surface re-sealed, by mid-January 2014. Paragraph 18 of Mr Wilcox's witness statement, in which he refers to the tanks as "the UFTs", was

> By the time the UFTs were removed in December 2013, it was too late to find alternative premises. From that point forward, with the confidence that I had in our accounts and core customers, I decided to stay with the premises on the representations by Mr Hosking that by mid January 2014 the UFTs taken out would be removed from the site and the surfaces resealed.

Although Mr Wilcox did not specify a date on which Mr Hosking made "the representations", I infer that it was before 17 December 2013, because that was the date on which he counter-signed the letter of proposed lease and committed Alea to an agreement to take a lease: a commitment, he said, Alea entered into because of "the representations."

(c) Because he decided that Alea could utilise the smaller of the two holes by turning it into a pit and by placing car-washing machinery (a triple interceptor) in it, he and Mr Hosking agreed that Mr Hosking would make good all the surface area except for the area where the smaller hole was, that Mr Wilcox could organise the concreting of the surface and that Mr Hosking would reimburse him for the cost of the concreting. Mr Hosking said that that agreement was made "in the New Year 2014."

43. In paragraph 33 of his witness statement Mr Hosking identified as 27 January 2014 the date upon which he and Mr Wilcox discussed what was to be done about making good the surface:

> At about the same time, Lynden and I discussed the driveway. Lynden told me that he would take responsibility for finalising the works required to smooth out the driveway. We agreed that he would cover the costs associated with filling and concreting the hole from the oil tank after he had installed his triple interceptor. He said at the same time that he would arrange for further soil to fill the hole from the removal of the petrol tank after the soil I had arranged to fill that hole had settled. Lynden said that he would arrange for concrete to be laid over the hole left following removal of the petrol tank. I agreed to pay for the cost of this.

44. Mr Graetzer gave evidence that:

(a) on no occasion when he was present at the premises with Mr Wilcox and Mr Hosking did Mr Hosking mention the existence of underground tanks or his intention to remove them; and

(b) on one such occasion, after the tanks had been excavated, Mr Hosking said that he would re-seal the asphalt driveway at the premises and other parts of the premises affected by the removal of the tanks.

45. Mr Perkins gave evidence that he had visited the premises with Mr Wilcox and had met Mr Hosking there, and that on none of those visits did Mr Hosking mention underground tanks or any proposal to remove them.

46. Both Mr Wilcox and Mr Hosking appeared to be truthful witnesses. In the absence of other evidence it would be difficult to decide whose evidence to prefer, especially the evidence about whether during their initial meeting Mr Hosking disclosed the existence of the tanks and his intention to remove them. But there is other evidence, and it leads me to prefer Mr Wilcox's evidence wherever it conflicts with Mr Hosking's, for two reasons.

47. First, Mr Graetzer corroborates Mr Wilcox's evidence about the initial meeting. Mr Hosking has committed himself to a version of it which places both Mr Wilcox and Mr Graetzer at the premises during the initial meeting and which has him telling Mr Wilcox, then and there, about the tanks and about his intention to remove them. Mr Graetzer corroborates Mr Wilcox's evidence that nothing was said about the tanks on that occasion. Mr Graetzer's other evidence, and Mr Perkins' evidence, do not exclude the possibility of Mr Hosking having made the disclosure to Mr Wilcox on an occasion when neither Mr Graetzer nor Mr Perkins was present, but Mr Hosking's placement of Mr Graetzer at the initial meeting makes Mr Graetzer's evidence important.

48. Secondly, Mr Hosking had a reason not to disclose to Mr Wilcox the existence of the tanks or his intention to remove them. In both his witness statement and during cross-examination, he said that, although his preference had been to lease the premises rather than to sell, there had been an interested purchaser who had decided not to purchase because (so the interested purchaser told Mr Hosking's agent Gorman & Kelly) that person's bank had refused his loan application after becoming aware that there were underground tanks at the premises. So Mr Hosking was proceeding to treat with Mr Wilcox and Alea in the knowledge that the presence of the tanks, once disclosed, would tend to deter a prospective purchaser or a prospective tenant.

49. I find that during their initial meeting at the premises Mr Hosking did not tell Mr Wilcox about the existence of the tanks or his intention to remove them. Preferring, as I do, the evidence of Mr Wilcox whenever it conflicts with Mr Hosking's, I find that on no occasion prior to 9 December 2013 did Mr Hosking tell Mr Wilcox about the existence of the tanks or of his intention to remove them. I accept the evidence of Messrs Graetzer and Perkins and find that on no occasion prior to 9 December 2013 when either of those men was present at the premises did Mr Hosking mention underground tanks or an intention to remove them.

50. Even though, as I have said, Mr Hosking appeared to be a truthful witness, once I have rejected his evidence about his having disclosed the existence of the tanks and his intention to remove them I am afraid that I cannot escape the conclusion that his omission to tell Mr Wilcox about those matters was deliberate. Otherwise it is hard to understand why (as I have found) he made no reference, however oblique, to the tanks during any conversation with Mr Wilcox at which Mr Graetzer or Mr Perkins was present.

51. As to the conflicting evidence about who would be making good the surface of the premises, where there is a difference I prefer Mr Wilcox's evidence, for reasons already given. So I find that:

(a) before 17 December 2013 (the date of the letter of proposed lease) Mr Hosking represented to Mr Wilcox that by mid-January 2014 he would make good the surface of the premises by removing the excavated tanks from the premises, by filling the two holes left after the excavation and by sealing the surface;

(b) Alea relied upon those representations and was induced by them to enter into an agreement to lease the premises, which was made once Mr Wilcox counter-signed the letter dated 17 December 2013 setting out terms of a proposed lease; and

(c) at a later date, probably towards the end of January 2014, Alea and Mr Hosking agreed that Mr Hosking would sufficiently honour the representations if he were to reimburse Alea for the cost of making good all the surface area of the premises except for the area where the smaller hole was.

52. Only Mr Hosking could and did give evidence about what happened to the tanks and soil after the date of excavation. The evidence was inherently credible and I accept it. It was as follows.

53. On 9 December 2013 the excavation contractor took away the two tanks which he had excavated, but returned them on the same day because there was a small quantity of oil in one and of petrol in the other. Mr Hosking proceeded to wash away the oil and the petrol, but his doing so led to a visit from an Environment Protection Authority (EPA) inspector, who required Mr Hosking to have the excavated soil tested for the presence of contamination. The excavation contractor had left the soil heaped on the surface of the premises and covered with plastic.

54. On the following day, 10 December 2013, Mr Hosking arranged for a soil test. The result, which Mr Hosking received on 19 December 2013, was that samples from the soil were contaminated. To lower the contamination level Mr Hosking engaged another contractor to spread the soil along the surface of his premises. That was done on 15 and 16 January 2014.

55. To fulfil the EPA requirements Mr Hosking arranged for another sample of the soil, spread across the premises, to be tested. The result of the test was that the soil was able to be removed. On 12 February 2014 the soil was removed.

56. In the meantime, I infer, the tanks finally had been removed from the premises. There was no evidence of exactly when they were removed. The above was the extent of Mr Hosking's evidence about what happened to the tanks and the soil after the excavation.

57. So according to Mr Wilcox's evidence which I accept, from the date when Alea took possession of the premises until the date when the soil was removed, there were two holes left in the surface where the tanks had been, cracking of concrete where the excavation machinery had operated, and soil either heaped on the surface or spread over the surface. The soil, he said, made it difficult for customers to drive their cars into and from the premises. After the soil was removed the two holes and the cracked concrete remained until 31 March 2014 when Alea itself attended to the filling of the two holes and the making good of the surface, Mr Hosking not having honoured the representations he had made about making good. The Tribunal Book included photographs of the tanks and of the dirt and other debris on the surface of the premises.[4] Mr Wilcox gave evidence, and I find, that the state of the premises described above adversely affected Alea's ability to operate its business.

The Tanks and the Soil: Alea's expenditure

58. Paragraph 27 of Mr Wilcox's witness statement included the following sentences:

> ….I attended to the repair of the surface but I was not paid by Mr Hosking for those works….in the sum of $2,982.27: Attached and marked "B" is an invoice rendered to Mr Hosking on 25 October 2014.

59. The Tribunal Book included documents marked "B", directly behind Mr Wilcox's witness statement.[5] They were not a single invoice. They were four separate invoices. They were not invoices to Alea from third parties. Rather, they were invoices from Alea itself, addressed to Mr Hosking. I shall call them invoices, even though they were nothing more than demands for payment, presented in the form of invoices. Each claimed amounts for labour and materials. Nothing in them corresponded to the figure of $2,982.27 specified in Mr Wilcox's witness statement. The total of the four invoices was $4,237.24. There was no explanation in Mr Wilcox's evidence of how the figure of $2,982.27 was arrived at. Perhaps, in accordance with Mr Wilcox's evidence of how the parties had agreed to bear the cost of making good the surface of the premises, Alea had omitted what it cost to fill one of the two holes. Or, perhaps, since the invoices' claims for "labour" did not identify whose labour was involved and it might have been the labour of Alea's own personnel, Alea decided to leave out of account the cost of the labour when calculating a figure of $2,982.27. All this is speculation. One is left with the bare figure in the witness statement, unexplained.

[4] TB pp 144-148.
[5] TB pp 150-151.

60. Mr Messer did not cross-examine Mr Wilcox about the part of his evidence where he claimed that Alea had spent $2,982.27 in making good the premises by filling the holes and concreting the surface. It is trite to say that there is no need for a party to cross-examine the other party about a claim in relation to which no evidence is led. No doubt that is why Mr Messer did not cross-examine Mr Wilcox about other parts of Alea's claim which I shall discuss below. But there was evidence, however meagre, about the expenditure of $2,982.27 in making good the surface of the premises. It was given by a credible witness. It was not contradicted or challenged. Despite the many unexplained features of it, I accept it. I find that Alea expended, and so suffered a loss of, $2,982.27 in making good the surface of the premises when the Hoskings did not.

The Tanks and the Soil: Loss of Income

61. In his report, which he adopted as his evidence in chief, the accountant Mr Cianci included his constructed profit and loss statements for Alea's business for the calendar years 2013, 2014, 2015 and 2016 (although the statement for 2016 was only for nine months, to the end of September 2016).[6] His evidence was that he had compiled those statements from information contained in Business Activity Statements (BAS) which Alea had had prepared and lodged for taxation purposes and from such of Alea's records as he had been able to view. The BAS documents have been included in the Tribunal Book directly after Mr Cianci's report.[7]

62. During the calendar year 2013 the business operated at the Hawthorn address. Mr Cianci's profit and loss statement for that year was of a profitable business. In summary the profit and loss statement was:

Sales:	Washes	$1,071.000.00
	Details	$ 102,000.00
	Café	$ 144,000.00
		$1,317,000.00
Less Direct Purchases and Costs		$ 575,830.00
		$ 741,120.00
Less Overhead Expenses		$ 314,280.00
Gross Earnings		$ 426,840.00

Those figures translate to gross earnings of $35,570.00 per month.

[6] TB pp 38-41.

[7] TB pp 45-61. These are BAS documents which Mr Cianci's firm copied into its software and printed out. In the copying there was a common clerical error made in the identification of the year of each document. During the hearing the parties agreed that BAS documents that had corrected the clerical error should be substituted for those in the Tribunal Book. Mr Virgona of Counsel for Alea handed them up. They are part of the Tribunal's file for the proceeding.

63. The comparable figures in Mr Cianci's profit and loss statement for the calendar year 2014, during which Alea operated its business at the Hoskings' Surrey Hills premises, showed a substantial loss for that year. They were:

Sales:	Washes	$ 31,176.00
	Details	$ 0.00
	Café	$ 0.00
		$ 31,176.00
Less Direct Purchases and Costs		$ 76,058.00
		-$ 44,882.00
Less Overhead Expenses		$131,880.00
		-$176,762.00

Those figures translate an annual loss of $176,762.00 to a loss of $15,025.00 per month.

64. The profit and loss statements for the calendar years 2015 and (part of) 2016 suggest an improvement in the business but not an improvement to the point of profitability. The statement for 2015 shows a loss of $8,271.00 per month. The statement for (part of) 2016 shows a loss of $4,215.00 per month.

65. The statement for 2013 reflects income from car washing, car detailing and a "café." Alea has not operated a café at the Surrey Hills premises. To that extent, the figures in the statement for 2013 and 2014 are not comparable. If it was a fact that during 2014 at the present premises Alea had performed only car washing, not car detailing – although Mr Wilcox did not give any evidence to that effect – the figures for the two years are, to that further extent, not comparable either.

66. In its Amended Points of Claim Alea made a claim for "Loss of Sales: $350,000.00". It made that claim in a paragraph that gave particulars of loss and damage alleged to have been suffered by a failure to have kept the premises in repair. Alea has conducted its case on the footing that it suffered "loss of sales" both during the period when the business was affected by the consequences of the removal of the tanks and during the period when water entered through the roof and a wall was not repaired or replaced. The Hoskings have defended it on the same footing. So I approach a consideration the claim for loss of income on

that footing too. Even so, neither the Amended Points of Claim nor Mr Cianci's evidence gave any explanation for or justification of the figure of $350,000.00. In his written submission Mr Virgona did not put forward any explanation of it other than it was "reasonable in the context of total loss of gross sales". In the same written submission Mr Virgona purported to claim on Alea's behalf "loss of goodwill: $255,033.00." Neither in the Amended Points of Claim nor in any of the evidence was there a word about "loss of goodwill." So I disregard that purported claim.

67. Mr Messer made many criticisms of Mr Cianci's evidence and submitted that it was irrelevant and that I should disregard it entirely. His criticisms included these:

    (a) Mr Cianci did not in his report set out his qualifications and experience to justify a conclusion that he is an expert witness. (It is true that Mr Cianci did not follow the Tribunal's Practice Note in that regard. But he gave evidence, and I accept, that he has had twenty years' experience as an accountant.)

    (b) Although Mr Cianci gave evidence that his report was based upon Alea's accounting records, he did not exhibit to his report or produce at the hearing any of those records or primary sources that he relied upon, except BAS documents that were not the original statements but ones which Mr Cianci had reproduced by keying them into his own software system and printing them.

    (c) Some of the expenses recorded in the profit and loss statements were estimates or the result of guesswork. For example, entries for expenses on computers and for light and power for the years 2014 and 2015 showed the same figures. In cross-examination Mr Cianci conceded that the recording of the expenses was not 100% accurate and there was a 20% margin for error in them.

    (d) The report set out a history of the business, and of the events which led up to this proceeding, as if he were giving first-hand evidence of them, which plainly he was not in a positon to do. (I accept that Mr Cianci was doing no more than recording the instructions he had been given for the purpose of his report.)

68. Despite those legitimate criticisms I accept Mr Cianci's evidence as expert evidence so far as it goes, which is really only to establish that Alea made a gross profit of about $35,000.00 per month during the calendar year 2013 but made a loss of about $15,000.00 per month during the calendar year 2014 once its business resumed at the Surrey Hills premises.

69. One of the pages in Mr Cianci's report was headed "Loss of Accounts Due to Renovation Works."[8] There followed a list of 18 business names, a figure for an "annual estimate" beside each name and a total of $262,380.00, or $23,865.00 per month. When asked in cross-examination about that page, Mr Cianci said that what appeared on the page was based upon what Mr Wilcox had told him. Two names on the list were "VicRoads" and "VW". In paragraph 46 of his witness statement Mr Wilcox had said:

> I believe my total loss as a result of the Respondent's actions is in the vicinity of $120,000.00 per annum in loss earnings for myself (as director and manager) and at least $50,000.00 per annum in account clients such as Volkswagen and VicRoads.

There was no other evidence in support of a claim that the business had lost custom as a consequence of the state of the premises as it had been until 12 February 2014 when the soil was removed from its surface or until the surface had been made good.

70. Although I have found that Alea's business was adversely affected by the delay in having the soil removed and in making good the premises, the above evidence does not enable me to quantify any loss of income that Alea suffered through that adverse effect. This is not the kind of case where proof of a loss is so difficult that an applicant can legitimately ask the Tribunal to estimate it as best it can. An applicant who proves the fact of loss but does not call the necessary evidence as to its amount cannot be awarded substantial damages; the applicant must put the Tribunal in a position of being able to quantify in money the loss or damage the applicant has suffered, otherwise no substantial damages may be awarded.[9]

71. Matters might have been different if some of the customers who Alea has alleged were lost to it had given evidence that they had been a customer at the Hawthorn site but had declined to give Alea its custom at Surrey Hills because of the state of the premises there, and if there had been evidence to support the figures given on Mr Cianci's list. In his written submission Mr Virgona asserted that "corporate customers made up 22-39% of the applicant's business at the previous premises" and that all of those customers had been lost to the business. Nowhere in the evidence was there any basis for either of those assertions.

72. While it stands to reason that Alea must have suffered some loss of income that was attributable to the unsatisfactory state of the premises in early 2014, it does not follow that whatever loss it suffered during that period is wholly attributable to that state of the premises. The lease that the parties executed provided for Alea to have a two-month rent-free period. While there was no evidence of why the parties agreed to the rent-free period, it is not difficult to infer, as I do, that

[8] TB p 42.
[9] *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at p 241.

the parties were recognising that a re-location of a business to a new site was likely to result in a downturn of custom temporarily. Moreover, the evidence was that Alea did not obtain a permit to carry on a car-washing business at the premises until 17 April 2014;[10] in cross-examination Mr Wilcox stated that Alea could do only car-detailing, not car-washing, before that date. Those features of the evidence demonstrate the likelihood that there were several reasons, not just one reason, why Alea lost custom in January and February 2014.

73. In view of the above matters I consider that Alea has failed to prove a claim for loss of income caused by the state of the premises as it was once the tanks had been excavated, the soil had been spread over the surface and the surface had not been made good.

The Tanks and the Soil: Legal Consequences

74. In its Amended Points of Claim Alea framed its causes of action, in relation what the Hoskings said (or did not say) and did about the tanks and the soil, in the following ways:

    (a) a breach of an implied term of the lease for Alea to have quiet possession of the premises (paragraphs 4 and 6);

    (b) representations, made "in trade or commerce", that the Hoskings would seal the driveway with asphalt and would pay Alea its reasonable costs of filling in the holes left by the removal of the tanks (paragraphs 8 and 9);

    (c) a "collateral contract set out in paragraph 8" (paragraph 10), even though there was no collateral contract alleged in paragraph 8, only representations: the collateral contract being, presumably, that Alea promised to execute the lease, presented to it for execution, in return for a promise by the Hoskings to do what they had represented they would do;

    (d) engagement in unconscionable conduct, in contravention of s 77 of the Retail Leases Act.

75. The Amended Points of Claim had put forward another cause of action: a breach of s 52 of the Act by failing to maintain the structure of the premises. I accept Mr Messer's submission that the fact (as Alea conceded) that disturbance to the surface of the premises occurred before 17 December 2013, when the agreement for a lease occurred, was fatal to that cause of action. At all events, Alea did not pursue it.

[10] TB pp 243-252.

76. *Breach of covenant for quiet enjoyment*. Once the parties entered into an agreement, on 17 December 2013, for a lease to Alea of the premises, a covenant for the tenant's quiet enjoyment of the premises was implied by law: "enjoyment" in the sense of an exercise and use of the right to occupy the premises exclusively and without interference by the landlord.[11] Once the parties executed the lease on 11 February 2014, clause 6.1 of the lease, an express covenant for quiet enjoyment, superseded the implied covenant. The express covenant and the implied covenant had much the same content: "quiet possession of the premises without any interruption by the landlord or anyone connected with the landlord".

77. My findings mean that Alea has established that until 17 February 2014, when the soil was eventually removed from the premises, the Hoskings were in breach of the implied covenant for quiet enjoyment, and became exposed to a claim for damages for breach of covenant. My conclusions, however, about the damages that Alea has proved, and about the damages that Alea has failed to prove, mean that the breach leads nowhere. The damages that Alea has proved – the expenditure of $2,982.27 in making good the surface of the premises – was not a consequence of the breach of the covenant; it was a consequence of the Hoskings not having done what they said they would do about reinstating the surface of the premises. A loss of income, if quantified and proved, would have been a consequence of the breach, but Alea did not quantify and prove such a loss.

78. *Representations*. I have found that before 17 December 2013 Mr Hosking represented to Mr Wilcox that by mid-January 2014 he would make good the surface of the premises by removing the excavated tanks from the premises, by filling the two holes left after the excavation and by sealing the surface. I have found that Alea relied upon those representations and was induced by them to enter into the agreement for a lease. I have found that Alea suffered damage quantified at $2,982.27 as a consequence of the Hoskings not honouring the representations.

79. Those findings, however, do not perfect a cause of action for Alea. At common law, a cause of action for damages for misrepresentation exists only if the misrepresentation was fraudulent or negligent. Alea has never alleged, let alone proved, fraud or negligence. My findings could have led part of the way towards the making out of a statutory cause of action under provisions of the Australian Consumer Law (Victoria) ("ACLV"): misleading or deceptive conduct, in trade

[11] *Kenny v Preen* [1963] 1 QB 499 at p 511.

or commerce, in contravention of the ACLV, resulting in loss or damage, recoverable under s 236 of the ACLV.[12] By alleging in the Amended Points of Claim that representations were made "in trade or commerce", Alea hinted at, but did not fully express, that cause of action. That is why I invited the parties to make submissions as to whether I could or should consider, and then determine, a claim based upon that cause of action. Below I shall deal with the submissions about that matter.

80. *"Collateral contract"*. There were two obstacles to the reaching of a determination that the Hoskings breached a contract, collateral to the agreement for a lease, whereby they promised to do or pay for certain works in return for Alea promising to enter into an agreement for a lease or to enter into the lease itself.

81. For a representation made in the course of negotiations to have contractual force it must be clear and certain; it must be possible to articulate precisely what the collateral contract is. At no time has Alea articulated precisely what it was, either in the Amended Points of Claim or in Mr Wilcox's evidence.

82. Secondly, the collateral contract postulated must pass the test of what a reasonable person in the position of the parties would understood to have been intended by the statement alleged to have been a term of the collateral contract: would such a person necessarily have understood that the statement was part of a binding contract?[13] There was some fluidity from time to time in Mr Hosking's statements (according to Mr Wilcox's account of them, which I have accepted) as to exactly what the Hoskings would do or pay for by way of making good the surface of the premises following the excavation of the tanks. Moreover, the parties entered into a written agreement on 17 December 2013 that contained the "as is" clause, agreeing that the landlord was not giving any warranty as to the condition of the premises, and eventually executed a lease which not only contained the "as is" clause but also provided, in clause 9.2, that the lease contained the whole agreement of the parties and that neither of them was entitled to rely on any warranty or statement in relation to the premises. In those circumstances I think it improbable that a reasonable person in the position of the parties would necessarily have concluded that they meant Mr Hosking's statements to have been part of a binding contract.

83. It is not surprising that Mr Virgona in his written submission, by way of final address, made only brief reference to the "collateral contract" claim. I do not accept it.

[12] Section 224 of the *Australian Consumer Law and Fair Trading Act* 2012 (Victoria) confers jurisdiction upon VCAT to hear and determine such a cause of action.
[13] *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26, (2016) V Conv R 54-878.

84. *Unconscionable conduct*. So far as they are relevant to Alea's claim in this proceeding or have been relied upon in Mr Virgona's final address by way of written submission, ss 77 and 80 of the *Retail Lease Act 2003* provide:

> **77 Unconscionable conduct of a landlord**
>
> (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 circumstance, unconscionable.
>
> **Note**
>
> Section 78 deals with unconscionable conduct by a tenant.
>
> (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 –
>
> (a) the relative strengths of the bargaining positions of the landlord and tenant; 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
>
> …..
>
> (k) the extent to which the landlord acted in good faith;
>
> …..
>
> **80 Recovery of amount for loss or damage**
>
> (1) A landlord or tenant, or former landlord or tenant, who suffers loss or damage because of unconscionable conduct of another person that contravenes section 77 or 78 may recover the amount of the loss or damage by lodging a claim with the Tribunal against the other person.
>
> …..

(3) If the matter of the loss or damage arises in connection with proceedings in the Tribunal, the Tribunal may proceed to decide the matter and award a sum that it considers appropriate.

85. The presence, in the circumstances of a case, of one or more of the factors listed in s 77(2), without more, does not mean that the conduct in question is unconscionable. The factors provide a useful, but non exhaustive, set of criteria by which to test the conduct. Nevertheless, a person whose conduct is in question will be at some risk of a finding that the conduct is unconscionable if one or more of those factors is present.

86. Section 77 is analogous to sections in consumer protection legislation, past and present, which provide for statutory unconscionability. There have been many judicial decisions about what, under those analogous sections, amounts to unconscionable conduct. As both Counsel have reminded me, I reviewed some of those decisions when I decided a case in 2009 in which there had been an allegation of unconscionable conduct within the meaning of s 77. After observing that the courts had adopted a cautious and restrained approach and had set a fairly high standard for the wrongdoing that is required to amount to "unconscionable" conduct, I concluded:

> In my opinion the phrase "conduct that is, in all the circumstances, unconscionable" in section 77(1) of the Act should be interpreted in the way that the above authorities have interpreted similar phrases in similar legislation. "Unconscionable" is a strong word. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgment.[14]

87. In 2013 the Victorian Court of Appeal had occasion to consider one of the analogous sections, which was s 8(1) of the *Fair Trading Act 1999*. The decision was *Director of Consumer Affairs Victoria v Scully* ("Scully").[15] In that decision the Court of Appeal noted that in every case in which a court had decided that a person had engaged in unconscionable conduct there had been a finding that the conduct had shown a degree of moral taint, or was highly unethical.[16] In the *Scully* decision the court referred approvingly to other attempted paraphrases of the expression "unconscionable" conduct: conduct that deserved a pejorative moral judgment[17], or displayed moral turpitude[18], or what should not be done in good conscience.[19] None of those attempted paraphrases, nor the concept of "moral obloquy", is a substitute for the expression "unconscionable" itself, however.

[14] *Transaero Pty Ltd v Goullthorpe* [2009] VCAT 2146 at [95].
[15] [2013] VSCA 292; (2014) V Conv R 54-843.
[16] *Scully*, at [18].
[17] *Scully*, at [22], [33] and [54].
[18] *Scully*, at [24].
[19] *Scully*, at [36].

88. Nothing in *Scully* causes me to change the view which I expressed in 2009. I adhere to it. I approach the allegation of "unconscionable conduct" in the present case with the recognition that the bar is set high for the making out of the allegation.

89. Amongst the factors in s 77(2) upon which Alea has relied to make the allegation, I consider that the factor described in s 77(2)(i) is present: the extent to which the landlord unreasonably failed to disclose to the tenant any intended conduct of the landlord that might affect the tenant's interests. I have found that Mr Hosking did fail to disclose to Alea the Hoskings' intention to excavate the tanks. The excavation of the tanks, and the leaving of holes in the surface of the premises and the excavated soil heaped then spread over the surface, did affect Alea's interests, so I have found, in that it adversely affected its business; so the intended conduct clearly might have affected Alea's interests as a prospective tenant at the time that the Hoskings had that intention. I have found that Mr Hosking's failure to disclose the attention was deliberate: it must follow, I consider, that the failure was unreasonable. I consider that it also follows that, to that extent, the Hoskings did not act in good faith, so that the factor described in s 77(2)(k) is also present.

90. The factor described in s 77(2)(a) – the relative strength of the bargaining positions – does not assist Alea. It is true that Mr Wilcox gave evidence, and I accept, that he was, to use his words, "between a rock and a hard place" when negotiating with Mr Hosking for a lease, because he was under pressure from the owner of the Burwood Road, Hawthorn premises to vacate them quickly and so might have shifted Alea's business to premises other than the Hoskings' Surrey Hills premises if he had had more time to negotiate a lease; he was in a weak bargaining position compared to the Hoskings' position. There was no evidence, however, that the Hoskings knew the position that Alea was in before the agreement for a lease was entered into, so they did not take conscious advantage of Alea's weak bargaining position.

91. My findings have been that Mr Hosking deliberately omitted to disclose to Alea the intention to excavate the tanks, failed to honour the representation he made to Alea that the Hoskings would make good the surface of the premises by removing the excavated tanks, by filling the two holes and by sealing the surface, then later failed to reimburse Alea for the cost of making good all the surface area of the premises (except for the area where the smaller hole was) as he said the Hoskings would do. Failing to honour a representation or a promises is not,

in itself, unconscionable conduct. But the failure followed a deliberate failure to disclose the intention to remove the tanks. Together those features of the conduct attract an adverse moral judgment. I have reached the conclusion that, by the conduct I have summarised in this paragraph, considered as a whole, the Hoskings engaged in conduct that was, in all the circumstance, unconscionable. Conscious of the high bar that has to be cleared before a party proves an allegation of unconscionable conduct, I have hesitated before coming to the conclusion. I have come to it nevertheless.

92. Alea has suffered loss and damage because of that unconscionable conduct. For reasons given above it has proved that loss or damage to the extent of $2,982.87. It is appropriate to award that sum to Alea in this proceeding as s 80 of the Act empowers the Tribunal to do.

93. *Misleading or deceptive conduct.* In view of my conclusion that the Hoskings engaged in conduct that was, in all the circumstance, unconscionable, it is not necessary for me to embark upon the question of whether they had engaged, in trade or commerce, in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACLV and so exposed themselves to liability under s 236 of the ACLV to pay damages to Alea. Nevertheless, I had invited the parties to make submissions about that question, and they did, so I ought to say something about it.

94. I had invited the parties to make submissions, in the first place, about whether I could or should embark upon the question at all, in view of the fact that Alea had not raised precisely that question in the course of the proceeding (although it had alleged "representations" made "in trade or commerce"). Mr Messer for the Hoskings submitted that it would not be proper for me to do so. He gave two reasons.

95. The first reason was that it would be wrong in law to do so, in view of a decision of the Court of Appeal[20] which allowed an appeal from a decision of a trial judge to permit a plaintiff to re-open its case on damages even though the hearing had been concluded and the judge had reserved his decision. The present case is not comparable to that case. In the present case there has been no invitation to Alea to apply to re-open its case and call further evidence. The question was only whether Alea might seek to try to fit the facts of the case into a different legal category from the ones that it relied on during its case, and whether it was proper for me to allow it to try.

96. The second reason was that there would be procedural unfairness to the Hoskings if I were to embark upon and decide the question, because they had not been given any opportunity during the hearing to give evidence touching upon the issue of whether they had reasonable grounds for doing what they did.

[20] *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1.

97. Two aspects of the Hoskings' conduct arguably contravened s 18 of the ACLV. The first was the failure to disclose the intention to excavate the tanks. By virtue of s 2(2)(c) of the ACLV, "conduct" includes doing or refusing to do an act, and refusing to do an act includes "refraining (otherwise than inadvertently) from doing that act". I have found that the Hoskings' refraining from disclosing the intention was not inadvertent; it was deliberate. So the non-disclosure was capable of being conduct that contravened s 18. I do not think that would be any procedural unfairness to the Hoskings in my considering and determining whether that aspect of their conduct did contravene s 18. It would be forensically incredible for Mr Hosking to attempt to say "I did disclose what Alea alleges I did not disclose; but if I did not disclose it I had reasonable grounds for not disclosing it."

98. The second aspect of the Hoskings' conduct that arguably contravened s 18 was the representations about making good the surface, or about recompensing Alea if it made good the surface. The representations were as to future matters: what the Hoskings would do in future. By virtue of s 4(1) of the ACLV, if a person makes a representation with respect to any future matter, and does not have reasonable grounds for making the representation, the representation is taken for the purposes of the ACLV to be misleading. Mr Hosking did not give any evidence that touched upon whether he had reasonable grounds for making the representations that he did make. Mr Messer correctly submitted that, in the absence of reliance by Alea upon s 4(1) in the case that it presented at the hearing, there had been no occasion for Mr Hosking to have given such evidence. I accept the submission that it would have been procedurally unfair to the Hoskings to have decided whether their representations as to future matters contravened s 18 when they had not had the opportunity to give evidence about reasonable grounds.

99. *Outcome*. The Hoskings have a liability under s 80 of the Retail Leases Act to pay to Alea $2,982.87 as compensation for loss that Alea suffered as a result of their unconscionable conduct as landlords within the meaning of s 77 of that Act.

Disrepair of the Premises: Evidence and Findings

100. As to the part of this proceeding that relates to the state of repair of the premises during Alea's tenancy, the available evidence has been the evidence of Mr Wilcox on the one hand and the evidence of Mr Hosking and the witness statement of the managing agent, Mr Ryan of Gorman & Kelly, on the other. There was little conflict in the evidence because Mr Wilcox's evidence and the other evidence really followed different streams and seldom intersected. Mr Wilcox's evidence was mainly about what happened at the premises to cause a state of disrepair and how the state of disrepair affected Alea's business. Mr

Hosking's evidence and Mr Ryan's witness statement were about what they did in response to their having been notified of the need to repair. The only significant conflict in the evidence was about when Mr Wilcox first notified Mr Ryan of an event which recurred in March 2014 (according to Mr Wilcox) when a storm caused water damage to the roof of the premises. With the exception of the evidence at that point of conflict, I accept all the other evidence and make findings in accordance with it. The evidence was as follows.

101. In March 2014, soon after Alea re-opened its business following the change in its location, there was a wind storm which blew off an asbestos section of the roof, according to Mr Wilcox, who took photographs of broken, cracked and lifting asbestos sheeting and damage to flashing; he attached the photographs to his witness statement.[21]

102. Mr Wilcox gave evidence that he reported the damage to the roof to Mr Ryan from time to time but Mr Ryan took no action until July 2014. Mr Ryan said in his witness statement that Mr Wilcox did not report the damage until immediately before 15 July 2014 and that he visited the premises on that day to investigate the complaint. Mr Wilcox's evidence on the point was vague and he did not produce any written evidence of having made a report earlier than mid-July 2014. Mr Ryan did not give oral evidence so there was no way by which his assertion, that Mr Wilcox did not make a report until mid-July 2014, could be tested. I am unable to make a finding on that issue, but I do not think that that matters.

103. When Mr Ryan visited the premises on 15 July 2014, Mr Wilcox also reported that there was a crack in the west wall of the building. In turn, Mr Ryan notified Mr Hosking of the complaint about the roof. Mr Hosking lodged a claim with his insurer and also sent Jeorge Lovito, whom he described as a "handyman",[22] to identify and repair any leaks to the roof. The handyman repaired some guttering but could not find any leaks in the roof.

104. On 20 August 2014 the cracked wall collapsed, leaving the premises' toilet damaged and exposed. On the following day Mr Ryan and Mr Hosking both attended at the premises to inspect the damage. Mr Hosking reported the damage to his insurance broker and lodged an insurance claim, and separately obtained a quotation from a builder to repair the wall.

105. An insurance assessor investigated Mr Hosking's claim and provided him with a report. Then the insurer engaged a builder to investigate and report. The reports inclined towards attributing damage to the roof to poor maintenance rather than to storm damage. At all events, nothing else was done before 29 October 2014 about repairing the roof or replacing the wall.

[21] TB pp 144-148.
[22] Mr Hosking's witness statement, paragraph 41; TB p 71.

106. Exposed as it was to intruders after the collapse of the wall, the toilet became vandalised.

107. Shortly before 29 October 2014 another storm resulted in water penetrating the roof and entering the building. Mr Wilcox reported the water entry to Mr Ryan on 29 October 2014. The water destroyed some of Alea's business records and equipment and some of Mr Wilcox's personal effects. A canopy above part of the premises was held up by a pole, but because the pole was bent the canopy collected rainwater and directed it into the building. Mr Wilcox attached to his witness statement photographs which showed how the interior walls of the building had been marked by water and how water had soaked some of Alea's equipment.[23]

108. Mr Ryan passed on Mr Wilcox's report to Mr Hosking and he lodged an insurance claim. This time, the insurer rejected the claim, alleging that the cause of the water entry was the poor state of the roof rather than storm damage. Mr Hosking sent a plumber to repair the roof.

109. The state of the toilet and the interior of the building caused "embarrassment" to Alea's customers and staff, and economic loss, according to Mr Wilcox, which led him to decide to rent neighbouring premises and conduct Alea's business there instead of trying to put back into order the interior of the building on the premises.

110. On 11 December 2014 Mr Hosking's insurer submitted for his approval a quotation for the replacement of the wall. Mr Hosking approved it, but the wall was not replaced.

111. In the early months of 2015 Mr Wilcox reported to Mr Ryan instances of vandalism to the toilet, which was still exposed to intruders. On 17 April 2015 Mr Hosking engaged Lynx Maintenance Services to repair the toilet.

112. On 22 April 2015 Mr Wilcox reported to Mr Ryan a further incident of storm damage and water entry. This time, Mr Hosking engaged Lynx Maintenance Service to repair the roof, which it did, successfully. There has been no further incident of water entry.

113. In early May 2015 a contractor engaged by Mr Hosking erected a corrugated iron fence where the collapsed wall had been.

[23] TB pp 153-171.

114. Two things emerge from that history, it seems to me. The first is that Mr Hosking did not, for many months, cause adequate repairs to be made to the roof. At the outset he sent not a plumber, but a handyman, to investigate and repair. Whatever the handyman did in July 2014 was inadequate, because there was water penetration through the roof in late October 2014. Even then, whatever a plumber did in an attempt to repair was inadequate, because there was water entry again in April 2015. It was not until Lynx Maintenance Services did work that the roof was repaired adequately. The second thing is that Mr Hosking's response to each report of damage was, in the first instance, to refer it to his insurer and to leave the problem with the insurer instead of attending to his obligations to his tenant. He did not take action directly to endeavour to repair the roof until the insurer refused his claim about it. Nothing was done about the collapsed wall for more than six months, and even then a corrugated iron fence, not a new wall, was built.

Disrepair of the Premises: Legal Consequences

115. In its Amended Points of Claim Alea has expressed several causes of action in relation to disrepair of the premises:

    a) a breach of clauses 6.1 of the lease (an obligation to give the tenant quiet possession of the premises) and of clause 6.4 (an obligation upon the landlord to keep the structure of the building "in a condition consistent with [its] condition at the start of the lease");

    b) a breach of the term which s 52(2)(a) of the Retail Leases Act imports into the lease (that the landlord is responsible for maintaining the structure of the premises "in a condition consistent with the condition of the premises when the retail premises lease was entered into"); and

    c) engagement in unconscionable conduct, in contravention of s 77 of the Retail Leases Act.

116. *Breach of the covenants in clauses 6.1 and 6.4.* Mr Messer submitted that the claim that clause 6.4 was breached had to fail because there was no evidence of the condition of the structure at the commencement of the lease. I do not agree. Mr Wilcox's evidence was that the structure at the commencement of the lease had asbestos sheeting on the roof and a brick wall; during the first storm asbestos sheeting blew off; later, the brick wall collapsed. Moreover, as Mr Virgona pointed out in his final address by way of written submission, Mr Hosking had stated in his evidence that the roof of the premises never leaked during the time (between 1997 and September 2013) that he and his son had operated a car dealership at the premises. The evidence, therefore, was of an intact roof and intact brick wall at the commencement of the lease.

117. The Hoskings' obligation under clause 6.4 was to keep the roof and the wall, and the toilet, in the condition that they were in at the commencement of the lease. Eventually they met that obligation so far as the roof was concerned, but it was many months before they did. It was not a sufficient compliance with the obligation to send a handyman to do repairs to the roof. In view of the later history of water entry I find that the handyman's work, whatever it was, did not result in an effective repair to the roof. They never met the obligation so far as the wall was concerned, because only a corrugated iron fence, not a brick wall, was built where the collapsed wall had been. Their failure to meet the obligation either in a timely fashion or at all exposed them to a claim for damages for breach of covenant.

118. In view of my conclusion about a breach of clause 6.4 I do not need to decide whether the failure properly to rectify disrepair also amounted to a breach of clause 6.1.

119. *Breach of the term imported by s 52(2).* For the same reasons as I have given for concluding that the Hoskings breached the covenant contained in clause 6.4 of the lease I conclude also that they breached the term, imported into the lease by s 52(2)(a) of the Retail Leases Act, that they would maintain the structure of the premises in a condition consistent with the condition of the premises when the lease was entered into.

120. The Hoskings' failure to rectify, as soon as practicable, defects in the premises – the roof, the brick wall and the toilet – exposed them to liability under s 54(2) to pay "reasonable compensation for loss or damage (other than nominal damage)" that Alea suffered because of that failure.

121. *Unconscionable conduct.* Alea alleged that the failure to attend satisfactorily to the disrepair of the premises was also conduct that was, in all the circumstances, unconscionable, within the meaning of s 77 of the Retail Leases Act. Mere failure to attend, promptly or at all, to rectification of premises is not conduct to be emulated but it is nothing remotely like the kind of conduct that would attract moral obloquy or an adverse moral judgment. I reject the allegation.

Disrepair of the Premises: Loss and Damage

122. In the Amended Points of Claim Alea has alleged that it suffered loss and damage by reason of the Hoskings having failed to maintain the roof of the premises in the same condition as when the lease was entered into. It gave particulars of the loss and damage as follows:

Repainting works:	$ 3,015.00
Laundry and general clean-up:	$ 1,861.00
Damage to equipment	$ 7,463.00
Phone and computers:	$ 7,547.00
Stationary [sic]:	$ 7,001.00
Loss of sales:	$350,000.00
Total losses:	$376,887.00

123. The first five items in those particulars correspond to items on a page of Mr Cianci's expert witness report, headed "Increased Working Capital Costs due to Renovation Works".[24] Neither in the report itself nor in his oral evidence did Mr Cianci explain any of those items or explain how they were calculated. He did not say whether the items were based upon any and which records of Alea. He did not link any of them to water entry through the roof. Mr Wilcox did not mention any of the items in his witness statement or in his oral evidence, let alone explain them.

124. I have looked in vain through the Tribunal Book for documents that might match any of those items. I give one example of a fruitless search through the Tribunal Book. The fourth item is "Phones and computers: $7,547.00". The only pages in the Tribunal Book which correspond to the item are a list of various electronic equipment (computers and printers, a phone system, a CD/DVD player, a DVD recorder and a radio).[25] Each piece of equipment has a dollar figure next to it. The total is not $7,547.00 but $7,075.00. The list gives no clue as to who compiled it or upon what the dollar figures in the list were based. The list is headed "Water damage September 2014" but there was no evidence given that would enable one to find that each listed piece of equipment was damaged by water entry. The Tribunal Book contains no invoice or quotation for a dollar figure that equated to one on the list. One does not know whether each amount claimed was supposed to be the original acquisition cost or a replacement cost, or whether any rate of depreciation was factored into the figure given. Without explanatory evidence, the pages are meaningless. I make similar conclusions about all those particulars which refer to painting works or to alleged damage to other goods. Alea has failed to prove any of those particulars of loss or damage.

125. As to the particulars given, "Loss of sales: $350,000.00", I refer to and repeat what I have said in paragraphs 61 to 73 above. Alea has failed to prove any loss of sales, or loss of income, that has been a consequence of any breach of the lease, breach of the earlier agreement for a lease, non-compliance with the Retail Leases Act or unconscionable conduct. The thrust of Alea's claim for loss of income seemed to me to come from its complaints about the Hoskings' failure to

[24] TB p 43.
[25] TB pp 317-318.

make good the surface of the premises and to remove contaminated soil, rather than from its complaints about their failure to attend to rectifying damage to the building from water entry. Nevertheless, insofar as a claim has been made for loss of income as a consequence of the water entry or from disrepair to the building, Alea has not proved it.

Other matters

126. In the Amended Points of Claim Alea alleged that, in the process of removing fuel tanks from the premises, the Hoskings by their agents cut a gas line. There was next to no mention of that in the witness statements or in the other evidence, and Mr Virgona did not mention it in his written submission. So the allegation has led nowhere.

127. There was also an allegation that Mr Hosking, when making his other representations, represented that he would repair the bent pole that held up the canopy. Alea made no point of this, it seemed to me, other than to say, as Mr Wilcox did in his evidence, that the canopy retained rainwater, because the pole was bent, and diverted the rainwater into the building.

128. The Amended Points of Claim included a small claim for $316.69 which Alea allegedly paid at the Hoskings' request for repairing paint damage on a wall. There was no evidence led at all about that matter.

129. The claim for relief in the Amended Points of Claim was not only for monetary compensation but also for an order requiring the Hoskings to perform works, including the construction of a brick wall to replace the collapsed wall. Because the Hoskings no longer own the premises and are no longer Alea's landlords, Alea could not and did not pursue the claim for such an order.

Conclusion

130. For reasons given above there will be an order that the Hoskings pay Alea $2,962.27.

A. Vassie
Senior Member

20 September 2017