VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP989/2015**

CATCHWORDS

Landlord and tenant; retail tenancy dispute; retail tenancy in a subdivision; nuisance from neighbour; duty of landlord and owners corporation to abate nuisance; proof of loss; landlords' claim for rent and make good costs.

APPLICANT	Ann Mary Christian
FIRST RESPONDENT	Paradyce Pty Ltd (ACN: 111 690 914)
SECOND RESPONDENT	Bencorp Pty Ltd (ACN 094 289 255) (Removed as Respondent by Order made 26 November 2015)
THIRD RESPONDENT	Gorman Commercial Real Estate (ACN 138 479 124) (Removed as Respondent by Order made 26 November 2015)
FOURTH RESPONDENT	Dr Ajit Sahni
FIFTH RESPONDENT	Mrs Govinder Sahni
SIXTH RESPONDENT	Owners Corporation No. 6 PS421836V
WHERE HELD	Melbourne
BEFORE	Member R Buchanan
HEARING TYPE	Hearing
DATE OF HEARING	30 November 2016, 1 and 2 December 2016 and 8 February 2017
DATE OF ORDER AND REASONS	8 May 2017
CITATION	Christian v Paradyce Pty Ltd (Building and Property) [2017] VCAT 631

ORDER

1 The applicant's claims against the respondents are dismissed.

2 On the fourth and fifth respondents' counterclaim, the applicant must pay to the fourth and first respondents $9,936.50 and must reimburse to the fourth and fifth respondents the Tribunal application fee of $458.60 paid by the fourth and fifth respondents, making the total payable by the applicant under this order to be $10,395.10.

3 Liberty is reserved to the parties to apply on the question of costs.

R Buchanan
Member

APPEARANCES:

For Applicant	Mr J Christian, representative
For First Respondent	Mr J Kerr, solicitor
For Fourth and Fifth Respondents	Mr J Castelan, of counsel
For Sixth Respondent	Mr J Cohen, solicitor

REASONS

Introduction

1 This case concerned a hairdressing salon in a large subdivision in Port Melbourne. The tenant alleged that a noisy extraction system from a neighbouring restaurant had caused her loss. She claimed damages for that loss from her landlords, her former landlord and from the owners corporation for the subdivision. For their part, her landlords counterclaimed for rent, make good and other costs.

Background

2 On 1 June 2004 the applicant, Mary Ann Christian ("Ms Christian"), entered into an undocumented lease of retail shop premises which were owned by Epaminondas Katsalidis, in the HM@S Beach Apartments development in Beach Street, Port Melbourne ("the leased premises"). The lease was subject to the provisions of the *Retail Leases Act 2003*.

3 The leased premises were a shell, which Ms Christian fitted out. She then carried on a hairdressing and beauty business in the premises, under the name of "Hair Tonic @ Bay".

4 On 3 June 2006 Ms Christian and Mr Katsalidis executed a formal lease of the leased premises ("the lease"). The lease was for a term of three years with options to renew and was also subject to the provisions of the *Retail Leases Act 2003*.

5 On 7 January 2009 Mr Katsalidis sold the premises to the Fourth Respondent, Paradyce Pty Ltd ("the former landlord") which later, on 4 February 2014, sold the premises to the fifth and sixth respondents, Dr Ajit Sahni and Mrs Govinda Sahni ("the landlords"). Throughout, the lease continued to be renewed. On 1 June 2013 the lease was renewed for a three-year term, with options for two further three-year terms.

6 The leased premises were part of a retail precinct within the HM@S Beach Apartments complex. Ms Christian's neighbour on the western side was a restaurant. The restaurant premises were also owned by Mr Katsalidis.

7 After Ms Christian took the leased premises, an extraction system was installed to service the kitchen in the restaurant:

- a fan and associated equipment were located in the space immediately behind the leased premises and
- a duct ran from the fan, through the space above Ms Christian's premises, exiting through a grille in the building facade. The grille was located immediately above the front windows of the leased premises.

8 In mid-2015 Ms Christian's son, James Christian, became involved in Ms Christian's hairdressing business. On 30 June 2015 James Christian wrote to the owners corporation and the landlord's agent complaining, among a number of other things, about the extraction system.

9 There followed a period of disputation during which James Christian made complaints to the relevant owners corporation (there were more than one) for the HM@S Beach Apartments complex ("the owners corporation") and to the landlords' managing agent about the extraction system, as well as about a wide range of other matters, which included:

- Requests to enter the premises by the owners corporation's manager and tradesmen,
- A CCTV camera pointing into the leased premises and
- Remarks made by the owners corporation's manager.

10 In addition, in the period after James Christian's 30 June 2015 letter of complaint, the landlords issued two notices of default to Ms Christian for non-payment of rent, on 14 July 2015 and 12 August 2015.

11 On 24 July 2015 Ms Christian issued this proceeding, applying for an injunction:

- To "stay" the landlords' notice of default dated 14 July 2015,
- For the extraction system to be turned off and
- For no works be carried out by the landlords or the owners corporation at the leased premises.

12 Ms Christian's application for an injunction was dismissed on 4 August 2015 and the proceeding continued as a contested claim. After a lengthy gestation, the proceeding came on for hearing on 30 November 2016.

13 Meanwhile, Ms Christian, not having exercised her option to renew, the lease had ended on 31 May 2016 and Ms Christian vacated the leased premises.

Ms Christian's initial claim and landlords' counterclaim

14 In its initial form, Ms Christian's claim sought orders that the extraction system be removed from the leased premises, for damages for disruption to Ms Christian's business caused by the extraction system, termination of the lease and for "financial compensation for the purpose of relocating the [tenant's] business to alternative premises".

15 Ms Christian's claims were denied by the respondents and the landlords made a counterclaim by which they sought damages for unpaid rent, make good costs and the cost charged to them by the owners corporation for rectifying damage caused by Ms Christian to the extraction system.

16 By their Further Amended Points of Defence the landlords claimed that the former landlord and the owners corporation were concurrent wrongdoers within the meaning of section 24AH of the *Wrongs Act 1958* and claimed that any liability which might attach to the landlords by reason of Ms Christian's claims was limited to an amount which the Tribunal considered just, pursuant to section 24AI of the *Wrongs Act 1958*.

Ms Christian's claims in their final form

17 Ms Christian's claims against the respondents, in their final form, are to be found in her Amended Points of Claim dated 5 September 2016, while her undated Outline of Submissions contains partial particulars of her alleged loss.

18 Ms Christian's main claim appears to be that, by not acting to abate the nuisance caused to Ms Christian by the extraction system, the landlords and former landlords failed to act to ensure her quiet enjoyment of the leased premises. That failure is alleged to be a breach of the lease covenant of quiet enjoyment and is also alleged to be unconscionable conduct in breach of section 77(1) of the *Retail Leases Act 2003*.[1]

19 By her Amended Points of Claim dated 5 September 2016, Ms Christian claimed from all respondents, without quantification:

- Compensation for the cost of relocating to new premises.
- Damages for loss of quiet enjoyment between 1 June 2015 and 30 May 2016.
- Damages for loss caused by lack of quiet enjoyment.

From the owners corporation Ms Christian claimed, also without quantification:

- Damages for withdrawal of services by the owners corporation.

20 Ms Christian's Outline of Submissions gave the following quantified particulars of loss:

- $90,470 in lost sales for the financial year ending 2016.
- $85,000 fit-out costs forfeited due to not being able to renew the lease.
- $11,278.03 reinvested in May 2015 for refurbishment.

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[1] Section 77(1) *Retail Leases Act 2003* A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

Hearing

21 At the hearing, Ms Christian was represented by her son, James Christian,[2] and the respondents were legally represented. Evidence was given:

For Ms Christian:	By Ms Christian and James Christian.
For the landlords:	By Dr Sahni and by the landlords' property manager, Stephanie Marasco.
For the owners corporation:	By the owners corporation's manager, Michael Nugent and by the site manager of HM@S Beach Apartments, Brett Robson.

No evidence was given on behalf of the former landlord.

22 The extraction system was clearly the engine which drove this proceeding. Thus, the first order sought by Ms Christian in her injunction application was that, "The extraction fan extraction system be removed from the … tenancy".

The extraction system: location

23 The leased premises were located on the ground floor of one of the buildings making up the HM@S Beach Apartments complex. From the plan of subdivision, the ground floor appears to have been largely given over to retail uses and to car parking spaces. Behind the leased premises lay an area of car parking spaces. Between the back of the leased premises and the start of the car parks, lay a narrow space, probably designed to be an access corridor, running along the back of the retail spaces (such as the leased premises). This corridor was common property, belonging to the owners corporation.

24 Rule 34.1 of the rules of the owners corporation provided that the part of the corridor lying behind the leased premises was for the use of the owner of the leased premises and the owner's tenants, for the purpose of storage.[3]

25 On 18 November 2003, some two months after rule 34.1 was created, the owners corporation entered into a 299 year lease of the corridor with the then owner of the leased premises, Mr Katsalidis. The effect of that lease was to frustrate the owners corporation's rule 34.1 and to place control of the space behind the leased premises into the hands of Mr Katsalidis, where it remains.

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[2] Ms Christian appears to have played no part in the proceeding. On the last day of hearing, however, she appeared and gave evidence.

[3] Rule 34.1 The rule was incorporated into the owners corporation's rules by an agreement dated 30 September 2003, between the developer of HM@S Beach Apartments and the City of Port Phillip, made under section 173 of the *Planning and Environment Act 1987*.

26 The extraction system was installed shortly after Ms Christian first took possession of the leased premises in 2004. It was installed in the western half of the corridor space behind the leased premises, together with the necessary ducting, which ran from the fan to the system's outlet. That ducting ran in common property, immediately above the leased premises.

27 There was no clear evidence about the layout of the leased premises at the time when Ms Christian first went into possession. It was, however, clear from the evidence that Ms Christian, her original landlord, Mr Katsalidis, and his successors all accepted that the leased premises did not include the closed off area (at the rear of the leased premises), in which the fan and motor of the extraction system were located.

James Christian's evidence

28 James Christian gave evidence and adopted the contents of his four affidavits filed in the proceeding. His evidence was as follows. He was familiar with the leased premises, having visited them regularly from the time of his schooldays. In May 2015 his mother had gone on an overseas holiday. James Christian also said that (presumably at about the same time) Ms Christian had suffered a breakdown. While he did not say so, it was obvious from the evidence that James Christian had taken on a management role in the business while his mother was away. He said that after her return from holiday, he had not run the business, but he had attended the business for some two to three hours every day. He "never had a role in the business" and after her holiday, Ms Christian remained active in the business.

29 He had discussed with Ms Christian her withholding rent, in order to force the landlords to take action about the extraction system.

30 James Christian played a brief sound recording of the noise made by the extraction system.

31 Noise from the extraction system was present for the last four to five years of the tenancy. Over the years, the extraction system had developed a buzzing noise, which became worse over the last 12 months of the tenancy. The system also produced a smell, which would come and go.

32 A number of employees had left because of problems with the extraction system.

33 Hair was washed at the back of the leased premises, but Ms Christian's employees were mostly at the front of the shop.

34 James Christian tendered two letters. The first letter, dated 30 June 2015, was written to the owners corporation and was copied to the landlords' agent. The letter included the following:

> 2 v. Our current investigations being carried out into assessing the fire safety risk together with occupational noise and the associated burden of potential disease from work-related hearing impairment caused by

> the extraction fan system which was installed through our premises on behalf of the neighbouring [restaurant] R1 retail premises approximately 11 years ago, and which produces continual loud ringing noise and continual vibrations to the walls, floor and fittings and fixtures of our premises together with causing a fatty odour (seven days a week from 7 am until 7 pm).

35 The second letter, dated 20 July 2015, was written to the landlords' managing agent, Gorman Commercial and referred to:

> Continual repetitive motor noise generated within the R2 premises [the leased premises] by the extraction fan extraction system, as detailed in the letter dated 30 June 2015 to Mr Michael Nugent (Bencorp OCM) [the manager of the owners corporation] and copied to Gorman Commercial [the landlords' managing agent], is excessive and disruptive to both R2 staff and customers and combined with potential fire risks caused by the system presents serious issues of safety and liability which, according to insurance policy's (sic) arranged by Gorman Commercial, the R2 tenancy has never been and is not covered for by insurance in relation to any safety risk or liability matter caused by the extraction fan extraction system which originates from the R1 & R2 premises.

Ms Christian's evidence

36 Ms Christian gave evidence and also filed an affidavit, which she had made on 6 February 2017. Ms Christian said in evidence that she took possession of the premises in June 2004, but did not sign a lease until 2006. At that latter point she was well aware of the presence of the extraction system, which had been installed shortly after she took possession of the leased premises in June 2004.

37 The noise from the extraction system became louder over time. She had to play music to cover the noise. She had to burn candles and spray hairspray to mask the smell. Customers complained about the smell. On occasion, she kept the entrance door open all day, because of the smell.

38 She made quite a few phone calls complaining about the noise, but nobody wanted to know about it. On numerous occasions, she spoke to Stephanie Marasco (the managing agent), about the noise and vibration from the extraction system and she also spoke to Michael Nugent (the owners corporation's manager) about the smell "quite a few times".

39 On numerous occasions she called Brett Robson, the owners corporation's on-site manager, about the smell and he would come into the salon to check. She also complained to Mr Robson about the noise, on a number of occasions.

40 She made phone call after phone call about the noise and the smell.

41 Towards the end of her tenancy, the situation was unbearable, but she did not make any written complaint, because she was too busy.

42 She had not complained about the extraction system to Dr Sahni, when she met him when the landlords bought the leased premises.

43 She got James Christian in to deal with the issues from the extraction system when she went on holiday in 2015. James Christian could not have managed Ms Christian's business, because he was not a hairdresser.

44 In May 2015 she went into business in a clothing store in Albert Park, but had wanted to stay in the leased premises.

Evidence of the owners corporation

45 Michael Nugent, the manager of the owners corporation, gave evidence that his company had taken over management of the HM@S Beach Apartments complex in 2009. In all, he would have had about four conversations with Ms Christian. She never complained about noise or smell from the extraction system. The extraction system is very sophisticated. Extracted air passes through an ultraviolet system which turns anything in the passing air to powder, which is blown out of the system outlet vent. The internal duct is made of steel and it is encased in fire-rated plaster board. In relation to James Christian's letter of 30 June 2015, he had not known that the fan and motor of the extraction system were located on common property and had believed that the owners corporation had no control over the extraction system.

46 Brett Robson, the on-site building manager for the HM@S Beach Apartments complex, gave evidence that he would do a walk around of the complex every one to two days and would usually wave to Ms Christian as he went past the windows of her salon. He would also walk past Ms Christian's salon every day. He had "no complaint or issue" with Ms Christian. She would sometimes say things such as, there is rubbish outside, but no more than that. He last saw Ms Christian in the salon in about April or May 2015, although she did come back on a couple of occasions. He believed that James Christian and James Christian's father ran the salon in Ms Christian's absence.

Ms Marasco's evidence

47 Stephanie Marasco, the managing agent for the leased premises, gave the following evidence. She took over management of the leased premises in 2014. Her employer, Gorman Commercial, had managed the leased premises from 2008.

48 Until June 2015, Ms Marasco dealt with Ms Christian and spoke to her about two times a month. Ms Christian never made any complaint to her about the extraction system. She had made enquiry of her predecessor, Dan Sacardo, about whether Ms Christian had made any complaint about the extraction system and she had been told by Mr Sacardo that there had been no complaint.

49 She first spoke to James Christian in the first part of 2015, after Ms Christian told her that Ms Christian was going on holiday overseas and that James Christian would manage the salon in her absence. On Ms Christian's return from her holiday, each time Ms Marasco rang Ms Christian to speak to her, she was told to "talk to James; he manages the business".

50 Ms Marasco said that she understood that the extraction system belonged to the restaurant which was next door to the leased premises and did not think that there was anything that the owners of the leased premises could do about it.

51 After she received James Christian's letter of 30 June 2015, she visited the leased premises "at least a dozen times", but was refused entry by James Christian on most of those occasions. She was, however, able to enter the leased premises on about two occasions. She was of the view that any noise from the extraction system did not enter the leased premises.

Dr Sahni's evidence

52 The fourth respondent, Dr Ajit Sahni, gave evidence that he and his wife, the fifth respondent, had bought the leased premises on 4 February 2014. He met Ms Christian on two occasions, the first before they bought. During their meetings, Ms Christian made no complaint about the property and made no reference to any problems. He did not notice any noise from the extraction system.

53 He left the management of the leased premises to his agent, Ms Marasco. Before July 2015, the only problem with the leased premises of which he was aware was a problem with the front door, which was repaired. The first time that he heard that there is any problem with the extraction system was in July 2015. He was then advised by his agent that the extraction system was not part of his property, but belonged to the neighbouring restaurant and that there was nothing that he and his wife could do about any complaint from Ms Christian.

Findings: James Christian as a witness

54 I found James Christian to be an unsatisfactory witness. When cross-examined in relation to Ms Christian's failure to make discovery (as she had been ordered to do) and the financial affairs of Ms Christian's business, he was evasive. He denied that he had managed Ms Christian's business, whereas the weight of evidence made it clear that, whether or not he had the formal title of "Manager", he had been much involved in its management. He also denied that Ms Christian had been largely absent from her business after May 2015, where the preponderance of evidence made it clear that she had rarely been present after that month.

55 In relation to discovery, James Christian's evidence was that, "I can't say that I understand discovery in litigation. I have a vague idea of what discovery is". Yet the landlords tendered in evidence an email from James

Christian to the owners corporation's Michael Jeans, dated 4 September 2015 which suggested that, at the very least, James Christian (who, throughout, had the full conduct of the present proceeding) had not inconsiderable experience of litigation:

> Your negligence, bullying and reckless threats have now caused me to look forward to engaging in future litigation with Bencorp [the owners corporation's manager]. You are a rude, imbecilic mutt.
>
> Here are some links to the CCP you can check to show I go all the way with legal proceedings:
>
> Federal Circuit Court of Australia
>
> YG3214/2013 Société des Produits Nestlé SA & Ors v James William Christian
>
> https://www.comcourts.gov.au/file/Federal/P/SYG3214/2013/actions
>
> Federal Court of Australia
>
> NSD940/2014 James William Christian v Société des Produits Nestlé SA & Ors
>
> https://www.comcourts.gov.au/file/Federal/PNSD940/2014/actions

56 The landlords also tendered the report of a decision of the Full Court of the Federal Court of Australia which sat ill with James Christian's claimed ignorance about discovery.

57 The decision was made in the second of the proceedings referred to by James Christian in the email which I have quoted above. The decision was an appeal from two decisions of the Federal Court of Australia, Société des Produits Nestlé SA & Anor v Christian & Anor (No 4) [2014] FCCA 2025 and Société des Produits Nestlé SA & Anor v Christian & Anor (No 6) [2014] FCCA 2368, made in the course of the proceeding, a proceeding which was ultimately disposed of by the High Court of Australia.

58 In the decision, the Court quoted from the decision of the Judge in the Federal Circuit Court, as follows:

> 55. There are sound reasons why I should not exercise my discretion. First, although James Christian in his affidavit makes serious claims of wrongdoing against the applicants and their advisers, James Christian does not particularise the claims. Instead, James Christian claims that evidence of wrongdoing will be uncovered through the making of the other orders he seeks, and in particular, orders for *"discovery through subpoenas, production of documents and interrogatories"*. (original emphasis)

59 The passage quoted reveals as disingenuous James Christian's claim that, "I can't say that I understand discovery in litigation".

60 In view of these matters, I find that James Christian was not a credible witness.

Findings: complaints before 30 June 2015

61 Ms Christian gave evidence that, prior to James Christian's letter of complaint dated 30 June 2015, she had made numerous complaints about both noise and smell to the landlords' managing agent, Ms Marasco, the owners corporation manager, Mr Nugent and the on-site manager, Mr Robson.

62 I do not accept the evidence of Ms Christian on this point, for the following reasons:

- The weight of evidence: Ms Marasco, Mr Nugent, Mr Robson and Dr Sahni all gave evidence contradicting Ms Christian's evidence. They presented as credible witnesses and I prefer their evidence over that of Ms Christian.
- In addition, Ms Christian gave evidence that she had got James Christian in to deal with her issues with the extraction system, when she went on holiday in May 2015. Yet in his evidence, James Christian made no reference to any such request by Ms Christian.

Findings: the respondents' response to the 30 June 2015 letter

63 The evidence made it clear that, other than making inquiries about the ownership of the extraction system, the landlords and the owners corporation took no steps to abate the nuisance complained of by Ms Christian.

Findings: was there a nuisance?

James Christian's sound recording

64 As well as the evidence about noise given by Ms Christian and James Christian, Ms Christian relied on a sound recording tendered in evidence by James Christian, and on an expert report.

65 In relation to the sound recording, James Christian said in evidence that it recorded the start-up of the extraction system and that he had made it when he was standing at the rear of the leased premises. The recording certainly revealed some mechanical noise, but there was no way of knowing whether the noise was sufficient to constitute a nuisance and, for that reason alone, the recording was of little probative value.

Ms Christian's expert report

66 The expert report, dated 17 May 2016, on which Ms Christian relied was by a noise officer, Svetmir Ristic. Mr Ristic was not called to give evidence and, accordingly, his report is of little probative value.

67 Mr Ristic's report stated that he took measurements 1.5 m away from what he described as the source of the noise, which no doubt was the fan which formed part of the extraction system. In the "summary" section of his report, Mr Ristic stated:

> The overall sound level … is the same in both cases: when the fan is running and when it is not; which is misleading in the argument that the extraction fan does not cause noise disturbance for the HMAS Hair. This is due to a masking noise from other activities in the hairdresser shop.

68 In the "Discussion" section of his report, Mr Ristic stated:

> Due to its nature, this sound is masked by the other sounds in the work environment of HMAS Hair, which falls into the normal working sound levels of 60dB(A) for such environment.
>
> It is striking that the (sic) both sounds, when adjusted to A – weighted sound levels, are 61 dB as there is no difference between them, as the obscured kitchen fan has no effect for the overall noise level.
>
> The significance of low-frequency noise is that the a (sic) person, or a group of people, that listens to low-frequency noise for a prolonged period time can develop an aversion towards to (sic) this noise and develop enhanced hearing towards to (sic) this noise, and become more sensitive to this type of noise.

69 From his report, I took it that Mr Ristic was opining that, whether the fan in the extraction system was running or not, made no difference to the audible noise level in the leased premises. There was, however, an increase in low-frequency noise (which Mr Ristic seemed to be saying would be inaudible). Such low-frequency noise had the potential to affect people exposed to it "for a prolonged period of time" by making them become more sensitive to that type of noise.

70 It is also relevant that Mr Ristic took his measurements 1.5 m away from the source of the noise (at the back of the leased premises) whereas, on James Christian's evidence, the staff spent most their time at the front of the salon.

71 I conclude that Mr Ristic measured the noise level at the back of the leased premises, near the noise source and not in the working area of the salon and that the noise made by the extraction system was masked by activities inside the salon.

72 For these reasons, I conclude that it would not be safe to rely on Mr Ristic's report. In any event, if anything, the report confirms evidence given by Ms Marasco that, when she went to the leased premises to investigate James Christian's complaints, she was unable to notice any discernible noise from the extraction system.

Other evidence

73 The only evidence which supported Ms Christian's claims in relation to noise from the extraction system was that of Ms Christian and James Christian.

74 James Christian said that noise from the extraction system was present for the last four to five years of the tenancy. Over the years, the extraction

system had developed a buzzing noise which became worse over the last 12 months of the tenancy. The system also produced a smell, which would come and go.

75 Ms Christian said that noise from the extraction system became louder. She had to play music to cover the noise. She had to burn candles and spray hairspray to mask the smell and, on occasion, kept the door open all day. Customers complained about the smell.

76 She had complained to Ms Marasco, the managing agent, Mr Robson and Mr Nugent from the owners corporation.

77 Against the evidence of Ms Christian and James Christian, was the evidence of Ms Marasco, who gave evidence that she had investigated the alleged noise from the extraction system and had concluded that there was none, and the evidence of Mr Robson and Mr Nugent who both said that Ms Christian had not complained to them about noise or smell from the extraction system.

78 Ms Christian was clear in her evidence that, before going on holiday in May 2015, she had asked James Christian to become involved in her business because she wanted him to deal with the noise and smell from the extraction system. Yet on 10 June 2015, when James Christian wrote to Ms Marasco to tell her that Ms Christian wanted to assign the lease to himself, his email made no reference to noise, smell or any problem with the extraction system.

79 In view of:

- The contrary evidence of Ms Marasco and Messrs Robson and Nugent,
- The fact that the report of Ms Christian's own expert did not support Ms Christian's claims about noise,
- The lack of written complaint before 30 June 2015 and
- The lack of complaint in James Christian's email of 10 June 2015,

I conclude that, if there was noise or smell from the extraction system, it was not sufficient to constitute a material nuisance. In reaching that conclusion, I accept the submission of the owners corporation, that any noise or smell from the extraction system was trivial and reasonable, in view of the commercial nature of the precinct in which the leased premises were located.

80 I therefore find that no material nuisance was caused to Ms Christian by the extraction system or any part of it.

Findings: was there a loss?

81 Although that finding is, of itself, sufficient to dispose of Ms Christian's claim I will, for the sake of completeness, consider the matter of the losses claimed by Ms Christian.

82 Ms Christian claimed that noise and smell from the extraction system caused the following quantified losses:

- $90,470 in lost sales for the financial year ending 2016.
- $85,000 fit-out costs forfeited due to not being able to renew lease.
- $11,278.03 reinvested in May 2015 to refurbish the leased premises.

Lost sales

83 In support of the claimed losses in the 2015/2016 financial year, the only evidence adduced by Ms Christian was a memorandum from her accountants and James Christian's assertion that the business had declined.

84 The memorandum, dated 28 September 2016, from Adrian Fielden of York Partners, showed that sales in 2015/2016 were $90,470 lower than the previous year's sales of $209,689. Mr Fielden was not called to give evidence.

85 Ms Christian had been ordered to make discovery, but discovered no accounting records of any sort. She had failed to do so despite the Tribunal's order of 8 August 2016. That order, made after the applicant's unsuccessful application for reconstitution of the Tribunal under section 108 of the *Victorian Civil and Administrative Tribunal Act 1998*, included the following:

> The Applicant said that her amended claim for damages would include claims relating to the financial performance of the Applicant's business conducted in the Premises, and the costs incurred or to be incurred by the Applicant in relocating her business. The Applicant's representative (James Christian) advised that the Applicant understood that making a claim for damages relating to the financial performance of the Applicant's business required the applicant to make discovery of accounting documents relating to the business and potentially to file and serve an expert report from an accountant or the like.

86 Further, on 21 September 2016 the solicitors for the owners corporation wrote to Ms Christian requesting particulars of how her claimed losses were calculated or made up. She did not respond.

87 In cross-examination, Ms Christian admitted that she did, indeed, have the usual accounting records for her business. Other than James Christian's claimed lack of understanding of the discovery process, no explanation was given for her failure to make discovery of her financial records. In view of Ms Christian's failure, I draw the inference that, if produced, the financial records would not have supported her claim of loss.

88 Against that background, it is not possible to attach any weight to the memorandum 28 September 2016 by Mr Fielden.

89 (Ms Christian did produce, on the second day of hearing, bank statements for the period 1 July to 30 December 2015, but that production was too little, too late.)

90 That said, as Ms Christian did close her business on 31 May 2016, it seems likely that Ms Christian's business declined in the 2015/2016 year. If one accepted that Ms Christian's business had made the loss claimed to have occurred in 2015/2016, there was, however no satisfactory evidence to link that loss to Ms Christian's alleged problems with the extraction system. Ms Christian and James Christian did say that staff left because of the extraction system and that Ms Christian was obliged to keep the door open and to burn candles and spray hairspray to mask the intermittent smells from the extractor system.

91 Ms Christian also claimed, in paragraph 8(i) of her Amended Points of Claim, that excessive noise and toxic gases from the extraction system caused all three full-time staff members to resign. In addition, in paragraph 8 (j) of her Amended Points of Claim, Ms Christian claimed that there were *"… losses caused to the applicant's business by the [extraction] system of approximately $4,000 per week in revenue since 15 July 2015, which was the revenue generated by the three staff who resigned".*

92 Yet neither Ms Christian nor James Christian gave any evidence about the circumstances of those resignations which, I note, were shortly after Ms Christian went on holiday in May 2015 and James Christian stepped into the business. Nor, most materially, was any evidence given to explain why the three employees, who had been generating a total of $4,000 per week, were not replaced.

93 There are many reasons why a business may decline. They could include things like the absence of the owner from a highly personal business such as hair and beauty treatment, poor management by a new manager, loss of important staff and, no doubt many other things beside. In that regard, it is to be noted that the decline described in Mr Fielden's memorandum of 28 September 2016 began after Ms Christian began a new business in May 2015 and James Christian stepped in to manage the business.

94 James Christian's role in Ms Christian's business was the subject of conflicting evidence. Both Ms Christian and James Christian were at pains to stress that James Christian had not been the manager of her business. Yet, on their own evidence, it was clear that Ms Christian had left the business in James Christian's care while she was on holiday in mid-2015 and that James Christian had subsequently been much present and much involved in the business. Further, the evidence of Ms Marasco and Mr Robson made it clear that James Christian was, at the very least, heavily involved in Ms Christian's business.

95 Having regard to the matters set out above, I find that Ms Christian has failed to adduce sufficient evidence to either support the quantum of her claimed loss or to link any decline in her business with the extraction system. Consequently, I am not satisfied, on the balance of probabilities, that the presence of the extraction system caused Ms Christian any loss and damage.

Other losses

96 The other quantified loss claimed by Ms Christian was the full amount of two fit-outs of the leased premises, on the ground that her problems with the extraction system had driven her to quit the leased premises, denying her the benefit of her two fit-outs. In evidence, Ms Christian said that she had wanted to remain in the leased premises. She had options which extended to 31 May 2019.

97 No documents were discovered in relation to the alleged fit-out costs. Ms Christian gave evidence that she had spent $85,000 and $11,278.83, but no other evidence was adduced in support of that assertion, either documentary or oral.

98 Further, Ms Christian claimed her fit-out costs in full and provided no calculation or evidence about the depreciated value of the fit-out.

99 In those circumstances, I find that there is insufficient evidence in relation to fit-out costs and I find that the claim is not made out.

100 Finally, I note that, by her Amended Points of Claim, Ms Christian claimed of all respondents the cost of relocation and, from the owners corporation, damages for withdrawal of services. Those claims were never quantified, no evidence as to quantum was adduced in relation to them and accordingly, I find that those claims are not made out.

101 In summary, I find that none of Ms Christian's claimed losses was made out.

The respondents' duties in relation to the alleged nuisance

102 Finally, I turn to the legal basis of Ms Christian's claims against the respondents. The respondents' duties to Ms Christian were as follows.

The former landlord's duties

103 There are two ways in which the former landlord might have owed a duty to act in relation to the alleged nuisance from the extraction system. First, as landlord of both the leased premises and the neighbouring restaurant premises, up to the time of the former landlord's sale of the leased premises on 4 February 2014. Secondly, as the landlord of the neighbouring restaurant premises after 4 February 2014.

Duty as landlord of both the leased premises and the neighbouring restaurant premises

Duty under covenant of quiet enjoyment

104 The former landlord's duty as landlord of the leased premises arose by virtue of the covenant of quiet enjoyment in the lease. Clause 8.1 of the lease provided:

> 8.1 Quiet enjoyment
>
> As long as the tenant performs its obligations under this lease, the tenant may occupy and use the premises without any interruption by the landlord or any person lawfully claiming under the landlord. An exception to this is where the landlord exercises a right under this lease.

105 The covenant was a contractual promise by the former landlord that, if Ms Christian performed her obligations under the lease, she could peaceably hold and enjoy the rented premises without any interruption by the former landlord or by those claiming through it (such as the former landlord's agent).

106 The promise was only this: that neither the landlord nor its agents would interfere with Ms Christian's quiet enjoyment of the leased premises. Accordingly, the covenant did not impose any obligation on the landlord to control the actions of persons over which it had no control, or which were unrelated third parties.

107 If, however, a landlord also owns and leases the neighbouring premises, the landlord's obligation under a covenant of quiet enjoyment may also apply to the use to which those neighbouring premises are put.

108 The landlord will not be liable, however, merely because it was aware of what the other lessee was doing and took no step to prevent it. Generally, a landlord is not liable for nuisance committed by its tenant unless the landlord has authorised the tenant to commit the nuisance. The rule was well expressed by Blackburn J in *Harris v James*:

> [F]or any mischief that arises from the natural and necessary result of what the landlord authorised and required, or even authorised and did not require, I think the landlord must be held liable.[4]

109 A noisy and smelly extraction system is neither a natural nor a necessary result of running a restaurant. Further, the evidence made it clear that the extraction system worked for years without causing any problems. Ms Christian claimed that the nuisance arose only in the last four to five years of her eleven year tenancy and arose, she claimed, because the extraction system had not been serviced correctly. There is no evidence to show that the former landlord had authorised the alleged failure to maintain or had authorised the use of the extraction system in a noisy and smelly condition.

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[4] (1876) 35 LJ 240 at 241

110 Accordingly, there is no evidence to show that the former landlord breached its covenant of quiet enjoyment.

Retail Leases Act 2003 – section 54

111 Section 54 of the *Retail Leases Act 2003* implied into the lease a liability to pay compensation to Ms Christian if the former landlord failed to "… take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises".[5] For the section to apply requires more than it being possible for a landlord to take "steps". As the Tribunal observed in the matter of *Guastalegname v One Ten Enterprisers Pty Ltd*, "A careful consideration of s54 makes it clear that a landlord is to compensate a tenant where its business has been interrupted because of a wilful act or omission by the landlord".[6]

112 In the present case, there was no evidence of any wilful act nor any evidence of any wilful omission on the part of the former landlord; there was no evidence to show that there was any reasonable step available to the former landlord which would allow it to control or stop the nuisance which Mr Christian alleged was caused to her by the former landlord's restauranteur tenant.

113 Accordingly, there is no evidence to show that the former landlord breached its duty under section 54 of the *Retail Leases Act 2003*.

Duty under the Retail Leases Act 2003 – section 77(1)

114 Ms Christian alleged that the former landlord had acted unconscionably, in breach of section 77(1) of the *Retail Leases Act 2003*. Section 77(1) of the *Retail Leases Act 2003* imposed a duty on the former landlord to not act unconscionably towards its tenant, Ms Christian.[7] Unconscionable conduct exists in circumstances where:

> … one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.[8]

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5 Section 54(2) *Retail Leases Act 2003* The landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damage suffered by the tenant because the landlord or a person acting on the landlord's behalf –
…
(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

6 *Guastalegname v One Ten Enterprisers Pty Ltd* (Retail Tenancies) [2010] VCAT 800 at 48, per Deputy President Aird.

7 Section 77(1) *Retail Leases Act 2003* A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

8 Kitto J, in *Blomley v Ryan* (1956) 99 CLR 362, at 415

115 A tenant will not merely, as a consequence of being a tenant, be regarded as being under a special disadvantage in relation to a landlord. Thus, in *ACCC v Samton Holdings Pty Ltd* [2000] FDA 1725, even a landlord which took an avaricious, opportunistic approach and struck a very hard bargain with its tenant was held not to have acted unconscionably. In the present case, there was nothing to suggest that Ms Christian was at a special disadvantage in relation to the former landlord. Accordingly, her claim under section 77(1) of the *Retail Leases Act 2003* must fail.

Duty as landlord of the restaurant premises

116 The second way in which the former landlord might have had a duty to act to abate a nuisance to Ms Christian from the extraction system was as the landlord at all times of the premises of the neighbouring restaurant.

117 A landlord may be liable for nuisance caused by a tenant if the landlord can be said to have authorised the nuisance, or otherwise have participated directly in its commission. A claim made against the former landlord on that basis would be founded in nuisance.

118 This Tribunal is a creature of statute and only has jurisdiction if it has been conferred by statute. The jurisdiction conferred on the Tribunal by the *Retail Leases Act 2003,* to hear disputes under or in relation to retail premises leases,[9] is sufficiently wide to embrace claims in nuisance.

119 The general rule is that a landlord will not be liable for nuisance caused by a tenant unless the landlord can be said to have authorised the nuisance, or otherwise have participated directly in its commission. If the landlord had been aware of the nuisance, but had taken no step to prevent it, this on its own would not be enough to make the landlord liable. Further, the mere letting of the property will not amount to authorisation, unless there is a very high probability that this would result in nuisance.[10]

120 In the present case, there was no evidence to suggest that the former landlord had any basis for knowing or believing that the extraction system would cause a nuisance. Accordingly, it cannot be said that the former landlord authorised the nuisance alleged by Ms Christian. Similarly, there is no evidence to suggest that the former landlord participated directly in the commission of the alleged nuisance.

121 Accordingly, I find that Ms Christian has failed to establish any ground for the relief which she seeks against the former landlord.

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9 Section 81(1) *Retail Leases Act 2003* … "retail tenancy dispute" means a dispute between a landlord and tenant –

(a) arising under or in relation to a retail premises lease

Section 89(1) The Tribunal has jurisdiction to hear and determine an application by any of the following persons seeking resolution of a retail tenancy dispute –

(a) a landlord or tenant under a retail premises lease

10 *Lawrence v Fen Tigers Limited* [2014] 2 WLR 433

122 Finally, in relation to all of the former landlord's duties in the period up to its sale of the leased premises on 4 February 2014, it should be noted that Ms Christian made no quantified claim in relation to that period; her only quantified claim was for the financial year 2015/2016, after the landlords had sold the leased premises.

The landlords' duties

123 As she had alleged against the former landlord, Ms Christian also alleged that the landlords had owed a duty to Ms Christian, to act in relation to the alleged nuisance from the extraction system, by virtue of the covenant of quiet enjoyment in clause 8.1 of the lease.

The landlords' argument about the covenant of quiet enjoyment

124 The landlords argued that their duty to provide quiet enjoyment was conditional on Ms Christian's not having breached her obligations under the lease. The relevant clause reads:

> 8.1 Quiet enjoyment
>
> As long as the tenant performs its obligations under this lease, the tenant may occupy and use the premises without any interruption by the landlord or any person lawfully claiming under the landlord. An exception to this is where the landlord exercises a right under this lease.

125 The landlords argued that Ms Christian had lost her right to quiet enjoyment. This, the landlords said, was so because there had been a number of breaches by Ms Christian which, the landlords argued, meant that she had lost her right to quiet enjoyment.

126 I do not accept the landlords' argument. To enliven the proviso on which their argument relied, Ms Christian's breach must have been a continuing one; it is unrealistic to assert that, once a breach occurred, Ms Christian permanently forfeited her right to quiet enjoyment, even if the breach were subsequently rectified.

127 Of the nine breaches relied on by the landlords in support of their argument, the only breach which might have been continuing was the allegation that Ms Christian had assigned the lease without the landlord's consent.[11] The landlords did not, however, satisfy me that such an assignment occurred.

128 As proof of the alleged breach, the landlords relied on the following:

- an email written by James Christian to Ms Marasco, the managing agent, on 10 June 2015, in which he said:

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[11] Clause 6.1 of the lease provided:
No assignment, subletting, mortgage etc
The tenant must obtain the written approval of the landlord before:
(a) assigning this lease …

> Please be advised my mother Ann Christian is travelling overseas until 7 July 2015 and a month prior to her departure she did a hand-over of the business to myself [James Christian] and will on her return arrange with your office to re-assign the lease to myself and the new trading name of HMAS Hair.

- The change of the business name on the front window of the leased premises from "Hair Tonic @ Bay" to "HMAS Hair".
- The fact that on 27 April 2015 James Christian and his father, Mark Christian had registered the business of HMAS Hair and on 29 May 2015 the business name of Hair Tonic @ Bay had been cancelled.
- The fact that from May 2015 Ms Christian was little, if at all, in evidence at the leased premises and the salon appeared to be run by James Christian.

129 These matters were well explained by Ms Christian. Ms Christian said that she had indeed intended to assign the business to James Christian, but on returning from her May 2015 holiday, had changed her mind. Ms Christian's evidence was confirmed by Ms Marasco, who said that she had followed up Ms Christian on the subject of the assignment raised in James Christian's email of 10 June 2015, that Ms Christian had told her that she had changed her mind about the assignment and that James Christian would only manage the business.

130 None of the matters relied on by the landlords as evidence of an assignment constituted clear evidence that an assignment had taken place. All they showed was that, after flirting with the idea of an assignment, Ms Christian had merely stepped back from the business and tinkered with the name of the salon.

Other considerations

131 As I have said above, a landlord has no duty to its tenant to control the actions of an unrelated third party, in this case the neighbouring tenant using the extraction system.

132 Ms Christian also alleged that the landlords had acted unconscionably, in breach of section 77(1) of the *Retail Leases Act 2003*. There was, however, nothing to suggest that Ms Christian was at a special disadvantage in relation to the landlords and her claim under section 77(1) must fail.

133 Accordingly, I find that Ms Christian has failed to establish any ground for the relief which she seeks against the landlords.

The owners corporation's duties

134 The owners corporation's relationship with Ms Christian rested on three bases:

- As owner of the common property at the rear of the leased premises, on which its tenant, Mr Katsalidis, had installed (or permitted the installation of) fan, motor and ducting for the extraction system,
- As owner of the common property above the leased premises, through which the extraction system's outlet ductwork ran and
- As the owners corporation of the subdivision in which Ms Christian was the occupier of a lot.

Duty as owner of the common property

135 Any claim by Ms Christian against the owners corporation as owner of the common property (from which the alleged nuisance emanated) must be founded in nuisance. As I have stated above, the Tribunal has no jurisdiction to hear claims founded in nuisance, per se. But the jurisdiction of the Tribunal to hear owners corporations disputes, conferred by section 162 of the *Owners Corporations Act 2006*[12] is sufficiently wide so as to accommodate claims based in nuisance.

136 As stated above, the general rule is that a landlord will not be liable for nuisance caused by a tenant unless the landlord can be said to have authorised the nuisance, or otherwise have participated directly in its commission.[13] There was no evidence of any such authority or participation, and accordingly there was no breach of duty on the part of the owners corporation.

137 It follows that the owners corporation was not in breach of any duty owed to Ms Christian by virtue of its ownership of the common property.

Duty as owners corporation for the subdivision

138 Any claim by Ms Christian against the owners corporation in its capacity as owners corporation for the subdivision could only be made on the basis that the owners corporation had failed in a duty to enforce the rules of the owners corporation. The rules of the owners corporation provided:

> 2.1 A proprietor or occupier of a lot must not:
>
> (a) create any noise or behave in a manner likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot …

139 Accordingly, the nuisance alleged by Ms Christian could well have constituted a breach of the owners corporation's rules. The relevant source of obligation on the owners corporation to enforce its rules lies in the

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12 Section 162 *Owners Corporations Act 2006* VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or rules of an owners corporation that affects an owners corporation ("an owners corporation dispute") including a dispute or matter relating to –
(a) the operation of an owners corporation; or
(b) an alleged breach by a lot owner or occupier of the lot of an obligation imposed on that person by this Act or the regulations of the rules of the owners corporation; or
(c) the exercise of a function by a manager in respect of the owners corporation.

13 *Lawrence v Fen Tigers Limited* [2014] 2 WLR 433

Owners Corporation Act 2006. Section 152 of the Act requires that, when an owners corporation receives a complaint from the occupier of a lot (such as James Christian's letter of 30 June 2015) the owners corporation must decide whether it will follow the dispute resolution process set out in part 10 of the Act, or take no action.[14]

140 It is true that James Christian's letter of 30 June 2015 did constitute a complaint under section 152 of the *Owners Corporations Act 2006*, on the basis of which complaint the owners corporation could have chosen to follow the complaint procedure set out in the Act. But by virtue of section 152(2)(c), the owners corporation could also have chosen to take no action in respect of the alleged breach, which in fact is what it did.

141 Under section 5 of the Act, the owners corporation had a duty to act fairly,[15] but no criticism can attach to the owners corporation for choosing to take no action. The primary functions of an owners corporation, as set out in the Act, are these: to manage and administer the common property, as well as to repair and maintain the common property, the chattels, fixtures, fittings and services related to the common property and equipment and services which exist for the benefit of the land affected by the owners corporation. I see nothing unfair in an owners corporation's declining to use the resources of the owners corporation in order to assist one of many occupiers. After all, an aggrieved occupant, such as Ms Christian, is always free to bring proceedings under the Act against an alleged offender against the rules of the owners corporation.

Other claims against the owners corporation

142 In addition to Ms Christian's claims against the owners corporation about the extraction system, she also made other claims against the owners corporation. I now turn to those claims.

143 By her Amended Points of Claim. Ms Christian made a number of claims:

a That the owners corporation breached section 5 of the *Owners Corporations Act 2006*, by not including the extraction system in its maintenance plan. The owners corporation was required by section 36 of the *Owners Corporations Act 2006* to have a maintenance plan for the common property for which it was responsible. The extraction system was probably the property of Mr Katsalidis, the lessee of the corridor space on which it was located. Alternatively, the extraction system was the property of the former landlord, as the owner of the premises on which neighbouring restaurant was conducted. In any

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[14] Section 153(2) *Owners Corporations Act 2006* The owners corporation must decide –
(a) to take action under this Part in respect of the alleged breach; or
(b) to apply to VCAT for an order requiring the person to rectify the breach; or
(c) take no action in respect of the alleged breach.

[15] Section 5 *Owners Corporations Act 2006* An owners corporation in carrying out its functions and powers –
(a) must act honestly and in good faith; and
(b) must exercise due care and diligence.

event, the extraction system was not the property of the owners corporation. As such, the owners corporation was not responsible for the extraction system. Further, there was no evidence before the Tribunal about the contents of the owners corporation's maintenance plan. Finally, even if the owners corporation were responsible for the extraction system and, even if the owners corporation's maintenance did omit reference to the extraction system, it is difficult to see how such an omission could have caused a loss to Ms Christian.

b The owners corporation failed to report to the owners corporation's annual general meeting in relation to the implementation of its approved maintenance plan. Ms Christian adduced no evidence in support of this claim, but in any event no loss could have flowed to Ms Christian from any such failure.

c By reason of various actions, the owners corporation facilitated the former landlord and the landlords in unconscionable conduct, which conduct breached section 77(1) of the Retail Tenancies Act 2003.[16] This claim has no basis in law, but Ms Christian is self-represented and the Tribunal is not a Court of pleading. Ms Christian's claim appears to amount to a claim that the conduct of the owners corporation, complained of by Ms Christian, constituted breaches of the owners corporation's duties under section 5 of the *Owners Corporations Act 2006* and I will treat it as such.

144 The conduct complained of was as follows:

- Not disclosing issues caused by the extraction system.
- Not attempting to resolve issues caused by the extraction system.
- Not taking responsibility for the extraction system.
- Supporting the misconduct of the former landlord and the landlords.

145 "Not disclosing issues caused by the extraction system". It is hard to see that any such breach did occur. There was no evidence to suggest any nondisclosure and Ms Christian was well aware of what she saw as issues caused by the extraction system. The claim is not made out.

146 "Not attempting to resolve issues caused by the extraction system", "Not taking responsibility for the extraction system" and "Supporting the misconduct of the former landlord and the landlords". Essentially, these three claims amount to an allegation that the owners corporation failed to abate the nuisance alleged to have been caused to Ms Christian by the extraction system. I have already found that the owners corporation had no duty to act.

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16 Section 77(1) *Retail Leases Act 2003* A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

147 As well as the conduct set out in paragraph 144, Ms Christian in her Amended Points of Claim also made what amounted to a general claim that the owners corporation had acted unconscionably in numerous ways. Again, this claim amounted to a claim that the owners corporation had acted variously in breach of its duties imposed by section 5 of the *Owners Corporations Act 2006*, by:

- Requiring the use of the leased premises for the installation of services required by the owners corporation and by Ms Christian's neighbours.
- Pressuring the applicant to allow cabling to be installed.
- Pressuring Ms Christian to install "alternative toilet facility access within the leased premises.
- Withdrawing cleaning and materials for toilet and bathroom facilities.
- Repetitive wrongful entries into the leased premises by the owners corporation's building manager and tradesmen.
- Pointing CCTV cameras into the leased premises.
- Telling Ms Christian, without making prior arrangement, that a technician would attend the leased premises to repair the extraction fan.
- Attempting to gain entrance to the leased premises on 30 November 2015.
- Making nuisance calls for police and fire brigade attendance at the leased premises.
- Agitating the tenant of the adjoining premises so that the tenant threatened the applicant's family.
- Withdrawing access to gymnasium and pool facilities.

148 Mr Nugent, the owners corporation's manager, gave evidence, which I accept, which made it clear that the matters complained of were all in proper discharge of the owners corporation's functions. I therefore find that none of the matters complained of by Ms Christian did in fact constitute a breach of the owners corporation's duties under section 5 of the *Owners Corporation Act 2006*.

149 In summary, none of Ms Christian's claims against the owners corporation is made out.

150 Accordingly, I find that Ms Christian has failed to establish any ground for the relief which she seeks against the owners corporation.

Conclusion

151 It follows from the above that Ms Christian has failed to establish any legal or factual basis for her claims against any of the respondents.

The landlords' counterclaim

152 By their amended counterclaim dated 8 August 2016, the landlords claimed from Ms Christian:

unpaid rent $1,166.75

make good costs $7,419.50

charges paid to the owners corporation for rectifying damage caused to duct work by Ms Christian $1,350.25

Total $9,936.50.

153 Ms Christian did not dispute the claim for unpaid rent.

154 In relation to make good costs, clause 2.3 of the lease provided:

> When the Lease ends, the Lessee must:
>
> (a) give the Lessor vacant possession of the Premises in a condition consistent with the performance of the Lessee's obligations under this Lease;
>
> (b) remove the Lessee's property from the Premises and make good all damage caused by or in the course of removal or the original installation; and
>
> (c) return the services to their original configuration.

155 The leased premises were an empty shell when they were leased to Ms Christian. Photographs tendered by the landlords showed that on vacating, Ms Christian did not remove all of her fit-out. The landlords adduced evidence that the cost of returning the leased premises to their original condition and making good was $7,419.50 and tendered a quotation for those works. Ms Christian also tendered a quotation to make good, in the sum of $4,050 plus GST. That quotation did not include items apparent from the photographic evidence, such as removing tiles, patching walls and repainting. Accordingly, I prefer the landlord's evidence on this point.

156 Finally, the landlords claimed an amount of $1,350.25 which they paid to the owners corporation, the cost of rectifying damage to the extraction system, caused by Ms Christian. Ms Christian admitted that the extraction system had been interfered with, with her knowledge, and did not dispute the amount claimed by the landlords.

157 Accordingly, I find that, on the landlords' counterclaim, Ms Christian must pay to the landlords the amount claimed, $9,936.50.

Orders

158 It follows from the above that Ms Christian's claims are dismissed as against all respondents. On the landlords' counterclaim, I will order that Ms Christian pay to the landlords the sum of $9,936.50 and reimburse the Tribunal fee paid by them. I will reserve liberty to apply on the question of costs.

R Buchanan
Member