VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R9/2014

BUILDING & PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* - whether oversight in failing to consider document tendered in evidence constitutes an accidental slip or omission.

SECOND APPLICANT	Faycroft Pty Ltd (ACN 158 141 727)
FIRST APPLICANT	Mr Francis Plancentino
RESPONDENT	Granopa Pty Ltd (ACN 111 476 638)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	23 December 2014
DATE OF ORDER	5 January 2015
CITATION	Faycroft Pty Ltd v Granopa Pty Ltd (No 2) (correction) (Building and Property) [2015] VCAT 11

ORDER

1. Pursuant to s 119 of the *Victorian Civil and Administrative Tribunal Act 1998*, Order 1 of the Tribunal's orders dated 21 November 2014 is corrected such that the figure of *$6,984.23* is deleted and substituted with the figure of $5,876.

2. Pursuant to s 119 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Tribunal's reasons dated 21 November 2014 are corrected as follows:

   (a) In paragraph 64:

      (i) the word *No* appearing in the third line of that paragraph is deleted and substituted with the word Insufficient; and

      (ii) the words *the cost of* appearing in the third line of that paragraph are deleted.

   (b) In paragraph 67, the figure of *$5,605.43* is deleted and substituted with $6,380.43.

   (c) In paragraph 67, the figure of *$7,287.06* is deleted and substituted with $8,294.56.

   (d) In Item 5 of the table appearing under paragraph 86, the figure of $0 is deleted and substituted with $775.

   (e) In the first row stating *Subtotal* of the table appearing under paragraph 86, the figure of *$5,605.43* is deleted and substituted with $6,380.43.

(f) In Item 11 of the table appearing under paragraph 86, the figure of *$1,681.63* is deleted and substituted with $1,914.13.

(g) In the second row stating *Subtotal* of the table appearing under paragraph 86, the figure of *$7,287.06* is deleted and substituted with $8,294.56.

(h) In the row stating *GST* of the table appearing under paragraph 86, the figure of *$728.71* is deleted and substituted with $829.45.

(i) In the row stating *Total* of the table appearing under paragraph 86, the figure of *$8,015.77* is deleted and substituted with $9,124.01.

(j) In paragraph 69, the figure of *$8,015.77* is deleted and substituted with $9,124.01.

(k) In paragraph 69, the figure of *($6,984.23)* is deleted and substituted with ($5,876).

(l) In paragraph 70, the figure of *$6,984.23* is deleted and substituted with $5,876.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr F Placentino (director and in person)
For the Respondent	Mr Di Iorio, solicitor

REASONS

Introduction

1. On 21 November 2014, I ordered that the Respondent reimburse the Applicant $6,984.23. That amount represented the balance of $15,000 held by the Respondent (**'the Landlord'**) as security (**'the Security'**), pending reinstatement works carried out by the Applicant (**'the Tenant'**) to retail premises, which it previously occupied.

2. My orders dated 21 November 2014, and accompanying reasons (**'the Reasons'**), were made following a hearing which was conducted on 26 June and 6 November 2014. The evidence given during that hearing was partly oral and partly in the form of affidavits filed by the Landlord.

3. By letter dated 24 November 2014, solicitors for the Landlord wrote to the Tribunal advising that there were two paragraphs of the Reasons which contained errors:

   (a) Paragraph 64, which stated:

   > **No evidence** was given as to the cost of undertaking that work [cleaning ductwork and filters]. Consequently I find that the Landlord has failed to establish that it has suffered loss as a result of this aspect of its claim.

   (b) Item 5 in the table appearing under paragraph 68, which stated:

Item	Description	Amount
5	Missing stone tile	**$0**

   [emphasis added]

4. Although the Landlord's solicitors' letter dated 24 November 2014 did not expressly mention s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**), it is clear that the intention of the letter was to invite the Tribunal to consider whether the Reasons were affected by an error arising from an accidental slip or omission or a miscalculation of figures.

5. Further, by correspondence dated 28 November 2014, the Tenant wrote to the Tribunal responding to the Landlord's letter dated 24 November 2014.

6. Consequently, by orders dated 1 December 2014, liberty was given to the parties to file any further written submissions by 8 December 2014, going to the question of whether Order 1 dated 21 November 2014 and the Reasons were affected by an accidental slip or omission or miscalculation of figures and if so, whether the Tribunal should make a correction order under s 119 of the Act.

7. By letter dated 8 December 2014, the Applicant requested that the s 119 application not be determined "on the papers" and that the proceeding be listed for a directions hearing to allow him to make oral submissions. Consequently, the proceeding was listed for an application directions

hearing on 23 December 2014, at which time oral submissions were made by both parties. Accordingly, what follows are my findings concerning the each parties' application for a correction order.

Section 119 of the Act

8. Section 119 provides:

> **119 Correcting mistakes**
>
> (1) The Tribunal may correct an order made by it if the order contains -
>
> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
>
> (d) a defect of form.

9. The purpose of what is commonly referred to as the 'slip rule' is to avoid injustice.[1] In *Vuka Homes v Couty*,[2] the Tribunal made the following observations concerning the provision:

> 5. The breadth of this provision has been said in a number of cases to be very wide (see ***Riga v Pennisula Home Improvements*** [2000] VCAT 56; re ***Stahle and Camberlea Properties Pty Ltd*** [2000] VCAT 1883 and the cased there cited). The error must arise from an accidental slip or omission but it would cover the situation where the Tribunal failed to make an order as a result of an accidental omission by counsel to ask for it or where the Tribunal made an order when, had its mind been turned to the true position, it would have not made such an order (see ***University of Ballarat v Deborah Bridges and Equal Opportunity Board*** (No. 7134 of 1993 Court Of Appeal 23 February 1996 - Unreported).

Failure to consider quotation from *Kleenduct Australia Pty Ltd*

10. The Respondent submits that the statement made in paragraph 64 of the Reasons that *no evidence was given as to the cost of* cleaning the ductwork and filters, failed to acknowledge that there was evidence before the Tribunal of that cost. That evidence was in the form of a quotation from *Kleenduct Australia Pty Ltd*, which was exhibited to the affidavit of Russell MacDonald. In that affidavit, Mr MacDonald exhibited a number of quotations relating to all of the remedial works which the Landlord claimed were necessary in order to reinstate the premises, following the removal of the Tenant's fixtures, fittings and goods. The *Kleenduct Australia Pty Ltd* quotation formed part of that suite of quotations.

[1] *Batagol & McGill v Monk* (2000) 16 VAR 357 at 360.
[2] [2005] VCAT 1301.

11. I accept that the *Kleenduct Australia Pty Ltd* quotation was overlooked when I deliberated on this particular issue. This is obvious by virtue of the fact that the statement in paragraph 64 of the Reasons is completely at odds with the tendering of that quotation. However, the question arises whether that omission is capable of being corrected under s 119 of the Act. On one view, it is arguable that the Tribunal has made a finding and it is now *functus officio.* On the other hand, it is arguable that s 119 of the Act is expressed widely enough to allow the Tribunal to revisit this aspect of the Landlord's claim.

12. In *Vuka Homes*, the Tribunal accepted that it had inadvertently overlooked a claim for interest, which had been set out in the *Points of Claim* filed in that proceeding and also by counsel in closing submissions. On that basis, the Tribunal determined that it had the power to consider what it would have done had it not overlooked the matter at the time of preparing the order and the accompanying reasons for decision.

13. In my view, the present situation is analogous. Here, I have proceeded on the erroneous belief that no evidence was before me as to the cost of cleaning the ductwork and filters. I had overlooked the quotation from *Kleenduct Australia Pty Ltd*, which formed part of the suite of quotations exhibited to the affidavit of Mr MacDonald. Consequently, that quotation formed no part of my deliberation on that issue.

14. This situation is to be contrasted to one where the Tribunal has regard to evidence but ultimately chooses not to accept the evidence. In that latter case, it would be impermissible for the Tribunal to revisit its orders and reasons, merely because insufficient weight was given to a document or evidence.[3]

15. That being the case, I should now consider what I would have done had I not overlooked the *Kleenduct Australia Pty Ltd* quotation.

16. In my view, the scope of work set out in the *Kleenduct Australia Pty Ltd* quotation has little, if anything, to do with cleaning the ductwork and filters of dust caused by the removal of the Tenant's fixtures, fitting and goods. Regrettably, no representative of *Kleenduct Australia Pty Ltd* was called to give evidence in order to explain how the quotation related to the removal of dust caused by reinstatement or the remedial work. The quotation itself appears to focus primarily on cleaning ductwork of grease, the presence of which was caused by the use of premises, rather than through any reinstatement of remedial work being carried out. It states, in part:

> All internal surfaces of the ducted system where accessible, not including the riser duct, will be manually cleaned using scrapers and chemicals to remove current build-up of dirt and grease. (Scraping ductwork to bare metal will incur an additional cost).

[3] *Berbers v Transport Accident Commission* (2002) 19 VAR 201.

Note: Riser ducts are quoted separately according to OH&S requirements.

Fans - fan blades and the fan housing will be soaked with degreaser, scraped back and wiped clean, where possible the protective mesh will be replaced with new mesh rather than clean…

Canopies - Canopies, filter housings and retaining trays will be manually scraped and washed clean using an approved detergent where practical and returned to an acceptable standard.

Filters - The efficient functioning of a kitchen exhaust system relies on a regular filter cleaning to ensure fire safe and hygienic conditions in your kitchen. There are many factors that have to be taken into consideration when choosing a frequency for the cleaning of honeycomb/baffle filters;

- Number of meals cooked;
- Type of equipment used,
- Type of oil used,
- Visual inspection for cleanliness.

17. The total cost of the proposed work, as set out in the quotation, is $2,612.50. As I have already indicated, I am not persuaded that this work relates to the removal of dust from the ductwork and filters, caused by any reinstatement work carried out by the Tenant. In my view, the quotation relates to what can be described as maintenance work; namely, cleaning ductwork and canopies as a result of the ordinary use of the premises.

18. As highlighted by the Tenant in its correspondence dated 28 November 2014, no-one gave evidence as to the current condition of the ductwork or kitchen canopies. Mr MacDonald did not say that the ductwork or kitchen canopies required the removal of grease. His evidence was limited to expressing an opinion that reinstatement works undertaken by the Tenant and any remedial works to be undertaken by the Landlord will create dust, which will necessitate the cleaning of the ductwork and kitchen canopies. In my view, that opinion is speculative. I am not persuaded, based on this evidence, that any work carried out by the Tenant in removing its fixtures, fittings and goods has created dust necessitating cleaning of the ductwork and kitchen canopies. Moreover, the quotation simply states what cost is attributable to cleaning the ductwork and kitchen canopies of grease and dirt. It assumes that cleaning is required but proffers no opinion as to the actual state of the ductwork or kitchen canopies.

19. Therefore, even taking into consideration the quotation, I am not persuaded that the cost of cleaning the ductwork and kitchen canopies should be deducted from the Security to be returned to the Tenant. In my view, insufficient evidence has been adduced by the Landlord to substantiate this aspect of its claim.

The cost of the missing stone tile - paragraph 68

20. In the table set out under paragraph 68 of the Reasons, I have allocated no amount against Item 5, described as *Missing stone tile*. This item relates to a feature stone tile, which I determined had previously been fixed to the front facade of the premises but was missing when the premises were re-entered by the Landlord. Paragraphs 39 to 43 set out my findings in relation to this aspect of the Landlord's claim for retention of the Security. In paragraph 43 of the Reasons, I state:

> 43. Accordingly, I find that the Tenant is liable to replace the stone tile. As a consequence, I will order that $775 (plus *preliminaries* and GST) is to be deducted from the Security, as I consider this cost to also be the responsibility of the Tenant under the terms of the Lease.

21. It is clear that my findings in paragraphs 39 to 43 have not been extrapolated into the summary table set out under paragraph 68 of the Reasons. This is an omission, resulting in a miscalculation of figures, which I consider falls squarely within the ambit of s 119 of the Act. Therefore, the table under paragraph 68 is to be corrected as follows:

Item	Description	Amount
1	Concrete floor	$2,131.25
2	Capping to pipe	$50
3	Plasterboard walls	$540
4	Rear door	$475
5	Missing stone tile	~~$0~~ $775
6	Glazing to front door	$0
7	Air conditioning	$1,609.18
8	Fire services	$0
9	Cleaning of ductwork	$0
10	Rubbish removal and hand-over clean	$800
Subtotal		~~$5,605.43~~ $6,380.43
11	Supervision, administration and profit	~~$1,681.63~~ $1,914.13
Subtotal		~~$7,287.06~~ $8,294.56
	GST	~~$728.71~~ $829.45
Total		**~~$8,015.77~~ $9,124.01**

22. I note that the Tenant submitted that the evidence given by the Landlord going to this issue was deficient and on that basis, the claim for $775 should not be allowed. In my view, this submission does not address matters relevant to an application under s 119 of the Act but rather, seeks to impugn evidential findings already made by the Tribunal. Section 119

of the Act does not permit that to occur. Accordingly, the findings made in relation to the *stone tile*, as set out in paragraph 43 of the *Reasons*, stand, insofar as this s 119 application is concerned.

GST

23. The Tenant submits that GST should not be allowed because *it was concluded that no work was carried out or paid for by the Respondent*.

24. The Tenant further submits that as no invoice has been rendered in respect of the value of the remedial works for which he is liable, he is unable to claim any input credit in respect of the GST added to the cost of repair. By contrast, he argued that the Landlord would be able to claim an input credit for the cost of remedial work it undertook, even though it has been paid or reimbursed for that expenditure by deducting an amount from the Security. According to the Tenant, that would result in the Landlord receiving a windfall in respect of the GST amount, whilst at the same time depriving the Tenant of claiming any input credit.

25. I do not accept that my finding of adding GST to the cost of remedial work for which the Tenant is liable constitutes an error arising from an accidentally slip or miscalculation of figures. Whether the Landlord is entitled to claim an input credit in respect of the cost of remedial work, in circumstances where it has been wholly compensated for that cost, is not relevant to my determination of the reasonable cost of undertaking the remedial work. Similarly, whether or not the Tenant is entitled to an input credit is irrelevant for the purpose of determining the reasonable cost of remedial work. In that respect, it is unclear to me why the Tenant would not simply claim the whole amount deducted from the Security as a business expense, rather than merely seeking a credit for the GST component of that expense.

26. Accordingly, the determination to add GST to the cost of the remedial work stands, insofar as this s 119 application is concerned.

Rear door – paragraphs 37 and 38

27. The Tenant submits that the Tribunal erred in holding that the rear door was to be replaced. In my view, that submission relates to a finding of fact made by the Tribunal and does not expose any error arising from an accidental slip or omission but rather, seeks to impugn evidential findings already made by the Tribunal. Section 119 of the Act does not permit that to occur. Accordingly, the findings made in relation to the *rear door*, as set out 37 and 38 of the *Reasons*, stand, insofar as this s 119 application is concerned.

Conclusion

28. The recalculation of the aggregate amount to be deducted from the Security will affect other paragraphs in the Reasons; namely, paragraphs

67, 68, 69 and 70. Those paragraphs will be amended in revised *Reasons* and in the orders attached to these reasons.

29. Having regard to the matters set out above, the order made on 21 November 2014 is to be corrected, such that $5,876 of the Security held by the Landlord is to be returned to the Tenant.

SENIOR MEMBER E. RIEGLER