VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.R299/2013

CATCHWORDS

Retail Leases Act 2003 s 57, abatement of rent and outgoings; burden of proof; responsibility of party who took on building permit for building works.

APPLICANT:	Charcoal Chicken & Souvlaki Xpress Pty Ltd (ACN 151 732 455)
RESPONDENT:	George Stamatakos
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	28 January, 29 January 31 March, 1 April and 27 April 2015
DATE OF ORDER:	8 July 2015
DATE OF REASONS:	8 July 2015
CITATION	Charcoal Chicken & Souvlaki Xpress Pty Ltd v Stamatakos (Building and Property) [2015] VCAT 1017

ORDERS

1. The Tribunal finds and declares that the applicant is not entitled to abatement of rent and any outgoings payable under the lease of Shop 10, 441-447 Sydney Road, Coburg ('Premises') in respect of damage to the Premises as a result of the ingress of water on or about 14 February 2012.
2. In respect of a second water ingress event on or about 16 May 2012, the Tribunal finds and declares that the applicant is entitled to suspension of the obligation to pay rent and any outgoings payable under the Lease for six weeks from 16 May 2013.
3. **The proceeding is listed for further hearing at 2.15 pm on 18 August 2015 at 55 King Street, Melbourne before Member Edquist with an allowance of half a day at which time the Tribunal will hear**

submissions from the parties in relation to all outstanding issues, including, but not limited to:

(a) whether outgoings are payable by the applicant under the Lease;

(b) whether the Lease should be rectified with respect to outgoings;

(c) if outgoings are payable by the applicant under the Lease, whether GST has been charged on council and water rates by the landlord, and, if so, should it have been?

(d) whether the applicant owes any, and if so, what moneys to the respondent;

(e) whether the applicant has repudiated the Lease;

(f) whether the respondent is entitled to immediate possession of the Premises; and

(g) if the respondent is entitled to repossession, what are the applicant's make good obligations under the Lease and is it obligated to pay any, and if so, what damages to the respondent.

4. If there are any other issues that either party considers are to be required to be determined, they must advise the other party and the principal registrar in writing **by 4.00 pm on 14 July 2015**.

5. **By 4.00 pm on 21 July 2015**, the applicant must file any submissions it wishes to make regarding the issue of whether outgoings are payable under the Lease.

6. By 4.00 pm on 28 July 2015, the applicant must file and serve any submissions in relation to other issues still to be determined.

7. By 4.00pm on 11 August 2015, the respondent must file and serve any submissions in reply.

MEMBER C EDQUIST

APPEARANCES:

For Applicant	Mr A Schlicht of Counsel
For Respondent	Mr B McCullagh of Counsel

REASONS

Introduction

1 At 441-447 Sydney Road, Coburg there is a shopping centre known as Foley's Mall. The applicant tenant leases from the respondent landlord shop 10 ('the Premises') in the Mall where it carries on a takeaway food business called Charcoal Chicken & Souvlaki Xpress ('Charcoal Chicken'). The lease ('Lease') is dated 10 July 2011.

2 This case concerns principally:

(a) the entitlement of Charcoal Chicken to retain its occupancy under the Lease of the Premises; and

(b) a claim by Charcoal Chicken that it is entitled to a refund, pursuant to clause 3 of the Lease, of rent and outgoings totalling $41,012.75 that it has paid for two periods in which it says they should have been abated; and

(c) a claim by Charcoal Chicken that it is entitled to a return of all outgoings paid under the Lease.

Background

3 When Charcoal Chicken took possession of the Premises they had been used as a florist's shop. They required to be converted for the purposes of operating as a retail food outlet.

4 The necessity for conversion work was recognised in the Lease in so far as the landlord was required to install a supply of natural gas to the Premises, at the landlord's expense. All other conversion work was to be undertaken by the tenant.

5 As the evidence came out, it became clear that the landlord, Mr Stamatakos, had signed a consent in favour of the two directors of Charcoal Chicken to enable them to apply for a building permit on his behalf so that the necessary conversion works could be carried out.

6 Mr Stamatakos arranged for a plumber, Michael Ioannidis, to install the natural gas. This work was completed by 22 September 2011.

7 Charcoal Chicken then arranged to have the balance of the conversion works carried out.

8 After Charcoal Chicken had been operating for a relatively brief period the business was interrupted by the entry of water on 14 February 2012.

9 Charcoal Chicken made a claim on its business interruption insurer seeking, amongst other things, replacement of a number of items of damaged equipment. Ultimately, much of the equipment was replaced.

10 Minor repairs to the Premises to the value of $1,720 were also carried out at the expense of the body corporate including repair of water damaged ceiling

plaster, repair of water damaged cornice, replacement of a water damaged skirting board, sealing all of the above with water stain sealer and painting to match the existing conditions.

11 Within days, Mr Stamatakos wrote to the agent managing to say that Charcoal Chicken's tradesman had left a lot of mess on the roof that had blocked the box gutters and caused the flood.

12 Charcoal Chicken after this point had the work carried out above the Premises to rectify the roof plumbing.

13 Charcoal Chicken resumed operations in the Premises on 30 June 2012.

14 Charcoal Chicken alleges that the Premises were flooded again in May 2013. This event was said to have caused significant damage to all the equipment and made it necessary to turn off the electricity for safety reasons. After the second event, Charcoal Chicken claims the Premises could not be used as a takeaway food store between 16 May 2013 and a point in October 2013.

Overview of the dispute

15 The dispute between Charcoal Chicken and Mr Stamatakos primarily arises out of these two events involving the water entry into the Premises on 14 February 2012 and 16 May 2013. During both periods, Charcoal Chicken continued to pay rent and outgoings as it believed it was obliged to do under the Lease.

16 Charcoal Chicken says it paid rent for the period February-June 2012 of $11,000, and that water rates of $819.72, body corporate fees of $2,659.30 and council rates of $568 took the total paid to $15,047.02. In the period from 16 May 2013 until the date on which Charcoal Chicken resumed occupation, a further total of $25,965.73 was paid. The $41,012.75 that Charcoal Chicken seeks to recover from Mr Stamatakos is the sum of the $15,047.02 and the $25,965.73.

17 After the shop was made good after the second event, Mr Stamatakos did not allow Charcoal Chicken to take possession again, and instead changed the locks on or about 23 October 2013.

18 This prompted Charcoal Chicken to bring these proceedings, seeking an injunction to allow it to re-enter and resume occupation of the Premises. Damages of $41,012.75 were also sought, together with costs.

19 An injunction was granted on 12 December 2013 on the giving by Charcoal Chicken, through its Counsel, of the usual undertaking as to damages, and also giving an undertaking 'to pay rent and outgoings in accordance with the lease'.

The hearing

20 Prior to the commencement of the hearing on 28 January 2015, both Charcoal Chicken and Mr Stamatakos had filed submissions. The hearing was held on 28 January, 29 January, 31 March, 1 April and 27 April 2015. Mr A Schlicht of Counsel appeared for Charcoal Chicken and Mr B J McCullagh of Counsel appeared for Mr Stamatakos.

The issues considered at the hearing

21 The issues canvassed in the hearing included:

(a) the identification of the circumstances in which clause 3 of the Lease applies;

(b) whether the event in February 2012 was an event to which clause 3 applies;

(c) if clause 3 applies to the first event what is the abatement to which Charcoal Chicken is entitled?

(d) whether there was a flood on or about 16 May 2013, as this is disputed by Mr Stamatakos;

(e) if there was a flood on or about 16 May 2013, was clause 3 enlivened?

(f) if clause 3 applied to the second event what is the abatement to which Charcoal Chicken is entitled?

(g) whether outgoings are payable by Charcoal Chicken under the Lease.

22 At the conclusion of the hearing, the parties agreed with the Tribunal's proposal that the issues above should be determined first, as their determination would have a direct impact on other key issues including:

(a) whether Charcoal Chicken owes money to Mr Stamatakos under the Lease and, if so, in what amount;

(b) has Charcoal Chicken repudiated the Lease?

(c) is Mr Stamatakos entitled to immediate possession of the Premises?

Subsidiary issues

23 Depending on the answer to the question as to outgoings, and subject to the Lease remaining on foot, these questions may require attention:

(a) if outgoings are not payable under the Lease, should the Lease be rectified at the request of Mr Stamatakos?

(b) if outgoings are payable by Charcoal Chicken under the Lease, whether GST has been charged on council and water rates by the landlord, and, if so, should it have been as this is queried by Charcoal Chicken?

Further submissions

24 At the conclusion of the fifth day of the hearing, Mr Stamatakos was ordered to file further submissions by 1 May 2015 and Charcoal Chicken was ordered to do likewise by 7 May 2015. Mr Stamatakos filed his submissions on time. These submissions addressed the two contested rent abatement claims and also the issue of whether outgoings are payable by Charcoal Chicken under the Lease. Charcoal Chicken filed its submissions only on 21 May 2015. They dealt with the abatement claims, but did not address the outgoings issue.

These reasons

25 Because Charcoal Chicken has not filed any submissions on the issue of outgoings, and because that issue can be determined separately from the abatement issues, these reasons will address the issues set out at paragraph 21 (a)-(f).

Operation of clause 3

26 Clause 3 (a) of the Lease provides, subject to the *Retail Leases Act 2003* (Vic) ('the Act'), that if:

> (A) the Premises or any part are totally or partially destroyed or damaged during the Term by fire, storm, tempest, earthquake, explosion or inevitable accident so as to be unfit for use and occupation by the Lessee; and
>
> (B) the event causing the destruction or damage was not caused by the default of the Lessee; and
>
> (C) Any policy of Insurance effected by the Lessor has not been vitiated or payment or renewal refused as result of the act, default or neglect of the Lessee-
>
> > Then the rental and outgoings or a fair and reasonable proportion having regard to the nature and extent of the destruction or damage or to any interference with their use by the Lessee must, so long as the Premises are unfit for use and occupation, be suspended and cease to be payable.

Clause 3 reflects s 57 of the Act

27 Clause 3 effectively incorporates ss 57(a) and (b) of the Act.

Application of clause to Charcoal Chicken's claims

28 The parties agree that no policy of insurance effected by Mr Stamatakos has been vitiated or payment or renewal refused as a result of the act, default or neglect of Charcoal Chicken, so this condition is not applicable.

29 Accordingly, Charcoal Chicken, in order to take advantage of the rent and outgoings abatement available under clause 3, will have to demonstrate that

the Premises, in whole or in part, have been destroyed or damaged by a storm or tempest so as to be unfit for use and occupation.

30 Charcoal Chicken says that once clause 3 of the Lease has been enlivened by the destruction of or damage to the Premises in whole or in part then, if the Mr Stamatakos wishes to avoid the consequence of an abatement of rent and outgoings, the onus shifts to him to demonstrate that it was the tenant that caused the destruction or damage. (See applicant's outline of final submissions, paragraph 11.)

31 Mr Stamatakos disputes that this onus shifts to him. (See respondent's final submissions, paragraph 5.)

32 Approaching the issue from first principles, I observe that:

(a) The primary obligation of the tenant under the Lease is to pay rent.

(b) Section 57 of the Act mandates that a retail premises lease is taken to provide that if the rented premises, or the building in which the premises are located, is damaged, then, except if the tenant caused the damage, the rent and outgoings or other charges under the lease will be abated for the period that the premises cannot be used or are inaccessible due to that damage. Where the damage is partial, the abatement is to be proportionate.

(c) In this particular Lease, clause 3 has the same effect as s 57 of the Act. There is a slight difference in the wording of clause 3 compared to s57, as clause 3 operates provided 'the event causing the destruction or damage was not caused by the default of the Lessee'. However, this phrase has the same effect as 'except if the tenant caused the damage', and the different terminology employed cannot affect where the burden of proof lies.

(d) On the basis of a plain reading of s 57 of the Act or clause 3, I consider that it is a matter for the tenant to establish that it did not cause the relevant damage. This is consistent with the usual rule that the legal burden of proving all the facts essential to a claim rests on the claimant. As explained in *Cross on Evidence*, 9th Edition, Australian Edition at [7060]:

> [a] fundamental requirement of any judicial system is that the person who desires the court to take action must prove the case to its satisfaction*. This means that the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.
>
> **Dickinson v Minister of Pensions* [1953] 1 QB 228 at 232; [1952] 2 All ER 1031 at 1033.

33 Furthermore, I consider that it does not matter that the burden of proof in this instance involves establishing a negative. In this regard, I quote Walsh JA in *Currie v Dempsey* [1967] 2 NSWR 532; 86 WN (Pt 2) (NSW) 460 (FC):

> The burden of proof in the sense of establishing a case lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg, if its existence is a condition precedent to his right to maintain the action.

34 I conclude that the burden of proving that it did not cause the event which damaged the Premises falls on the tenant, as proof of this fact, even though it is a negative, is an essential part of enlivening s 57, alternatively, clause 3 of the Lease.

35 This conclusion is consistent with the fact that the Charcoal Chicken in this case did accept the responsibility for discharging the burden of proof by seeking to establish that the first flood in 2012 was caused by a blocked drain.

Was the flood in the shop in February 2012 an event to which clause 3 applies?

36 Charcoal Chicken's submissions about this are:

(a) The Premises have historically been the subject of flooding. Charcoal Chicken called Harika Altay who has worked for twenty years in shop 8, which is next to the Premises. She said that the Premises had flooded in or about 2005, and in 2011, as well as in February 2012 and May 2013. Charcoal Chicken also called Effie Bintebis who also said she had worked for 20 years at Foley's Mall. She worked in a jewellers shop which is adjacent to the Premises. She also said the Premises were flooded in or about 2005, in 2011, in February 2012 and May 2013.

(b) On 14 February 2012, there was a thunderstorm which caused severe flooding at the Premises.

(c) The cause of the flooding was a blocked drain which caused a back pressure flow up the downpipe, and the rain then came through the pipe into the Premises.

(d) The Premises were closed and not fit for occupation until repairs were made to both the Premises and the equipment. All the machinery located in the Premises and the property of the tenant was damaged by water.

(e) As a result, the Premises were unable to be occupied by the tenant until 30 June 2012.

Tenant's evidence regarding the cause of the flood in February 2012

37 Charcoal Chicken submitted that weight should be placed on the fact that there had been a history of flooding in shop 10 over 2005, 2011, 2012 and 2013; that there had been numerous requests to find the source of the flooding; that no tradesman had been able to find the cause of the flooding; and that despite the landlord alleging that he rectified the cause of the flooding by unblocking the drain, the drain has had to be unblocked on three separate occasions.

38 If Charcoal Chicken's position is that because there has been a history of flooding in the Premises then s 57 of the Act and/or clause 3 of the Lease must apply, I do not agree with it. I reject this position because neither Ms Altay nor Ms Bentebis gave any explanation as to the cause of the floods they witnessed in 2005, 2011, 2012 and 2013. Their evidence accordingly established a pattern of flooding, but did not assist in determining what caused each of the floods.

39 It is entirely possible that each flood had a separate cause. It is necessary to consider carefully the evidence regarding the cause of the alleged water ingress events in February 2012 and May 2013.

40 In support of its contention that the flood in February 2012 was caused by a blocked drain, Charcoal Chicken principally relied on the evidence of Romeo De Lorenzis. Mr De Lorenzis is a registered builder who on 16 May 2013 investigated the cause of water damage into the Premises at the invitation of Mr Michael Kyriackou on behalf of Charcoal Chicken. In an affidavit affirmed on 12 December 2013, Mr De Lorenzis deposed that:

(a) he first of all examined the roof above the canopy flue and surrounding flashing;

(b) he then cut a manhole in the ceiling near the water-damaged area and physically entered the roof space;

(c) he observed the purlins and beams and the rainhead connection to the downpipe;

(d) he could see that water had escaped the rainhead area and from his observations concluded that:

> the most likely cause was that there was back pressure flow from the drainage system which forced the rainwater back up the downpipe and the water would come out through the join between the rain head and the downpipe.

He also considered:

> This was in all likelihood caused by the rain not being able to drain away, either by a blocked drain or excess water.

He investigated where the drain led to and wrote:

> I assumed that the stormwater drain goes to a pit at the rear in car park close to the shop which had a solid concrete pit cover. Accordingly, if there was back pressure, water would not be able to escape through the pit cover and therefore would back flow up the downpipe into the shop.

41 Evidence in support of the contention that the cause of the flood was a blocked drain pipe came from the testimony of Salvatore Naso of Nastar Plumbing, who repaired the plumbing work on the roof after the first flood. Mr Naso evidence on the fourth day the hearing. He confirmed he had

inspected the Premises in May 2013 with Mr De Lorenzis. He was referred to a letter from Mr De Lorenzis to Mr Kyriackou (Tribunal Book ('TB') page 8.55) and said that he agreed with Mr De Lorenzis' view that the probable cause of the flood was a partially blocked underground drain.

Mr Harley's evidence

42 Charcoal Chicken also called Robert Harley, a licensed plumber, who gave evidence on the first day of the hearing. He confirmed the statements set out in a report he had prepared of an 'official investigation' into a flooding roof at the Premises which he had compiled after an inspection in May 2014. He confirmed he had conducted an investigation of the roof over the Premises and found a rag lodged in the downpipe which he said he believed caused flooding damage to the Premises. He said that:

> the rag was old and had been in the downpipe for some considerable time.

43 When it was put to Mr Harvey by Mr Stamatakos' counsel that a plumber had cleared the stormwater line and downpipe on 25 May 2013 and accordingly the rag must have blown in after that time, he agreed that must be the case. I find, accordingly, that Mr Harley's evidence as to what he observed in May 2014, which was of course some 27 months, after the flooding event of February 2012, does not assist Charcoal Chicken's case.

Landlord's response to the blocked drain pipe contention

44 The first, obvious, criticism of the evidence of Mr De Lorenzis in connection with the flood in February 2012 is that he did not inspect the Premises until May 2013. He accordingly could not give direct evidence as to the blocking of the drain fifteen months before.

45 In direct rebuttal of the blocked drain argument, counsel for the landlord referred to the evidence of Mr Montagaris of Plumbtech Drain Services who deposed on the fifth day of the hearing that he had attended at the Premises on 20 May 2013 and used a dye test to demonstrate that the discharge point of the downpipe was in the laneway.

46 Mr Stamatakos submits that any blocking of the underground drain is simply irrelevant to the flood in February 2012. I accept this submission.

47 Mr De Lorenzis merely theorised about the relevance of a blockage in the underground drain. His words were:

> I assumed that the stormwater drain goes to a pit at the rear in car park close to the shop.

48 Mr De Lorenzo did not carry out a dye test to demonstrate his proposition. I consider the dye test carried out by Mr Montagaris, which established that the rainhead on the roof drained into the laneway and not into the pit in the carpark, effectively rebuts his contention.

The landlord's contention regarding the cause of the 2012 flood

49 Mr Stamatakos says that the first flood was caused by Charcoal Chicken in converting the Premises from a florist shop to a retail food outlet. This involved significant work to the roof which Mr Stamatakos contends was carried out defectively.

50 The defects were said to be two-fold. First, rubbish was left on the roof, which got into the downpipe and blocked it. Second, no flashing, or insufficient flashing, was used after penetrations were made in the roof to install flues.

51 Charcoal Chicken submits that the Mr Stamatakos is advancing contradictory evidence regarding the flooding. In support of this contention Charcoal Chicken says in part (in its submission at paragraph 12(e)) that, Chris T, of Unique Homes, stated that the leak was possibly caused by a burst underground pipe. This is reflected in Unique Homes' invoice dated 2 March 2012 which is appended to Mr Houdalakis' statement as MH-6 (TB9.75). However, Mr Houdalakis went on to say in his statement at paragraph 15 (TB9.5):

> Chris T of Unique Homes subsequently advised me that the water in Shops 8/9 was due to a leak from a fridge and sink and was not caused by the same water ingress event associated with Shop 10 on 14 February 2014. Unique Homes provided me with photographs of the leaking sink.

52 Charcoal Chicken also suggests that by advancing simultaneously the view that the leaks in the roof were caused by poor workmanship when installing the flues and also by a blocked downpipe Mr Stamatakos is putting forward contradictory evidence. I do not accept this. I consider that in advancing these propositions Mr Stamatakos is proposing causes which are cumulative rather than inconsistent with each other.

What work was carried out on the roof?

53 The current sole director of Charcoal Chicken, Anthony Katranis, gave evidence on the first and second days of the hearing, and was recalled to give further evidence on the fourth day. He said that at the time Charcoal Chicken took possession of the Premises, there was an air inlet flue on the roof. A number of photos, including those at TB9.38 and TB9.42, indicate that in addition to the air intake flue there are three exhaust flues.

54 The installation of two of these exhaust flues was to have been expected according to the designer of the works undertaken to convert the Premises from a florist's shop to a takeaway food shop. This was Mr Dominic Grillo. He confirmed when he gave evidence that his plans called for the installation of two flues. Mr Katranis in his evidence confirmed the three flues had been installed on behalf of Charcoal Chicken. I accordingly find that the three flues were installed on behalf of Charcoal Chicken.

55 The building permit issued in respect of the works issued by the Relevant Building Surveyor, Adam Sorati, to the owner, George Stamatakos, through his agent, George Souroulias, permitted the construction of the building work: 'As shown on approved plans'. The building permit also contained express conditions including that the: 'Works must be carried out and completed strictly in accordance with the approved documentation' (condition 3), and that: 'No variation from or alteration of the approval (sic) plans and specifications shall be made prior to obtaining written consent from the Relevant Building Surveyor' (condition 4).

56 The town planning permit which was obtained in respect of the conversion works (Exhibit A2), expressly allowed: 'Buildings and works to construct two flues and waiver of car parking requirement, in accordance with the endorsed plans'.

57 It is therefore clear that the construction of the third flue was carried out in breach of the town planning permit and of the building permit.

Was the quality of the roof plumbing work satisfactory?

58 Mr Mavroidis of Supreme Property Maintenance was called on behalf of Mr Stamatakos. He was involved in his capacity as a subcontractor to Unique Homes. He gave evidence on the last day of the hearing. He was shown an invoice from Unique Homes dated 2 March 2012 (TB9.75) which covered these works:

> Called out to site to investigate leaks in shops, 8/9 through sealing (sic) and from floor, found that penetrations through shop roof near shop 10 have not been sealed correctly, there a (sic) screws that have not been sealed, flashing incorrectly installed, we recommend that the person who installed these return to fix the flashing, we also recommend that the rubbish on top of shop 10 be removed so as it does not block up sumps/downpipes.

59 This invoice clearly suggests in early March 2012, more than two weeks after the first flood, the penetrations in the roof had not been sealed and rubbish had been left on the roof.

60 As noted, the plumbing work on the roof was repaired by Salvatore Naso of Nastar Plumbing. He rendered an invoice for $4,950, dated 24 April 2012, which was one of the documents referred to in Mr Houdalakis' statement at Exhibit MH-7 (TB9.79). This invoice is addressed to Charcoal Chicken. Charcoal Chicken some months later asked the agent Raine & Horne to rebate the charge and claim the invoice from the body corporate insurer. (See TB 9.78). A claim was duly submitted to the insurer Strata Unit Underwriting on 29 November 2012 (TB 9.81). The claim was rejected by the insurer on the following day (see TB 9.84)

61 The work covered by the Nastar Plumbing invoice related to repairs to the roof and included cappings, flashings, sealants and fibreglass coatings. It was carried out in April 2012, that is to say, after the February 2012 flood.

62 Mr Naso was very reluctant to criticise the workmanship of the person who carried out the original plumbing work on the roof work. He repeatedly said that he did his work his way and others did their work their way.

63 Despite the fact that Mr Naso refused to expressly criticise the original roof plumbing work and say it was substandard, he did concede that there had been leakage around the flashings and he did undertake substantial rectification work at a significant cost to Charcoal Chicken to prevent further leakage around the flashings.

64 The quality of the original roof plumbing work was trenchantly criticised by the expert witness called on behalf of Mr Stamatakos, Mr John Merlo, who gave evidence on the fifth day of the hearing. Mr Merlo is a registered building practitioner. He submitted a detailed report dated 10 December 2014. (TB7.1)

65 Mr Merlo's comments in respect of the original roof plumbing work were based on photos which he said had apparently been taken by Unique Homes. He said at page 5 of his report (TB7.6) that:

> Photo 71 and 72 show an incorrect attempt to prevent rainwater collected in the higher section of the roof slope upstream from one of the stack penetrations through the roof from causing damming and consequently potential leakage… Photos 73 and 74 illustrate untradesmanlike applications of polyurethane sealant.

Mr Merlo also said that photo 25 showed that the western exhaust stack penetration had been inadequately braced.

66 Mr Merlo favourably compared the rectification work which Mr Naso confirmed he had carried out with the original roof plumbing work.

67 The fact that poor quality of the flashings was at least partially a cause of the ingress of water into the Premises in February 2012 is demonstrated by Mr Katranis' evidence that in the first flood the water came in over the canopies, which were below the new flues. In contrast, when Mr Katranis gave evidence about the second event in May 2013, he said the water came down the back wall but not over the canopies. This strongly suggests the flashings were defective before they were repaired by Mr Naso.

68 I am satisfied, on balance, that the original roof plumbing work was substandard and find it was at least a partial cause of water penetration during the storm which Charcoal Chicken says occurred on or about 14 February 2012 because:

(a) Mr Mavroidis found the flashings had not been sealed correctly when he made his inspection in March 2012;

(b) Mr Naso considered that he needed to perform $4,950 worth of rectification work after the first flood;

(c) Mr Merlo criticised the original work based on photographs;

(d) Mr Katranis described different routes of water entry in the two floods.

Rubbish on the roof

69 Mr Stamatakos says he attended the Premises within an hour of being told by a representative of Charcoal Chicken that there had been a flood on 14 February 2012. He says further that he contacted the Owners Corporation's manager, Michael Houdalakis, and requested that the Owners Corporation investigate the cause of the water damage. (Refer Mr Stamatakos' statement at TB 15 and 16).

70 Mr Houdalakis provided a witness statement (TB9.1) and appeared as a witness at the hearing on 27 April 2014. He confirmed that he had been advised by Mr Stamatakos by telephone of water ingress into the Premises on 14 February 2012. He said that it was also advised of water ingress into shops 8 and 9 by the shop operator Altay Gifts. He said that he advised Unique Homes Pty Ltd of water ingress into shops 8, 9 and 10 and asked Unique Homes to inspect the cause of the water ingress. Mr Houdalakis deposed further that on 15 February 2012 he was advised by Unique Homes that their representative had attended shops 8, 9 and 10 and advised:

> that a piece of insulation stuck in the box gutter caused the water ingress, and that building rubbish had been left on the roof due from the time that works on the canopies took place.

71 Mr Houdalakis added that on 20 February 2012 he received an email attaching photographs of the roof from Chris T of Unique homes (identified in his oral evidence to be Chris Touralis). He annexed these photographs to his witness statement as Exhibit MH-2, being the photographs at TB9.19-9.66.

72 No witness from Unique Homes was presented but, as noted, George Mavroidis, who had performed work as a sub-contractor to Unique Homes, was called. He confirmed that he had carried out the work which had been billed by Unique Homes to Mr Houdalakis' business Ace Body Corporate Management, on 2 March 2012, in the sum of $1,892 inclusive of GST (TB9.68). Mr Mavroidis confirmed he performed the work described in this invoice which was unblocking a sump/downpipe, and repairing water damage within the Premises, and removing his own rubbish.

73 As noted above, Mr Mavroidis confirmed that while attending the Premises in March 2012, he got on the roof and saw rubbish there. He confirmed having taken the photos contained in the Tribunal Book at pages 9.21-9.27 inclusive, and that all these photos were sent to Chris T at Unique Homes. I consider that the photos, particularly those at TB9.21- 9.26 inclusive, clearly show rubbish on the roof.

Who left the rubbish on the roof?

74 Mr Ioannidis, the plumber who carried out the work of installing a natural gas line for Mr Stamatakos, gave evidence that when he had completed his work in September 2011, he left the roof clean.

75 Mr Katranis did not inspect the roof before Charcoal Chicken's roof worker performed their work. Accordingly, Mr Katranis was not able to comment on the state of cleanliness of the roof before that person started work, and therefore was not in a position personally to dispute Mr Ioannidis' evidence.

76 No-one else on behalf of Charcoal Chicken disputed Mr Ioannidis' evidence either.

77 The identity of the person who installed the flues on the roof is unknown. The evidence of Mr Katranis did not assist in resolving the issue. In particular, on the first day that he gave evidence Mr Katranis said that his father, Michael Kyriackou, had been responsible for the conversion and had dealt with all the subcontractors, and that he was not aware of the arrangements regarding the works. Mr Katranis, again, on the fourth day when he was recalled, said that he could not identify who had performed the work on the roof. In response to a direct question, Mr Katranis could not confirm that the person who had performed the work on the roof was a plumber. Nor could Mr Katranis produce a certificate of compliance in respect of the plumbing work on the roof.

78 Mr Kyriackou was present throughout almost the entire hearing. He would therefore have been available as a witness had Charcoal Chicken chosen to call him. Charcoal Chicken clearly made a decision not to call Mr Kyriackou in respect of the issue of the state of the roof before Charcoal Chicken's roof worker started their work, and in particular whether any other person such as Mr Ioannidis had left rubbish on the roof.

79 I draw no inference adverse to Charcoal Chicken's case from the failure to call Mr Kyriackou, but at the same time emphasise that no evidence was presented to counter Mr Katranis' evidence that Mr Kyriackou had organised the conversion works. I accordingly find that Charcoal Chicken was responsible for the physical performance of those works.

80 Furthermore, as no evidence was led in rebuttal of Mr Ioannidis' testimony that he did not leave rubbish on the roof, I accordingly accept that Mr Ioannidis did not leave rubbish on the roof.

81 This is the critical point, for present purposes, because if the person who left the rubbish on the roof was not Mr Ioannidis, I must find on the basis of Mr Katranis' evidence that it was someone working on behalf of Charcoal Chicken who did.

82 This finding is consistent with other evidence. For instance, Mr Stamatakos, at paragraph 18 of his statement (TB 8.3), gave evidence that Mr Houdalakis advised him on 17 February 2012 of what Unique Homes had found regarding the cause of the flood.

83 Also, Mr Stamatakos, at paragraph 21 of his statement (TB 8.4), said that on 21 February 2012, only a week after the first event, he sent an email to the managing agent of the Premises, Jayden Manno at Raine & Horne, to the effect that Charcoal Chicken's tradesmen were responsible for leaving

rubbish on the roof which had caused the flood. Mr Stamatakos says that he requested that the rubbish be removed. As water was still entering the Premises from the canopies the managing agent was requested by Mr Stamatakos to make Charcoal Chicken provide certificates of compliance from all tradesmen, and to fix all damage to the Premises and potentially the shop next door. (Refer statement of Mr Stramatakos, paragragh 21 (TB 8.4) and Exhibit GS-6 (TB 8.42))

84 It is reasonable to infer that this message was communicated to Charcoal Chicken as it was after this, in April 2012, that Nastar Plumbing performed work on the roof of the Premises at Charcoal Chicken's expense.

85 Having regard to the extent of debris which the photographs establish was left on the roof, I find, on the balance of probabilities, that it was insulation left on the roof by the person or persons who carried out the original roof plumbing works that was washed into the drain pipe and was at least a partial cause of the flood on 14 February 2012. The other possible cause of the flood was the poor flashing around the flues.

Who was legally responsible for work on the roof?

86 This brings us to the next argument advanced on behalf of Charcoal Chicken, which is that because the building permit was issued to Mr Stamatakos, he became vicariously liable for issues with the building work, even if it was not personally carried out by him.

Did Mr Stamatakos assume responsibility for the conversion works carried out on behalf of Charcoal Chicken?

87 When the hearing opened, counsel for Charcoal Chicken said that it would be amending its case to run a new argument to the effect that the landlord had undertaken the role of builder for the purposes of the tenant's fit out works. He said that this allegation was based on new documentation which had only come into his possession the day before. The result, it was said, was that if those works had resulted in the two events of water damage, then those events were the responsibility of Mr Stamatakos.

88 After the second day of the hearing, when the matter was adjourned part heard, Charcoal Chicken was ordered to file and serve amended points of claim articulating this argument in full.

89 The amended pleading of Charcoal Chicken is that Mr Stamatakos carried out the works as an owner/builder and pursuant to the Building Act and Regulations is liable for any damage caused by the works carried out by him or by any other person. This allegation is supported by the assertions that Mr Stamatakos applied for a building permit and authorised persons to apply for a building permit on his behalf, that a building permit was issued to him by Adam Sorati, and that a certificate of file inspection was issued to him by Mr Sorati.

90 The defence put forward by Mr Stamatakos is simply that he did not carry out the works as an owner/builder, he is not liable for any damage caused by the works, and that he is not liable to Charcoal Chicken in the circumstances.

91 Neither the amended pleading of Charcoal Chicken nor the amended defence of Mr Stamatakos is particularly helpful. Accordingly, the matter must be approached from first principles. The starting point is that under s 16 of the *Building Act 1993*, a person must not carry out building work unless a building permit has been issued in respect of the work. The usual rule, arising under s 17(a), is that the application for a permit will be made by or on behalf of the owner. It follows that compliance with the building permit will ultimately be the responsibility of the owner. This will be even more the case where the owner is an owner builder, which is the situation that Charcoal Chicken says exists.

92 The first relevant fact in this regard established by Charcoal Chicken is that Mr Stamatakos signed a consent to act as agent in favour of George Savroulias and Anthony Katranis (who were the two directors of Charcoal Chicken at the time the Lease was signed) to apply for a building permit on his behalf as owner builder. (Exhibit A1)

93 Mr Stamatakos admits this, and says that he did so on the recommendation of his real estate agent to facilitate his tenant getting a building permit to carry out the works necessary to convert the Premises into a retail food outlet.

94 The next relevant fact is that the building permit was issued to George Sauroulias (sic) as agent for George Stamatakos, in which the builder is described as 'owner builder'. The owner/builder's address given is that of Mr Stamatakos.

95 Given that the building permit was issued to Mr Stamatakos through his agent, Mr Sauroulias (sic), it is hardly surprising that the certificate of final inspection issued by Mr Sorati was issued also to Mr Stamatakos.

96 I do not think that these facts necessarily create liability for the works carried out by persons unknown on behalf of Charcoal Chicken, as it is contending. I say this for these reasons:

(a) Mr Stamatakos says, and I accept, that he signed the consent in favour of Mr Savroulias and Mr Katranis to assist them to get a building permit so that they could convert the Premises.
(b) Mr Stamatakos did not intend to carry out the conversion works himself, and he did not do so. He merely arranged to have a gas pipe installed by Mr Ioannidis.
(c) Mr Katranis does not suggest that Mr Stamatakos carried out any work other than putting in the gas pipe. On the contrary, he confirms that his father, Michael Kyriackou, arranged to have the conversion work carried out.

(d) Furthermore, the roof plumbing works carried out on behalf of Charcoal Chicken actually exceeded the permitted works. This means that the person or persons who carried out the roof plumbing works on behalf of Charcoal Chicken went beyond the permit which Mr Stamatakos had obtained.

(e) Mr Stamatakos has never accepted responsibility for the roof plumbing works.

(f) Rather, the evidence is that Charcoal Chicken accepted responsibility as it was the party which arranged for Nastar Plumbing to rectify the roof plumbing works in April 2012 and paid Nastar Plumbing's invoice for $4,950.

97 In these circumstances, I consider the argument that Mr Stamatakos was the owner/builder does not take Charcoal Chicken anywhere. It may well be that, if a third party had been injured by the conversion works, they could have looked to Mr Stamatakos for compensation without proof of who actually carried out the works. But this is a hypothetical scenario and does not reflect the facts here.

98 The present proceeding is about which party, out of a landlord and a tenant, is to bear responsibility for water damage to leased premises. I find that, in the particular circumstances of this case, the responsibility for the performance of the building works required to convert the Premises from a florist's shop to a take away food shop remained with the tenant that carried out the works, and was not transferred to the landlord who took out the relevant building permit.

Finding regarding the applicability of clause 3 of the Lease to the first flood

99 I have found (at paragraph 68 above), that it was the defective roof plumbing work which at least partially contributed to water entry into the Premises and (at paragraph 85) that it was insulation left on the roof by the party who carried out the original roof plumbing works that was washed into the drain pipe and caused the flood on 14 February 2012. I have further found (at paragraph 79) that it was Charcoal Chicken which was responsible for the physical performance of the original roof plumbing work, found (at paragraph 81) that it was someone working for Charcoal Chicken who left the rubbish on the roof, and found (at paragraph 98) that the responsibility for the performance of the conversion building works remained with Charcoal Chicken.

100 I note that these findings are consistent with the facts that Charcoal Chicken:

(a) did not allege that a blocked downpipe caused the flood until after the inspection by its plumber after the flood in May 2013; and

(b) did not seek rent abatement for the first event in 2012, and in fact did not seek it until late in 2013.

101 It follows from these findings that s 57 of the Act, alternatively clause 3 of the Lease, is not enlivened because Charcoal Chicken caused the flood on 14 February 2012 which caused the damage to the Premises. I accordingly find and declare that Charcoal Chicken is not entitled to abatement of rent and any outgoings payable under the Lease after the first flood under s 57 of the Act, alternatively, clause 3 of the Lease. This finding and declaration disposes of the first limb of the case.

The second event

102 I turn now to the second incident of water entry on or about 16 May 2013. The first issue is whether it occurred at all, as Mr Stamatakos disputes that it did.

103 Mr Merlo attached to his witness statement the daily rainfall records for the weather stations at Melbourne Airport and for Bundoora for 2012 and 2013 (TB7.17-7.20). With respect to 2013, he commented on what the reports showed for 8 April 2013. This was apparently because he understood he was to comment on this date. However, the comments are unhelpful as Charcoal Chicken is seeking rent abatement following a storm which is alleged to have occurred on or about 16 May 2013.

104 The rain record for Melbourne Airport shows that on 16 May 2013, 1.4 ml fell. On 17 May 2013, 4.8 ml fell. At Bundoora, 6.6 ml fell on 16 May 2013 and another 6.0 ml fell on 17 May 2013.

105 These figures may be consistent with the possibility that rain fell on the Premises on 16 May 2013 as they are located between the weather stations at Melbourne Airport and Bundoora. The figures may be consistent with the evidence of Harika Altay and Effie Bintebis, who both said that the Premises flooded in both February 2012 and again in or about May 2013. However, I consider them to be inconclusive as the Premises are not located at either Melbourne Airport or at Bundoora.

106 The next issue is who, in the legal sense, is responsible for the May 2013 event. Mr De Lorenzis and Mr Naso say it was a blocked down pipe leading to the pit in the car park. Mr Stamatakos called Mr Lou Montagaris of Plumbtech Drain Services, who had a different theory.

107 Mr Montagaris confirmed that he had performed the work described in the Plumbtech invoice dated 20 May 2013 produced in Mr Stamatakos' statement as Exhibit GS-9 (TB8.50), which was:

> Inspect stormwater line & drain pipe. Discharge point found to be in the laneway.
>
> Down pipe found to have rubbish build up ie (plastic packaging, straps etc)
>
> CCTV inspection & supply DVD.

108 During his oral evidence, Mr Montagaris showed a number of DVD's taken using CCTV. He said that he had used red dye to establish the discharge

point of the drainpipe was in the laneway. He said Mr De Lorenzis' theory that the probable cause of the flood was a blocked underground drain was '100% wrong'.

109 Mr Montagaris confirmed that he had identified a blockage and had used a high pressure water jet to clear the drain. This work was carried out separately to the initial CCTV investigation and was invoiced on 25 May 2013. (See Exhibit GS-11 appended to Mr Stamatakos' statement, at TB8.53). After the downpipe was cleared it was found to be serviceable.

110 I find on balance that it was the blockage in the downpipe identified by |Mr Montagaris which caused the second event of water ingress.

Cause of the blockage in the downpipe which caused second event of water ingress

111 Mr Stamatakos gave evidence in his statement at paragraph 26 at TB8.5 that when he went to the Premises on 16 May 2013 after being advised by Mr Katranis that Moreland City Council had declared the shop unfit for occupation, he went on the roof and observed:

> the Applicant (Charcoal Chicken) had not yet cleared the debris from the roof or fixed the faulty work around the canopies.

112 I comment that I do not attach much weight to this statement as Mr Stamatakos in the same sentence also said that Charcoal Chicken had not:

> fixed the faulty work around the canopies.

113 Mr Naso confirmed that he had fixed the faulty work in April 2012, and the Mr Merlo confirmed this.

114 However, Mr Mavroidis also deposed that when he went back to the Premises in April 2013 at the request of Unique Homes, he went up on the roof and saw rubbish there. He took photos. These were tendered as Exhibits R9(a)-(d) by the respondent. They clearly show plumber's rubbish on the roof.

115 Because of the evidence that plumber's rubbish or debris was still there in May 2013, I consider that it is possible that rubbish left by the person or persons who carried out the roof plumbing works on behalf of Charcoal Chicken caused the water ingress of May 2013.

116 However, I consider there are two reasons to find that Charcoal Chicken should be not held responsible for the second flood. The first is the sheer effluxion of time between the time that Charcoal Chicken's workers did the conversion works and the date of the second flood, noting that the certificate of final inspection was issued by the Relevant Building Surveyor, Adam Sorati, on 25 October 2011. The second is the prospect that the owner's corporation should have attended to the cleaning of the roof since it had become aware of the rubbish on the roof.

Did the responsibility to clean the rubbish left on the roof by Charcoal Chicken pass to another party after the event of February 2012?

117 Charcoal Chicken contends (at paragraph 26 of its submission) that:

> Mr Houdalakis gave evidence that the Body Corporate were responsible for the state of the roof. Accordingly once it had been apprised of the debris on the roof, it was under an obligation to keep the roof clean. It is not sufficient to say that the tenant was under an obligation to clean the roof. Its obligation was to clean the roof then bill the offending party.

118 On one view this argument misses the point, which is that after Charcoal Chicken became aware of the blockage and of the defective workmanship on the roof, it became obligated to fix both problems. Importantly, it accepted the responsibility to get the roof plumbing fixed by Nastar plumbing. The roof could have been cleaned at that time.

119 However, I think there is some force in the Charcoal Chicken's argument that the owner's corporation was responsible for the roof. Mr Houdalakis of the owner's corporation manager says in his statement at paragraph 14 (TB 9.4) that on 16 May 2012 he received an invoice from Unique Homes dated 2 March 2012 which, after reporting on its investigation of leaks, recommended that:

> The rubbish on top of Shop 10 be removed so as it does not block up sums(sic)/drainpipes.

120 The roof is common property. I consider that as the owner's corporation was aware of the rubbish on the roof and knew it ought to be cleared, it had a responsibility to either engage a contractor to get the rubbish removed or, if it considered the tenant to be responsible, to ensure that the tenant undertook the work. It would appear that the owner's corporation adopted neither course.

121 Certainly Mr Katranis gave evidence that he thought the 'OC' had attended to removing the rubbish, from which it may be inferred that Charcoal Chicken thought the owner's corporation was attending to this.

122 In the circumstances, I consider that Charcoal Chicken has discharged the burden on it as tenant to establish that it did not cause the relevant damage.

123 I accordingly find that clause 3 of the lease, alternatively s 57 of the Act, is enlivened with respect to the second event

124 The issue then arising is: having regard to the nature and extent of the damage to the Premises and the resultant interference with their use by Charcoal Chicken, for what period is the tenant's obligation to pay rent and outgoings to be suspended?

For what period is Charcoal Chicken entitled to abatement?

125 It is necessary to examine the evidence about the impact of the second event.

126 Mr Katranis, in his evidence on the second day of the hearing, said that the flooding on the second occasion was not as bad as on the first occasion. In particular, water did not come in over the canopies, but came down the back wall. This was '90%' of the water penetration.

127 Mr Katranis gave detailed evidence about the event in May 2013 at paragraphs 13-16 inclusive of his affidavit sworn 5 December 2013 (TB 2.3):

> 13 Again, in mid-May 2013 the premises were flooded for a second time. This caused significant damage to all the equipment and given the fact that the premises were flooded, it was necessary to turn off the electricity at the premises for safety reasons. This meant that the coolroom, fridges and freezers were not operational and that all the food that was stored in the premises had to be thrown out and destroyed. This was done in conjunction with two officers from the Moreland City Council being Officers Carney and Males.
>
> 14 I was present on 16 May 2013 when the officers from the Moreland City Counsel attended the premises following the flooding. They advised me that the food was now potentially hazardous and that it now must be destroyed. I agreed to this course of action and all the food stored at the premises at that time was destroyed. Now produced and shown to me and marked with the letters 'AK3' are notices of seizure and detention of that food.
>
> 15 Further, the premises were held to be unfit for occupation and it was noted that the premises were not permitted to reopen for trade until the Council's environmental health officer had inspected the premises and deemed it compliant with the Food Act 1984 and the Food Standards Code. The Council closed the premises. Now produced and shown to me and marked with the letters 'AK4' is a true copy of such assessment dated 16 May 2015.
>
> 16 As a result, the equipment again was repaired and/or replaced and the premises cleaned. It took a considerable period of time to clean the equipment and the premises. Integrated Consulted Services were to certify compliance with the Food Act and the Food Standards Code.

128 In asserting that there was water penetration of the shop on 16 May 2013 Mr Katranis is in direct conflict with Mr Stamatakos who, in his statement at paragraph 25 (TB8.5), says:

> I attended Shop 10 and observed no water damage from the alleged severe thunderstorm that day. When I asked Mr Katranis to show me where the water damage had occurred, Mr Katranis pointed to the north facing wall being the wall away from the major pieces of equipment including the fryer, the bain marie, the grill, the charcoal rotisseri (sic) and refrigerators. I could not find any sign of water ingress or flood on the wall or anywhere in Shop 10.

129 Faced with this head-on conflict of evidence, there is a real question as to whether the Premises suffered any damage at all.

130 Certainly, Mr Merlo, who was called on behalf of Mr Stamatakos, was of the view that the fit out of the shop made the Premises essentially resistant to water damage. In particular, at page 8 of his report (TB7.9) under the heading *Hardy Finishes In Shop Prevent Any Substantial Damage* he said:

> In the event that the leaking roof issue was widespread as alleged by the tenant (certainly not agreed to by the Writer), it should be noted that the finishes within the shop are essential (sic) resistant to any water damage. The floor of the shop is tiled, the visual food display has a stainless steel top and bench, the large stainless steel canopies protect anything beneath them from any spillage, the drinks refrigerated cabinets should be resistant to spillage, the large cool room is roofed and therefore potentially unaffected by water. Consequently, any claim for significant damage to equipment and fittings would be untenable.

131 Mr Merlo considered that a shutdown of one day would be justified in respect of the second event.

132 Mr Katranis did not concede this, but he did concede that had it not been for the dispute which Charcoal Chicken had had with its insurer in respect of the claim made after the second event, the business could have been restarted within six weeks, as distinct from 5 and a half months.

133 No justification for this estimate of six weeks was given. In particular, no detailed evidence was given of the extent of damage which was said to have been caused to Charcoal Chicken's equipment. No independent technical report was submitted by Charcoal Chicken. The evidence of Mr Katranis, such as it was, was that the insurer would not replace again the equipment which it had already replaced in 2012.

134 Attached to an email from the loss assessors, Crawford & Company, dated 30 July 2013 copied to Charcoal Chicken's lawyer (TB16.1), is a report from Quantum Restorations on the electrical items and machinery located at the Premises. On the basis of the report the loss assessor said that only one item – a sandwich press – was found to be 'not economical to repair'. The email went on:

> 'All other items either have no damage, or can be restored to their pore-loss (sic) condition'.

135 There is external evidence supporting Mr Katranis' claim that because of the flood the power had to be turned off, and that this led to Moreland City Council seizing food stored at the Premises. The evidence comes firstly in the form of an AFSA (Australian Food Safety Assessment) dated 17 May 2013 (TB 2.40) which noted that two officers attended the Premises after flooding from the roof. The document went on to record that electricity had been turned off and the coolroom, refrigerators and freezers were not operational. Potentially hazardous food had been destroyed. The Premises were declared 'closed' and were 'not permitted to open for trade until Councils Environmental Health Officer has inspected the premises and

deemed them compliant with the Food Act 1984 and the food Standards Code'. The AFSA notice is consistent with a 7-page Notice of Seizure and Detention in respect of foodstuffs issued by Moreland City Council on 16 May 2013 (TB 2.23-2.9) and a 9-page Notice of Seizure and Detention issued by the council on the following day (TB 2.30-2.38).

136 The fact that Charcoal Chicken led no evidence regarding damage to the Premises after the second event is almost fatal to its claim under s 57 of the Act and clause 3 of the Lease. The abatement arises under clause 3 of the Lease on damage or destruction to the Premises occurring which renders them unfit for use and occupation by the tenant or under s 57 of the Act when they cannot be used or are rendered inaccessible. It would appear that neither damage to stock nor to machinery will trigger abatement. It is the use of the premises which must be interfered with. See *Hirlmont Pty Ltd v Dybka* (1998) Q ConvR 54-517, noted in Australian Tenancy Practice and Precedents, Lexis Nexis Looseleaf Service at [25 33].

137 Charcoal Chicken does not articulate the argument fully but it is clear that it is contending that by reason of the cutting off of power and damage to equipment the Premises were unfit for use as a take away food store. Also, Charcoal Chicken can be taken to be saying that for the period Moreland City Council maintained that the Premises were 'closed' they were also 'inaccessible' for the purposes of s 57(a) of the Act.

138 Mr Katranis in his affidavit of 5 December 2013 exhibited a report from Integrated Consulting Solutions dated 10 October 2013 (TB 2.45) which listed a number of items in the Premises requiring attention which had been identified by the insurer. A review of this report makes it clear that these issues relate to hygiene and cleanliness, rather than the reconnection of power.

139 No evidence was been put before the Tribunal as to the period that the power was kept off as a result of damage, real or potential, to the electrical system in the Premises. This is a critical matter, because once the power was restored, there should have been no reason for access to the Premises to be denied merely by reason of lack of refrigeration or of power for cooking and lighting. In other words, there should have been no reason why the Premises remained unfit for use as a take away food store or remained 'inaccessible' because of a closure notice from the Council.

140 In the absence of direct evidence as to when the power was restored, it is not possible to fix an exact date when the Premises became fit again for use as a take away food store. There is also no evidence as to when the Council lifted its closure order. It is likely, in the normal course of things, that power could have been restored within days.

141 In absence of direct evidence as to when the Premises became fit for use again and 'accessible' I adopt as the relevant period of abatement six weeks, as this is the time that Mr Katranis said the Premises would have been

closed but for Charcoal Chicken's dispute with its insurer after the second event.

142 I find and declare that Charcoal Chicken is entitled to suspension of the obligation to pay rent and any outgoings payable under the Lease for six weeks from 16 May 2013.

MEMBER C EDQUIST