VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP365/2018

CATCHWORDS

RETAIL LEASES, whether tenant in breach entitling the landlord to forfeit the lease, whether landlord is required to reimburse tenant for the reasonable cost of repairs pursuant to s 52 of the Retail Leases Act 2003 (Vic), whether tenant entitled to compensation pursuant to s54 of the Retail Leases Act 2003 (Vic),

APPLICANT	Gozul Pty Ltd (ACN 133 484 189)
RESPONDENT	Resources Consulting Services Pty Ltd (ACN 006 939 840)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	27 September 2018
DATE OF ORDER	8 October 2018
CITATION	Gozul Pty Ltd v Resources Consulting Services Pty Ltd (Building and Property) [2018] VCAT 1558

FINDINGS

1. Gozul Pty Ltd breached the lease by installing a cool room on the car park of the neighbouring property. The breach is not a repudiation of the lease.

2. Gozul Pty Ltd owes Resources Consulting Services Pty Ltd the sum of $450 being for legal costs of the January 2018 Notice of Default.

3. Resources Consulting Services Pty Ltd owes Gozul Pty Ltd the sum of $2,952 being the cost of repairs to the facade and the air-conditioning unit on the ground floor of the leased premises.

ORDER

1. The landlord Resources Consulting Services Pty Ltd is not entitled to retake possession of the premises at 70 William Street, Abbotsford Victoria (the premises) in reliance on its Notices of Default dated 19 January 2018 and 7

May 2018 and is hereby restrained from doing so by its agents or otherwsie in reliance on such notices.

2. It is declared that the tenant Gozul Pty Ltd has not repudiated the lease based upon the evidence before the Tribunal.

3. Gozul Pty Ltd must remove the cool room constructed on the carpark adjacent to the premises within 90 days of the date of this order.

4. Resources Consulting Services Pty Ltd must pay Gozul Pty Ltd the sum of $2,502 within 14 days.

5. Liberty to apply on the question of costs. Such liberty to be exercised by 29 October 2018.

L. Forde
Senior Member

APPEARANCES:

For Applicant	Mr E. Taylor, director
For Respondent	Mr N. Jones of counsel

REASONS

1 This is an application by Gozul Pty Ltd (the **tenant**) to prevent Resources Consulting Services Pty Ltd (the **landlord**) from forfeiting its lease of retail premises at 70 William Street, Abbotsford, Victoria (**premises**). The tenant also claims reimbursement for various structural and repair works it carried out to the premises and a declaration that it is entitled to maintain a cool room erected outside the premises.

2 The landlord has counterclaimed seeking declarations that the tenant is in breach of the lease, has repudiated the lease, the lease is terminated as well as an order for reimbursement of legal costs of $1500 for issuing two Notices of Default.

3 Mr E. Talmor, a director of the tenant, gave evidence on the tenant's behalf. Mr Staltari, a director of the landlord, and Mr Tom Casamento, a structural engineer engaged by the landlord gave evidence.

ISSUES FOR DETERMINATION

4 The main issue for determination is whether the tenant failed to comply with two Notices of Default issued by the landlord under the *Retail Leases Act 2003 (Vic)* (**RLA**).

5 Both notices dated 19 January 2018 and 7 May 2018 respectively set out essentially the same particulars of default as follows: –

a The tenant has removed the carpeting in the upstairs rooms without the written consent of the landlord;

b The tenant has installed a gate in the fence of the premises without the written consent of the landlord;

c The tenant made an opening in the external wall of the premises for an air conditioner without the written consent of the landlord;

d The tenant has made a hole in the ceiling of the bathroom without the written consent of the landlord;

e The tenant has installed a cool room on the car parking space in breach of AP 19 (D) of the lease;

f The tenant has demolished and removed a wall; and

g The tenant has removed carpet without written consent.

6 The January 2018 Notice of Default included rental arrears which have since been paid. The notices are almost identical.

7 A secondary issue for determination is whether the tenant is entitled to:-

a reimbursement pursuant to s52 of the RLA for structural works it carried out; and

b compensation pursuant to s54 of the RLA for the alleged loss of use of the upstairs area of the premises for a period of time.

FACTUAL BACKGROUND

8 It is not disputed that the landlord and tenant entered into a lease for a period of four years starting on 1 June 2016 with a further 4 year option.

9 Mr Staltari says the landlord bought the premises in late 2014 with settlement in mid-2015. He says the premises required work to the roofing, guttering and extensive works to the rear. The landlord recarpeted the upstairs area before the tenant moved in. Originally there was a small milk bar downstairs and upstairs had two bedrooms with a sleepout area that was not in use.

10 Mr Talmor says that the premises were in a very poor condition at the start of the lease requiring him to remove cabinetry, install lighting, remove a domestic kitchen downstairs and build a commercial kitchen upstairs and generally clear out rubbish and dead rodents. The premises had been locked up and unused for an extended period. He says that prior to entering the lease he had only ever spoken with the landlord's agent. He was told by the agent that the landlord would not be involved "in any shape or form" with renovations to the premises and anything the tenant wanted to do was the tenant's "problem". He understood that if he paid for renovations he could do them. When the tenant took possession, Mr Talmor undertook the work. The agent was dismissed by the landlord a few months into the lease.

11 Mr Talmor says the landlord generally did not care about what works were undertaken by the tenant. If the works were not being paid for by the landlord, then the landlord appeared happy for the works to proceed. The works would after all improve the value of the premises.

12 In giving evidence, Mr Talmor acknowledged that the works referred to in the particulars of default in the Notices of Default were carried out without written consent of the landlord. He says that as a result of the above events consent was given orally or impliedly by the landlord, thereby varying the lease requirement of obtaining written consent.

13 Mr Talmor says that about a year into the lease he considered obtaining a liquor licence and opening a bar upstairs. Mr Staltari, the director of the landlord owned the adjoining premises, where he had an office. Mr Talmor would often see Mr Staltari outside the premises and they had many casual conversations. These included discussing using the upstairs area of the premises as a bar and possibly extending a deck for a rooftop bar and opening the rear wall. The close proximity of Mr Staltari's office meant, and I find that the landlord was generally aware of what works took place at the premises.

TENANT' S RESPONSE TO ALLEGATIONS IN DEFAULT NOTICES

Upstairs air conditioner installation

14 Mr Talmor says he did not specifically discuss the air-conditioning installation in the external wall upstairs with the landlord, but it was included as part of a general discussion about installing a rear deck. He said the wall the air-conditioning unit was installed in was the same wall he and Mr Staltari discussed putting in a doorway for a roof top bar. He says the installation of the air-conditioning unit is not finished. He said it was implicit in the general discussions he had with Mr Staltari that he could undertake renovations without the need for written consent. The air-conditioning unit was installed in late 2017. Shortly thereafter the January 2018 Notice of Default was issued by the landlord, so no further works were undertaken.

15 The expert engaged by the landlord, Mr Casamento, was asked whether the air conditioning unit in the rear wall of the first floor has been installed in a proper and workman-like manner. In his report dated 10 September 2018 and in his oral evidence Mr Casamento says the installation is defective, unstable and is of poor workmanship.

16 This conclusion was challenged by the tenant, but no expert evidence was called in support. I accept the expert evidence of Mr Casamento.

17 I accept the tenant's evidence that, based on discussions with the landlord's agent prior to and at the start of the lease and discussions with Mr Staltari including the possibility of building an upstairs deck with a doorway, that it was reasonable for the tenant to assume it did not require written consent to install the upstairs air-conditioning unit. Furthermore, given the extensive works by the tenant to the ground floor, which I find occurred with the landlord's knowledge, it was reasonable for the tenant to conclude that the strict requirements of the lease for written consent had been waived by the landlord.

18 The particulars of default in the Notices of Default concerning the air-conditioning unit was that the installation occurred without the landlord's consent. It follows from my finding that the tenant was not in breach of the lease by installing the air-conditioning unit.

19 I note that the tenant will have to carry out additional works to the unit based on the Casamento report. The landlord is now requiring clause 2.2.11 of the lease to be strictly complied with. The tenant must therefore follow the requirements of that clause before undertaking further works to complete the air-conditioning installation.

Ceiling storage space

20 Mr Talmor acknowledges that he cut a hole in the bathroom roof, and was using the area for storage. He says that the area was already used to store rubbish and he continued to use it after moving into the premises. He

acknowledges that one noggin was removed. He says that only paper goods are stored in the area.

21 Mr Casamento, called by the landlord, was asked whether this storage space was sufficiently strong for the purpose it is currently being used. In his report dated 10 September 2018 and in his oral evidence he notes that the ceiling opening has been created by the removal of the plasterboard between the joists and it appears one noggin may have been removed. The tenant acknowledges removal of one noggin. He noted that his inspection revealed reasonably light loads in the roof space and recommends that the ceiling joists be design-checked by a structural engineer (he not having time to do so) to determine the allowable load the joists are able to carry.

22 Based on Mr Casamento's evidence I find that the alteration by the tenant to the ceiling does not require further work, and is not unsafe given the nature of the goods being stored.

23 I accept the tenant's evidence that based on discussions with the landlord's agent prior to and at the start of the lease and discussions with Mr Staltari it was reasonable for the tenant to assume that it did not require written consent to carry out the minor works to the bathroom ceiling to create the storage space. Furthermore, given the extensive works by the tenant to the ground floor area, which works I find occurred with the landlord's knowledge, it was reasonable for the tenant to conclude and I find that the strict requirements of clause 2.2.11 of the lease for written consent to be obtained before alterations were carried out had been waived by the landlord.

24 I find that the tenant was not in breach of the lease for storing materials in the roof space of the bathroom without obtaining written consent of the landlord to make the alteration to the ceiling roof. The tenant will of course be required to reinstate the roof at the end of the tenancy.

Car park, cool room and gate

25 As the tenant's business became more successful Mr Talmor says he discussed the need for more storage space with the landlord. The tenant was acquiring more tables and chairs for the outside area and needed more bins and a place to store these items. As the business had outgrown the premises Mr Talmor says the only space that could be used was the car parking space and that he discussed with Mr Staltari closing off the car park to the street. Both parties accepted that there was a well-known drug problem in the area, with drug users accessing the car park area after closing, leaving syringes and turning over bins. Mr Talmor says he had multiple conversations with Mr Staltari about these issues. He says Mr Staltari told him that he had obtained a quote to put a roof over the area and he considered closing it but that it was too expensive, so he did not proceed. Mr Talmor took this to mean that the landlord was not averse to the area being used but the landlord would not incur any costs in relation to the area.

26 According to Mr Talmor the cool room was installed on the car parking space on 10 May 2017. During the preparation works Mr Staltari had seen the works being undertaken to smooth out the pitted concrete of the car parking space. Mr Talmor says that he discussed with Mr Staltari that he was preparing the area to use it for storage. Mr Talmor says that Mr Staltari asked him during the construction process whether the underneath structure would last and whether the levels would be structurally sound.

27 Photos of the cool room were produced by both parties. I consider that the area is well maintained and painted to fit with the rest of the premises. There is a gated area behind where the bins are stored.

28 Mr Talmor said that the landlord did not raise the issue of the cool room being in breach of the lease until some 308 days after installation.

29 Mr Talmor says that he had the landlord's consent to use the car park area for storage and rubbish bins. He acknowledges that he did not seek permission for a cool room specifically as he did not believe he needed it.

30 Mr Staltari says he never gave consent to the tenant using the car park for storage. He said he was asked on numerous occasions and always replied no. He recalls having discussions with Mr Talmor over rubbish being left in the car park. He produced an exchange of emails between himself and Mr Talmor in September 2016. In those emails he reiterated to the tenant that pursuant to clause AP19 (d) of the lease the tenant must ensure that the car space is used only for parking one standard motor vehicle and under clause AP 19 (e) must comply with all reasonable directions given by the landlord in connection with the use of the car space. He wrote in one email "unfortunately I have lost faith in you being able to manage the rubbish situation in the car space. The car park should only be used for parking and nothing else. I suggest you find another solution that suits your needs."

31 When asked about his concerns about the cool room Mr Staltari replied that he found the cool room to be unsightly, intrusive and it robbed him of the light coming into his office in his warehouse next door to the premises. He said it was a continual noise source and was built on his warehouse land, not the premises land. It is only because he owns the neighbouring premises that the tenant has use of the car park. When asked about seeing Mr Talmor pouring concrete in the car park he said he asked what he was doing and was told that he was levelling the ground. Mr Staltari said he did not think anything of it and there was never anything said about building a structure on the car park. When he came to his office the next day the cool room was two thirds constructed. By then, he said, "the horse had bolted."

32 Mr Staltari said he was dumbfounded when he saw the construction on the car space as he had made it clear nothing was to be placed in the car space other than a car. At that time the rental was two or three months in arrears. He said he spoke to his wife and she considered whether they let the cool room stay while the business was growing. He said it took about two months before he started seeking legal advice in relation to the ongoing

default by the tenant. He decided that his only option was to take legal action given the tenant repeatedly ignoring his instructions.

33 When asked what would have happened had the tenant sought his written permission for the various works the tenant undertook, Mr Staltari said that he would have acceded to his requests provided sufficient information was given. The one request he would not have agreed to however was the construction of a cool room on the car space.

34 I find that the cool room and associated fencing falls into a different category to the other renovation works undertaken by the tenant. The landlord has specifically instructed the tenant in writing that the car park was only to be used as a car park. This is reflected in the lease. The tenant accepts that it did not specifically ask for consent to install a cool room. The installation of a structure on neighbouring land is something quite different to installing an air-conditioning unit or making an internal storage space. Discussions about the need for more storage cannot be confused with consent to build a cool room.

35 I find that constructing the cool room and associated fencing was installed without the landlord's consent and in breach of the lease.

36 The landlord does not have a positive obligation to stop the tenant breaching the lease. While it is unusual that the landlord did not take steps against the tenant in relation to the cool room for some 308 days, that does not mean that the landlord can be taken to have waived its rights in relation to the breach by the tenant. This position is confirmed by clause 7.6 of the lease which provides that even though the landlord does not exercise its rights on one occasion, it may do so on any later occasion.

37 Had the car park been on the premises, the tenant would have breached an essential term of the lease which by reason of clause 7.4 of the lease constitutes a repudiation. The car park however is not part of the premises. Premises is defined in the lease as 70 William Street Abbotsford 3067. The car park is not located at 70 William Street Abbotsford 3067. The car park is on a neighbouring property. Accordingly, I am of the view that the tenant has not breached clause 2.2.11 of the lease by reason of constructing the cool room on the neighbouring property. Under the lease the tenant is entitled to use one of the car spaces which is situated alongside the eastern most title boundary accessible from Mollison Street Abbotsford. This space is however not the premises.

38 Had I found that the tenant was in material breach of clause 2.2.11 of the lease I would have found in favour of the tenant on an application for relief against forfeiture. Section 146(2) of the *Property Law Act 1958 (Vic)* gives the tenant a right to apply to the Tribunal for relief from forfeiture and the Tribunal may grant or refuse relief having regard to the proceedings and the conduct of the parties and to all other circumstances it sees fit. To not allow the tenant relief would result in the tenant suffering a disproportionate detriment because of the breach, if strict application of the landlord's rights

under the terms of the lease were applied. I accept that there had been a relaxed arrangement between the landlord and the tenant in relation to renovations to a rundown premise being undertaken by the tenant.

39 I find the construction of the cool room to be in breach of the lease but not a breach entitling the landlord to forfeit the lease. The landlord is entitled to require the tenant to remove the cool room from the neighbouring car space.

Demolition and removal of wall

40 The tenant acknowledges that it removed an interior wall on the first floor. It was not a structural wall but divided the two rooms. Mr Talmor says there was no specific discussion about removal of the wall, but there was a general discussion about what would happen to the upstairs area when it was open to the public as a bar.

41 The landlord referred me to the planning permit application lodged by the tenant in about February 2017. The application contained plans of the first-floor space. The landlord relies on the plans showing an internal wall. The tenant says the plans can be interpreted as the internal wall being at bar height as that was the original intention. In any event I do not find the plans conclusive of anything. The wall was removed after the plans were submitted.

42 Mr Casamento states that it was a non-loadbearing wall. He has no structural concerns with the removal of the wall.

43 I accept the tenant's evidence that based on discussions with the landlord's agent prior to and at the start of the lease and discussions with Mr Staltari, it was reasonable for the tenant to assume that it did not require written consent to remove the internal wall. Furthermore, given the extensive works by the tenant to the ground floor, which I find occurred with the landlord's knowledge, it was reasonable for the tenant to conclude that the strict requirements of the lease for written consent had been waived by the landlord.

44 I find that the tenant was not in breach of the lease for removing the first floor internal wall without obtaining written consent of the landlord to make the alteration. The tenant will of course be required to reinstate the wall at the end of the tenancy.

Carpet removal

45 The landlord claims that the tenant wrongly removed a carpet on the first floor of the premises. Mr Talmor acknowledges that he removed the carpet and says it was removed because it was water damaged and smelt. He says he did not seek the consent of the landlord as the landlord had previously indicated that it would not be involved in any work and Mr Staltari made it clear he did not want to be involved. After removing the carpet, the floors were sanded and painted. Mr Talmor says that had the carpet been in good order he would have kept the carpet.

46 Mr Staltari says that prior to the tenant moving into the premises, the landlord installed new carpet on level one at a cost of $2100. I accept this evidence in the absence of any contrary evidence.

47 I accept the evidence of the tenant that water came into the first floor through the façade. Photographs of water leaking onto the balcony area were produced by the tenant at the hearing. I do not think it was necessary for the entire first floor carpet to be removed given the leak was confined to the balcony area. The tenant elected to remove the non-structural wall on the first level. On that basis it is likely although no evidence was provided that the carpet would need to be replaced in the area where the wall was removed. No evidence was given as to whether patches of the carpet could be replaced or whether the entire carpet needed to be replaced.

48 I find that the carpet in the balcony area was likely water damaged due to the poor condition of the façade. I find that once the internal wall was removed, the carpet in that area was no longer functional, and had to be removed. At the end of the lease the tenant will be required to pay the cost of reinstating the carpet to the interior room of level one but not the cost of reinstating the carpet to the balcony area.

49 I find that the tenant for the reasons stated did not require the consent of the landlord to remove the carpet and is not in default of the lease by doing so.

CLAIMS BY TENANT

50 Section 52 of the RLA provides: -

> (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—
>
> (a) the structure of, and fixtures in, the retail premises; and
>
> (b) plant and equipment at the retail premises; and
>
> (c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

51 Mr Talmor says there were issues with water entering the premises and the first-floor facade being unsound. These issues did not occur in the first year of the lease and should be repaired by the landlord under s52 of the RLA. The upstairs area was used by the premises' chef as a residence in the first year.

52 Mr Talmor said that when he had issues with the facade wall he contacted the landlord. Dennis, a handyman who had previously done work for the landlord came and provided a quote to do some repair works. Some time elapsed before the works were to be undertaken and by that time Dennis' business structure had changed so that he had a partner. When he requoted for the job, the works were more expensive, and the landlord did not agree to carry out the works.

53 Mr Telmor said that when part of the facade was opened up it was evident that there was rotten wood, and water was coming in from outside. The landlord said it was not its responsibility to do the work, so the tenant undertook the works. Mr Talmor acknowledged that he could not recall if he discussed the facade works with the landlord before he organised for the works to be done.

54 Mr Talmor says he was not aware of the extent of the structural problems until the works on the façade commenced. The premises had leaks which developed over time and which were not there at the start of the lease. For example, in the kitchen area downstairs water would run down the wall from the ceiling. Mr Talmor said he asked the landlord to repair the leaks. He gave evidence that these leaks were not present at the start of the tenancy. This is consistent with the landlord's evidence that the premises had no leaks when the tenancy began.

55 When questioned about whether he had received complaints from the tenant about water ingress, Mr Staltari denied having received any complaints other than following a severe hailstorm on 17 December 2017. Mr Staltari remembers that storm well as his adjoining building had flooded and he was upset about the extent of the damage. He says this is the only time the tenant ever said anything about water leaking in the premises.

56 Mr Talmor says he started to renovate the first floor area after he obtained a planning permit on 18 July 2017 and that the renovations took two or three months.

57 Mr Talmor says the damage to the upstairs balcony facade occurred over many years and was getting worse and worse. He says the delay in the repairs that the landlord should have carried out to the balcony prevented him from using the first-floor area as a bar. Consequently, he lost revenue.

58 The landlord's position according to Mr Staltari is that when the premises was purchased the balcony area was in a poor state although he did not inspect to determine the structural integrity of the balcony. He noticed water leakage near the flu upstairs as there were ice cream containers placed on the floor to catch drips. This leak was repaired. He said there were no leaks in the premises when the tenancy began.

59 After acquiring the premises, Mr Staltari says the landlord carried out works totalling approximately $50,000. A spreadsheet was produced which recorded a description of the works undertaken by the landlord and the cost of those works. There were works carried out to the roof including the replacing of guttering and sealing cracked joints to existing flashing.

60 Mr Staltari says that in late 2016 the tenant contacted him and asked about repair works to the balcony. As a result he contacted Dennis and arranged for him to look at the balcony. Dennis reported on the remedial work required to stop the wobble and flash under the windows. The quote was $600. Mr Staltari says he relayed this information to the tenant and

indicated that while it was not the landlord's responsibility he would arrange for it to be done. For whatever reason the matter did not come up again until March 2017. Dennis came by and measured up the balcony. Mr Staltari says that he was told by Mr Talmor to hold off doing the work as people were still sleeping in the upstairs area. On that basis the matter was left with Mr Talmor and nothing further occurred.

61 It is agreed that Dennis' business arrangements changed, and he had gone into partnership. When the balcony area was revisited by Dennis he said the job was more significant than originally quoted and a further quote was provided. Mr Staltari thinks that quote was about $4000 or $6000 to replace the facade. On that basis he decided not to proceed and advised Mr Talmor. He says that under the terms of the lease it was a pre-existing issue which had taken place over many years. He says the damage can be seen in the photographs of the premises on the advertising brochure when the landlord purchased the building. There were rotting timbers on the outside and if you tap the walls it was clear that there was rotting timber under the paintwork.

62 Mr Staltari says that the issue of the upstairs balcony only became an issue when the tenant changed its focus to introduce the public to the upstairs.

63 Section 52(4) of the RLA makes specific provision for urgent repairs for which the landlord is responsible (whether under s 52(2) or under the terms and conditions of the lease). Section 52(5) permits a tenant who carries out these repairs to obtain reimbursement of costs from the landlord.

64 By clause 6.4 of the lease, the landlord must keep the structure (including the external faces and roof) of the building in a condition consistent with their condition at the start of the lease, but is not responsible for repairs which are the responsibility of the tenant.

65 The parties agree that at the commencement of the lease the facade wall was not structurally sound. I accept the evidence of the tenant including photographic evidence taken in September 2017 of water coming in through the facade windows onto the floor of the balcony area and that the condition of the façade worsened over the time the tenant was in possession. The parties both gave evidence that at the start of the tenancy this area did not leak. Accordingly, there is an obligation upon the landlord under clause 6.4 of the lease to keep the structure in a condition consistent with the condition at the start of the lease.

66 Both parties agree that the landlord refused to carry out the repairs to the façade following the quote by Dennis in 2017 of $4000 or $6000.

67 Mr Talmor gave evidence that he engaged Mr S Weller to repair the facade area and stop the leaking. Receipts were produced to substantiate the cost of the repair at $2750.

68 Given the time that elapsed between the area leaking and repairs being carried out, I do not classify the repairs as urgent in the sense of urgent repairs under s52 of the RLA.

69 I find it reasonable that the tenant arranged the repairs to the façade when the landlord refused to do so. I find that the repairs were necessary to stop the ongoing deterioration of the facade including leaking. I find the cost of the repairs by the tenant in the sum of $2,750 to be reasonable. The tenant is entitled to be reimbursed this amount by the landlord.

70 The tenant claims compensation for its inability to use the first-floor premises between March and September 2017. No detailed reason was provided as to why the tenant could not have used some parts of level one of the premises other than the balcony area as a way of mitigating any loss. On its own evidence it did not obtain town planning approval until 18 July 2017. Until such approval was given, the premises could not operate as a bar. Accordingly, there can be no entitlement to compensation for any period of time prior to 18 July 2017. I am not satisfied that the tenant was in a position to proceed with the opening of the bar any earlier than it did. I note that the tenant had its chef reside in the upstairs area which prevented Dennis from undertaking some structural repairs to the facade area in early 2017 at the landlord's expense.

71 I do not award any compensation to the tenant for this claim as I find that the landlord was not responsible for any delay in operating the bar area. It was clear to the tenant in March 2017 that Dennis was not going to carry out any works in the balcony area. At that point of time it was open to the tenant to undertake those works. The tenant did not do so until October 2017.

Ground floor air-conditioning unit

72 The tenant claims the cost of replacing an air-conditioning unit on the ground floor. Mr Talmor purchased a replacement unit for a broken unit on eBay for $202. A receipt was produced as evidence of the purchase price. Mr Talmor says he had not previously asked the landlord to reimburse him because he was not aware of the landlord's responsibility.

73 The air-conditioning unit is an installation of the landlord under clause 6.4 of the lease. As such the landlord is required to keep it in a consistent condition as at the start of the lease.

74 No evidence was given by the tenant to suggest that it followed the strict requirement of s52 (4) and (5) of the RLA concerning the replacement of the unit. Given however the relaxed adherence by the parties to the strict requirements for consent for works under the lease, I find the tenant's failure to seek the landlord's assistance at the time or reimbursement of the unit cost earlier is not a bar to seeking reimbursement now.

75 I find that the landlord is required to reimburse the tenant the sum of $202 for the replacement air-conditioning unit.

CONCLUSION

76 I find that the landlord is not entitled to terminate the lease on any of the grounds in the Notices of Default.

77 I also find that the tenant was not in breach of the lease and has not repudiated the lease by reason of any matters raised before the Tribunal.

78 The landlord must reimburse the tenant $2,750 for the works undertaken by the tenant to the façade and $202 for replacing the air-conditioning unit.

79 The tenant is required to pay the landlord $450 being a reasonable amount for the landlord's legal fees of issuing the January 2018 Notice of Default. I disallow the full amount claimed on the basis that numerous grounds of default set out in the notice have not been found to be defaults under the lease. I find that the landlord is not entitled to recover any legal fees from the tenant in relation to the May 2018 Notice of Default as the notice was substantially the same as the January notice and the tenant was not, except for the cool room, in default of the lease.

80 The landlord's request for an order for possession of the premises is therefore dismissed.

81 The tenant's claim for reimbursement of costs relating to the removal of the first-floor carpet is dismissed.

82 The tenant's claim for loss of income is dismissed.

L. Forde
Senior Member