VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP179/2014

CATCHWORDS

RETAIL LEASES–COSTS–Section 92 *Retail Leases Act* 2003–landlord's application for costs–whether tenant's proceeding was bound to fail such as to amount to the tenant having "conducted the proceeding in a vexatious way".

Multiple causes of action pleaded by tenant–whether it is necessary for a finding that the entire proceeding was bound to fail so as to amount to the tenant having conducted the proceeding in a vexatious way–found that a cause of action forming part of the tenant's proceeding, and which took up appreciable hearing time, including the cost of preparation of experts reports and experts' testimony, was bound to fail–found that, to this extent, the proceeding was conducted in a vexatious way within the meaning of section 92 of the *Retail Leases Act* 2003, entitling the landlord to a "specified part of the costs" within the meaning of that section, such part being in respect of the dismissed cause of action.

Whether other aspects of the conduct of the proceeding by the tenant amounted to conducting the proceeding in a vexatious way, including allegedly using the proceeding for a collateral purpose so as to amount to vexatious conduct–no evidence to support such findings.

APPLICANT (First Respondent to Counterclaim)	Grenville Trading Pty Ltd
(Second Respondent to Counterclaim)	Wayne Hall
RESPONDENT (Counterclaimant)	Robert Braszell
WHERE HELD	Melbourne
BEFORE	Member A T Kincaid
HEARING TYPE	Costs application.
DATE OF HEARING	5 March 2018
DATE OF ORDER AND REASONS	29 August 2018
CITATION	Grenville Trading Pty Ltd v Braszell (Building and Property) (No 4) (Costs) [2018] VCAT 1332

ORDER

1. Subject to order 2, the applicant must pay the costs incurred by the respondent in respect of the applicant's claim for damages based on the

applicant's allegation that it had duly renewed the lease (including the applicant's related causes of action for relief from forfeiture and unconscionability).

2. For the purpose of order 1, the respondent's costs are declared to be:
   (a) those incurred by the respondent in respect of 2 hearing days (both instructing solicitor's and Counsel's fees);
   (b) a further 12 hours in respect of the respondent's instructing solicitors and Counsel reviewing the applicant's expert witnesses statement on quantum, instructing the respondent's own witness on quantum, and preparing for the hearing in respect of quantum issues; and
   (c) the professional costs charged by the respondent's expert witness, both in respect of his reports and for his attendance at the Tribunal.
3. If the costs ordered by order 1 are not agreed, they are to be assessed by the Victorian Costs Court calculated on the *County Court Scale of Costs* on the standard basis.
4. Save for orders 1-3, the respondent's claim for costs is dismissed.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr C R Northrop of Counsel
For Respondents	Mr P Duggan of Counsel

REASONS

1 I heard the proceeding on 14-18 November 2016 and on 21-25 November 2016. I made my orders on 6 September 2017, following the exchange of lengthy written submissions, and final oral submissions on 30 August 2017.

2 The respondent applies for his costs of the proceeding, from the date on which I determined a preliminary question.

BACKGROUND

3 The proceeding concerned premises in Vincent Street, Daylesford (the "**premises**"), leased by the applicant (the "**tenant**") on 26 February 2010 as an assignee of a lease dated 7 August 2009 (the "**lease**") from the respondent (the "**landlord**").

4 Beyond the initial 5-year term expiring on 31 May 2014, the lease also granted the tenant options in respect of three further terms of 5 years each.

5 Mr Wayne Hall ("**Mr Hall**"), the sole director of the tenant and second respondent to the counterclaim, is guarantor of the tenant's obligations.

6 The permitted use of the premises under the lease was a licensed grocery store.[1] The tenant conducted a business at the premises known as the "IGA Supermarket".

7 At the expiry of the term on 31 May 2014, the landlord had not given the tenant notification under section 28 of the *Retail Leases Act* 2003 (the "**Act**") of the last day for the exercise by the tenant of the option to renew. It was not until 19 December 2014 that the landlord gave such notice (the last day being 19 June 2015) and so, pursuant to section 28(2)(b) of the Act, the lease continued to 19 June 2015, on the same terms and conditions of the lease.

8 The Municipal Building Surveyor of the Hepburn Shire Council (the "**Council**") served on the tenant a Building Notice dated 12 June 2014, requiring the tenant as occupier to show cause why stipulated works to the western section of the premises should not be carried out. The reason for this Notice was the existence of damage to the floor and sub-floor of the western end of the premises which, in the Municipal Building Surveyor's view, made continued occupation of that part of the premises dangerous. The western section of the premises had been used by the tenant for deliveries.

9 The Municipal Building Surveyor served on the tenant an amended Building Notice dated 16 June 2014 requiring the evacuation of the western section of the premises. It was stated to have been served in reliance on a report of a Mr Ross Proud, Structural and Civil Engineer dated 13 June 2014.

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[1] Item 15 of the Schedule to the lease.

10 The Council served a Building Order dated 5 August 2014 (the "**Building Order**") on the tenant, preventing occupation of a section in the western part of the premises until stipulated works had been carried out.

11 The tenant vacated the premises in late September 2014 when, allegedly as a result of the Building Order, it said it could no longer trade.

12 The tenant did not pay rent (being entirely in the nature of back-dated CPI increases for the period 1 June 2010-30 September 2014) that had then been claimed by the landlord, amounting to $20,591.01.

13 By email dated 10 June 2015, the tenant purported to exercise its option to renew.

14 By a caveat lodged on 28 January 2016, the tenant, seemingly confident that it had renewed the lease, claimed a leasehold interest in the land on which the premises are located.

15 The premises therefore remained vacant since late September 2014, save for the landlord accessing the premises for the purpose of carrying out repair works which, at the time of the hearing, were largely complete.

THE COURSE OF THE PROCEEDING

16 The dispute arose because each party alleged that the other was responsible for causing damage to the wooden floor and sub-floor of the premises, which resulted in the service of the Building Order.

17 The tenant commenced the proceeding on 7 August 2014, seeking injunctive relief, and compensation for losses arising from the alleged structural failure of the premises.

18 The tenant sought the following relief:

(a) that the landlord immediately commence structural repairs to the premises as identified in the [Building Notice] of 16 July 2014[2] and [the Building Order].

(b) that the landlord be injuncted from preventing access to the premises by [the tenant]; and

(c) that the landlord compensate the tenant for losses arising from the structural failures of the premises.

19 The tenant filed points of claim dated 24 October 2014, in which it relevantly alleged:

> 1. The [tenant held] and currently holds the lease for [the premises and] operates, to the extent permissible by the physical condition of [the premises], the business of selling groceries
>
> …

[2] This was presumably intended to be a reference to an amended Building Notice dated 16 June 2014.

> 9. By the end of August 2014, the premises had become unsafe and unusable for the permitted purpose…
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> 10. The sub floor of the Supermarket had become so damaged [by the end of August 2014] by the long term effects of water exposure it had failed, or was near failure, in so many parts that it was not possible to continue the operation of the Supermarket. …While the operations were continued as long as possible and every attempt was made to mitigate loss, cessation of operations was the only alternative available to the [tenant]. The Supermarket was closed to the public on 24 September 2014.
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> …
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> 17. The necessity to cease trading due to the unsafe and unusable state of the premises has caused [the tenant] loss and damage.
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> 18. In the circumstances the [landlord] is liable to make good the premises such that they comply with all relevant authorities and standards and such that the premises can lawfully be used [by the tenant] for the permitted purpose identified in the lease.

20 In addition to the tenant's "landlord make good" declaratory relief claim, the tenant conducted the litigation on the basis that it had, by its email dated 10 June 2015, duly renewed the lease for the first 5 year period to 31 May 2019. In anticipation, therefore, of proving that it had duly done so, the tenant filed an expert's report of Mr Bruce Wilkinson, Chartered Accountant, providing his opinion on the tenant's past loss of operating profit for the 29 month period from 1 July 2014 to 30 November 2016 in the amount of $370,000. The tenant claimed future losses from 1 December 2016 to 31 May 2019 in the further amount of $565,000.

21 The landlord filed a defence and points of counterclaim dated 26 November 2014, seeking declaratory relief, and the rent arrears of $20,591.01 for the period to 30 September 2014.

22 My final orders dismissed the tenant's "make good" claim, and its damages claim. In doing so, I found that the tenant had not renewed the lease beyond 19 June 2015.

23 My final orders required the tenant to pay to the landlord the claimed arrears of $20,591.01. In addition, I ordered the tenant to pay the landlord $138,591.01 being rent for the period from 1 October 2014 to 19 June 2015, and mesne profits thereafter to 31 October 2016. I also ordered the tenant to pay the landlord a further sum of $56,380.62 as mesne profits from 1 November 2016 to 6 September 2017, the date of my order.

24 I also dismissed the landlord's counterclaim for rectification costs.

First Preliminary Question

25 The landlord contended that the lease came to an end as a result of the events at the end of September 2014, when the applicant vacated the premises. If this were so, it would have followed that the amount of

damages that were sought by the tenant in the proceeding, and to which I have referred, would have been substantially reduced.

26 I therefore agreed to hear argument on this issue, by way of answering preliminary questions, and determined them by orders dated 3 July 2015.[3]

27 In summary, I found that, contrary to the submissions of the landlord, the lease did not come to an end in when the tenant left the premises in late September 2014, by surrender at law, by a purported re-entry by the landlord pursuant to the terms of the lease for the failure by the tenant to pay rent or, as further contended by the landlord, by his alleged rescission upon the tenant's alleged repudiation.

28 My reason for finding that the purported re-entry pursuant to the terms of the lease was unlawful was that the landlord had not given the required written notice under the lease.[4]

29 I also went on to find that the tenant was not entitled to withhold payment of the entire claimed outstanding rent of $20,591 on account of the failure by the landlord to render a valid tax invoice, but was entitled only to withhold that part of the claimed indebtedness relating to GST, a sum of $1,871.90.[5]

30 From the landlord's point of view, therefore, these findings were to the effect that the balance of the rent claimed in the amount of $18,719 was therefore due and payable.

31 I also found, on the evidence then available at the date of the first preliminary hearing, that the tenant was not entitled to suspend payment of the balance of the claimed rent on account of a claim that the premises could not be used or accessed for the permitted use. The question arose because of the ability of a tenant, granted by section 57 of the *Retail Leases Act 2003* (the "**Act**") to suspend payment of rent when premises cannot be used or accessed for the permitted use, or to suspend payment of a proportion of the rent commensurate to usage (reflected also in the provisions of clause 8.1 of the lease). I found that there was no evidence before me that, at any time prior to the service of the Building Order, the premises were not being used or accessed by the tenant for the purpose of the permitted use of a licensed grocery store.[6]

Second Preliminary Question

32 Clause 12 of the lease provided:

> 12. **FURTHER TERM(S)**

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3 *Grenville Trading Pty Ltd v Robert Braszell* (Building and Property) [2015] VCAT 985.
4 Ibid at [93]-[114].
5 Ibid at [115]-[123].
6 *Grenville* (ibid) at [124]-[129].

12.1 The tenant has an option to renew this lease for the further term or terms stated in item 18 and the landlord must renew this lease for that further term or further terms if,

12.1.1 there is no unremedied breach of this lease by the tenant of which the landlord has given the tenant written notice,

12.1.2 the tenant has not persistently committed breaches of this lease of which the landlord has given written notice during the term, and

12.1.3 the tenant has requested the renewal in writing not more than 6 months nor less than 3 months before the end of the term. The latest date for exercising the option is stated in item 19 (**emphasis added**).

33 The landlord also relied on section 27(2) of the Act, which states:

(2) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if-

(a) **the tenant has not remedied any default under the lease** about which the landlord has given the tenant written notice; or

(b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

34 It followed therefore, the landlord subsequently contended, that the tenant was in breach of the lease for not paying the balance of the rent to the landlord, given my earlier finding that there were no rights of abatement found to have been available. If so, the tenant was in breach or default of the lease within the meaning of the above provisions at the time it purported to exercise its option to renew on 10 June 2015. The landlord submitted that the purported exercise of the option by the tenant therefore had no effect.

35 The landlord submitted that if the purported renewal had failed, as suggested by my findings when answering the first preliminary question, the damages sought by the tenant in the proceeding would be substantially reduced. This is because the tenant would have had no interest in the premises after 19 June 2015. The length and expense of the litigation (if it then proceeded at all), the landlord argued, would therefore have been substantially lessened.

36 I subsequently agreed to hear a second preliminary question, and determined it by my orders dated 30 May 2016.[7]

37 In the event, I found on the second preliminary question, and for the reasons I gave,[8] that my consequential findings expressed in my reasons, when answering the first preliminary question, did not give rise to an issue estoppel against the tenant on the question whether, at the time of

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7 *Grenville Trading Pty Ltd v Robert Braszell* (Building and Property) [2016] VCAT 877.
8 Ibid at [45]-[48].

purporting to exercise its option to renew, the tenant was in breach of the lease. This meant that it was open to the tenant, at the hearing of the proceeding, to submit that at the time it purported to exercise its option to renew, when there was rent found to have been outstanding, it was not in breach or default of the lease because, for instance, it had a right of abatement at law in respect of such rent.

GENERAL PRINCIPLES APPLICABLE TO COSTS APPLICATIONS UNDER SECTION 92

38 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* empowers the Tribunal to make costs orders in certain circumstances.

39 Section 92 of the Act overrides that provision. It provides:

> (1) Despite anything to the contrary in Division 8 of Part 4 of [the Act], each party to a proceeding before the Tribunal under [Part 10 of the *Retail Leases Act*] is to bear its own costs of the proceeding.
>
> (2) However, at any time the Tribunal may make an order that a party shall pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because-
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> (a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or
>
> (b) the party refused to take part in or withdrew from the mediation or other form of alternative dispute resolution **under this Part** (emphasis added]

40 The parties agree that section 92(2)(b) of the Act is not relevant.

41 It follows then, that if I am to order costs against the applicant, I must be satisfied that it is fair to do so, because I find that either one of the criteria in sub-paragraphs (a) and (b) applies.

Conducting the Proceeding in a Vexatious Way

42 In a much-quoted decision *Attorney-General (Vic) v Wentworth*,[9] Roden J stated:

> It seems to me that litigation may properly be regarded as vexatious for present purposes on either subjective or objective grounds. I believe that the test may be expressed in the following terms:
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> (a) proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
>
> (b) they are vexatious **if they are brought for collateral purposes,** and not for the purpose of having the Court adjudicate on the issues to which they give rise;
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> (c) they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, **they are so obviously untenable or manifestly groundless as to be utterly hopeless** (emphasis added).[10]

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9 (1988) 14 NSWLR 481 at 491.

10 ibid at 223.

43 In *State of Victoria v Bradto Pty Ltd*[11] his Honour Judge Bowman held that a proceeding is conducted in a vexatious matter "if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging".[12] The Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[13] agreed that his Honour's description "encapsulates the circumstances in which conduct may be classified as vexatious".[14]

44 The relevant test was also carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[15] and concluded:

> [77] By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:
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> (a) commenced an action for damages, following the finding that the Respondent was in breach of the lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;
>
> (b) **persisted in what should, on proper consideration, be seen to have been a hopeless case**;
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> (c) **engaged in conduct which caused a loss of time to the Tribunal and the Respondent**;
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> (d) commenced a proceeding in wilful disregard of known facts or clearly established law; and
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> (e) **made allegations as to losses which it claimed to have incurred, which ought never to have been made.**
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> [78] In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages (**emphasis added**).

45 In *24 Hour Fitness*, an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval.

46 On appeal,[16] the applicant submitted that for the purposes of section 92 of the Act, it is the conduct of the party in the proceeding that is material, not a

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11 [2006] VCAT 1813.
12 Ibid. at [67].
13 [2015] VSCA 216.
14 Ibid. at [4].
15 See *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* (Costs) (Building and Property) [2015] VCAT 596
16 *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216.

consideration of the strength of its claims as had been taken into account at first instance. The Court of Appeal rejected the submission:

> [28] The applicant's criticism does not take into account the Tribunal's detailed analysis of the 14 matters upon which the respondent relied as constituting vexatious conduct. As can be seen from what we have set out above, the Tribunal carefully considered each of those matters and made findings in respect of them. It is obvious that the Tribunal relied upon those findings in reaching the conclusion that the case was an appropriate one in which to order costs. True it is that the Tribunal also considered the hopelessness of the applicant's claim, but there is no error in that. The strength of the applicant's claim for damages was a relevant factor to take into account.
>
> [29] It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having regard to the strength of that party's case. In the present circumstances, it was relevant [for the purpose of determining whether the applicant conducted the proceeding in a vexatious way] that the applicant pursued the damages claim, in circumstances that it was bound to fail.

47 I therefore consider that when deciding whether a proceeding is conducted in a way productive of serious and unjustified trouble or harassment, or whether there is conduct which is seriously and unfairly burdensome, prejudicial or damaging, so as to constitute the conduct of a proceeding in a vexatious way within the meaning of section 92(2)(a) of the Act, a relevant consideration is where the proceeding is maintained in circumstances that it is obviously untenable or manifestly groundless as to be utterly hopeless or, in the words of the Court of Appeal, "bound to fail".

THE LANDLORD'S SUBMISSIONS

48 The landlord contends that each of the two main causes of action in the tenant's proceeding were both hopeless, and therefore the proceeding was bound to fail.

49 These causes of action comprised:

(a) the seeking of a declaration that the landlord was liable pursuant to section 52 of the Act for carrying out repairs to the sub-floor of the premises that had allegedly been damaged by water and/or condensation;

(b) the claimed entitlement of the tenant to damages at law and/or compensation under section 54 of the Act for breach of section 52 of the Act and the lease, in respect of the period *beyond* the date of the end of the lease, 19 June 2015.

50 The landlord therefore contends that the tenant conducted the proceeding in a vexatious way within the meaning of section 92(2)(a) of the Act.

51 The tenant denies that the causes of action were hopeless.

Discussion and findings-the tenant's first cause of action

52 I now consider the tenant's first cause of action.

53 In issue here was whether the landlord had failed to maintain the premises in a condition consistent with their condition when the lease was entered into, or whether the need for repairs arose out of misuse by the tenant.

54 The origin of the dampness and/or water affecting the bearers and joists in the sub-floor of the premises, resulting in structural failure, was the key issue in the proceeding. Was it leaking refrigeration and freezer equipment owned by the tenant, or some other and if so, what cause?

55 The other causes of the dampness, alleged by the tenant, were the existence of high ambient moisture caused:

(i) by a lack of sub-floor ventilation; and

(ii) the pooling of water in the sub-floor caused by a leaking storm gutter located in the north parapet of the premises.

56 For its expert evidence in regard to the first alleged cause, the tenant relied principally on the evidence of Mr Ross Proud, chartered professional engineer (who prepared reports dated December 2010, 24 May 2012, 16 April 2014 and 8 October 2014). In respect of the second alleged cause, the tenant relied on the evidence of Mr Peter Shaw, architect (who also swore an affidavit sworn 12 August 2014), whose particular experience is the design and construction of supermarkets.

57 The landlord relied on the expert opinion of Mr Bruce Cossins, registered engineer and building surveyor and Mr Bruce Hollioake, consulting civil and structural engineer.

58 Both parties also relied on lay evidence.

59 In the event, I made the following findings (excluding footnotes):

> ...
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> [324] The lay and expert evidence demonstrates to my satisfaction that the damage to the floor was caused by the tenant's leaking and inadequately insulated refrigeration equipment, and the excessive weight of that equipment.
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> [325] It is notable that no witness called by the applicant was asked about the presence of drip trays or properly functioning drainage installations for water from the refrigeration equipment.
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> [326] I find that after the initial discovery of damage to the flooring from leaking refrigeration equipment in May 2010, the condition of the flooring and sub-floor deteriorated as water continued to leak onto the wooden floors, and that it

gradually started to affect and damage the sub-floor areas as well.

[327] I find that the tenant was also aware, from the first Proud report, that the floor was unable to bear the weight of the tenant's equipment, and that no steps were taken by the tenant to alleviate the problems caused by excessive weight, despite a clear recommendation in the first Proud report.

[328] I find that the deterioration to the floor and sub-floor after May 2010 was due to misuse by the tenant within the meaning of section 52 of the Act, in continuing to use the refrigeration equipment, when the tenant knew or should have known that it was too heavy.

[329] It follows that the damage to the premises, resulting in a Building Order dated 5 August 2014 being served by the Shire of Hepburn, and the tenant's subsequent vacating of the premises in late September 2014, was not due to:

(a) any failure by the landlord to maintain the structure of, and fixtures in, the premises consistent with the condition when the lease was entered into on 1 June 2009, as required by section 52(2) of the *Retail Leases Act 2003*;

(b) any failure by the landlord to keep the structure (including the external faces and roof) of the building in which the premises are located in a condition consistent with their condition at the start of the lease on 1 June 2009 (as required by clause 6.4 of the lease); or

(c) any other like obligation on the landlord

but was due to the failure of the tenant to comply with 3.1.1 and 3.2.5 of the lease, in default of the lease, and the tenant's misuse within the meaning of section 52(3) of the *Retail Leases Act 2003*. The [tenant's] claim in this respect is dismissed.

60 My reasons make it plain that in reaching my conclusion as to the cause of the damage to the structure of the premises, I attached prime importance to the physical observations made by persons who were able to view the sub-floor in 2010. These included:

(i) the landlord's observations during his inspections in May 2010;

(ii) the written observations in the report of a Mr Simon Fuller, refrigeration engineer engaged by the tenant, included in his report dated 26 June 2010 (defined in my reasons as the "second Fuller report");

(iii) the written observations from a Mr Rothberger of Patersons *Insurerbuild,* engaged by the landlord's insurers following his inspection of the sub-floor on 6 August 2010; and

(iv) the observations made on 11 September 2010 by the tenant's expert Mr Proud, chartered professional engineer, of "standing water" under freezer units, and confirmed in the first Proud report dated December 2010 (and noting that Mr Proud subsequently changed his opinion, such as to be of the view that the dampness did not emanate from the refrigeration or freezer units).

61 The landlord therefore submits that the tenant's cause of action in this respect was hopeless and had no prospects of success, given the contents of the second Fuller report (compounded by the failure to call Mr Fuller), the first Proud report and the lay evidence.

62 I do not agree. The issue was primarily one of causation. I consider that the physical observations made by Mr Fuller and Mr Rothberger, recorded in their respective reports, the tenant's subsequent unexplained decision not to rely on these gentlemen, and the revision by Mr Proud of his initial views and observations expressed in his first report all significantly lessened the tenant's prospects of its proving that the cause of the damage was as it alleged. However, the tenant also had to hand the revised opinion of Mr Proud and the opinion of Mr Shaw, both of whom ascribed different causes to the high ambient moisture surrounding the sub-floor and which resulted in its alleged failure, being the physical state of the premises generally. I consider that these opinions were arguable, albeit perhaps faintly so, and notwithstanding the weaknesses identified by the landlord in Mr Shaw's evidence. Given this, I find that the cause of action was not bound to fail.

Discussion and findings-the tenant's second cause of action

63 Had the proceeding involved only one cause of action, that is to say, if the tenant had only sought a declaration that the landlord was liable pursuant to section 52 of the Act for carrying out repairs to the sub-floor of the premises that had allegedly been damaged by water and/or condensation, my decision on costs would have been straightforward. Such a proceeding, as I have found, was not bound to fail, and therefore it was not vexatious within the meaning of 92(2)(a) of the Act.

64 However, the landlord also relies on the argument that the tenant's second principal cause of action, being its claimed entitlement to damages at law and/or compensation under section 54 of the Act for breach of section 52 of the Act and the lease, in respect of the period *beyond* 19 June 2015, the date of the end of the lease, was also bound to fail.

65 If I find this to have been the case, it would be open to me, provided I am satisfied that the other criteria in section 92 of the Act are satisfied, to make an order in favour of the landlord for the costs incurred in respect of that cause of action. I consider that such a course is open to me because the

express words of section 92(2) of the Act, by which the Tribunal may make an order that a party pay "a specified part of the costs of another party in the proceeding", enables the Tribunal to find that "…[conducting] the proceeding in a vexatious way…" in section 92(2) of the Act extends to the conducting of a cause of action in the proceeding in a vexatious way.

66 I therefore proceed to assess whether the tenant's claim that the lease had been renewed was bound to fail.

67 It follows from the summary of events above that as matters stood at 30 May 2016, the date of my determination of the second preliminary question, it remained open to the tenant to prove, by reference to either having had no access or only limited access to the premises for the period 1 June 2010-30 September 2014, or in reliance on some other ground, that it was not liable to pay rent (less the GST element) of $18,719 for that period.

68 For the reasons that accompanied my orders dated 6 September 2017,[17] I found that:

(a) the tenant was in breach of the lease at the time that it purported to exercise its option to renew, by having failed to pay rent to the landlord when demanded;

(b) written notice of breaches of the lease, within the meaning of section 27(2) of the Act, were given by the landlord to the tenant;

(c) as a result of the tenant's breaches, and subsequent notices given by the landlord, the lease came to an end on 19 June 2015, notwithstanding the tenant's purported exercise of its option to renew on 10 June 2015; and

(d) no relief against forfeiture could be granted to the tenant under section 89(2) of the Act, or on the grounds of alleged unconscionable conduct by the landlord within the meaning of section 77 of the Act.

69 The landlord submitted, in support of its argument for costs, that the tenant's case for renewal of the lease had no chance of success. In particular, the landlord contends that my findings on the first and second preliminary questions had fairly put it on notice that it might only seek to demonstrate that it was not in breach of the lease for failing to pay rent by proving that it was entitled at law to an abatement of its rent obligation,[18] and that the tenant never sought to do so.

70 Properly advised, the landlord says, the tenant would have known, on the facts, that it had failed to exercise its option to renew the lease, and that its claim for renewal was always going to fail.

71 I observed in my reasons accompanying my orders determining the first preliminary question that there was no evidence that at any time prior to

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17 *Grenville Trading Pty Ltd v Robert Braszell* (No 3) (Building and Property) [2017] VCAT 1426.

18 See *Grenville Trading Pty Ltd v Robert Braszell* (Building and Property) [2015] VCAT 985 at [127]-[129]

service of the Building Order, the premises could not be used or accessed by the tenant for the purpose of a licensed grocery store, sufficient to give rise to an entitlement to suspend any proportion of the rent payable prior to that date. I observed that the most that the tenant had asserted, in correspondence that was in evidence, was that "the first occasion of the floor failing was in 2010 and that here had been "ongoing issues with significant sections of the supermarket having to be closed off in 2010".

72 I subsequently held in my determination of the second preliminary question that my consequential finding that the tenant did not have any right to suspend its obligations to make payment of rent pursuant to clause 2.1 of the lease[19] did not, however, create an issue estoppel against the tenant, and it would have therefore been open to the tenant to lead evidence, or make a legal submission in the absence of further evidence, that it did have such a right.

73 There was no evidence led by the tenant at the hearing that it was not liable to pay the rent (less the GST element) of $18,719 for the period 1 June 2010-30 September 2014, whether by reference to either having had no access or only limited access to the premises for that period, or in reliance on some other legal ground.

74 I find that, given the failure of the tenant to lead any evidence as would have provided it with a basis for withholding the rent the subject of the landlord's claim in September 2014, its claim that it had duly renewed the lease by its email dated 10 June 2015 was bound to fail having regard to the provisions of section 27(2)(a) of the Act. Accordingly, applying the principles discussed in *24 Hour Fitness* I further find that, in respect of that cause of action, the tenant conducted the proceeding in a vexatious way within the meaning of section 92(2)(a) of the Act.

75 The actual claim made by the tenant for past loss of operating profit of $370,000 was for the 29 month period 1 July 2014-30 November 2016. In addition, relying on the false proposition that it had duly renewed the lease, the tenant also claimed the loss of alleged value of its business, beyond then, in the amount of $565,000.

76 Further, if the tenant had accepted that in the absence of its establishing a right at law to a full abatement of the rent outstanding at the time it purported to renew the lease from 19 June 2015, the tenant's damages claim would have been limited to the period 5 August 2014 (the date of the Building Order) to the date of the end of the lease 19 June 2015, a period of about 10 months. Such a claim would have amounted to $127,586, applied pro-rata to the 29-month loss of profits claim of $370,000 from 1 July 2014 to 30 November 2016.

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[19] See *Grenville Trading Pty Ltd v Robert Braszell* (Building and Property) [2015] VCAT 985 at [128].

77 It might therefore be contended, with some force, that had the tenant properly considered the likely outcome on its renewal claim, its claims against the landlord for both the "make good" declaration, and for damages, would never have been pursued at such cost, with the landlord consequently avoiding the payment of costs it has been forced to outlay in defending the entire proceeding and bringing his counterclaim. Having regard to all the circumstances though, and in the absence of some persuasive evidence to this effect, I do not think that I am in a position to go so far as to make such a finding.

78 I also find, for the reasons I gave in my final decision, that the tenant's claim that the landlord acted unconscionably, as a basis for its contention that the landlord was not entitled to rely on the strict terms of section 27(2) of the Act, was also bound to fail.[20]

79 I also find that the tenant's claim for relief from forfeiture of the term the subject of the option was also bound to fail, given the authorities to which I referred in my reasons.[21]

THE TENANT'S SUBMISSIONS

80 The landlord sought damages by reason of the tenant's alleged breaches of clauses 3.1.1, 3.2.5 and 3.3.2 of the lease.

81 These damages amounted to $79,241.07 being the expenses allegedly incurred by the landlord in carrying out reinstatement works to the floor and sub-floor of the premises, and the claimed value of the landlord's own time allegedly in undertaking these works in the amount of approximately $96,000.

82 The tenant submits that, in this respect, the landlord relied on a cause of action in his counterclaim that was bound to fail. The tenant submits that this should also, in fairness, be considered in the context of costs.

83 By way of background, Clause 3.3.1 of the lease provided:

> The tenant is not obliged
>
> 3.3.1 to repair damage against which the landlord must insure under clause 6.2 unless the landlord loses the benefit of the insurance because of acts or omissions by the tenant or the tenant's agents
>
> 3.3.2 to carry out structural or capital repairs or alterations or make payments of a capital nature unless the need for them results from:
>
> (a) negligence by the tenant or the tenant's agent
>
> (b) failure by the tenant to perform its obligations under this lease,

[20] At [414]-[441].
[21] At [442]-451].

(c) the tenant's use of the premises, other than reasonable use for the permitted use, or

(d) the nature, location or use of the tenant's installations,

in which case the repairs, alterations or payments are the responsibility of the tenant.

84 I found that

(a) the damage was caused by the use by the tenant of refrigeration and freezer equipment that was too heavy for the floor of the premises, and by the failure of the tenant to rectify faults in the drainage installations forming part of that equipment;

(b) the need to repair the damage arose out of "misuse" by the tenant within the meaning of section 52(3)(a) of the Act amounting also to a breach by the tenant of clauses 3.1.1 and 3.2.5 of the lease;

(c) to the extent that the need for repair did not arise from "misuse" by the tenant or if, notwithstanding the "misuse", the landlord was by force of clause 3.3.1 of the lease nevertheless obliged to repair the relevant part of the premises, the landlord was unable to comply with this obligation because he was denied access to the damaged portions of the premises for the purpose of doing so; but that

(d) the landlord was not entitled to damages in the nature of rectification costs that have resulted from the tenant's breaches of the lease, by reason of the operation of clause 3.3.1 of the lease.

85 It was only during final submissions, and over the objection of the landlord, that the tenant raised clause 3.3.1 as a defence to these claims. Notwithstanding its lateness, I allowed it to be relied on. I subsequently convened a further short hearing, whilst the proceeding was reserved for decision, to provide a further opportunity to the landlord to indicate whether he wished to lead any evidence in response. The landlord chose not to do so.

86 The landlord argues that the late reliance on the point was "without justification" and that, had the defence been raised earlier, "the landlord would not have incurred the time, trouble and expense of seeking to establish the cost of effecting repairs covered by the insurance…[there] would have been no need to consider issues of betterment…the hearing would have taken less time, the landlord's witness statement would have been shorter and submissions would have been briefer as well". These matters were in fact raised in support of the landlord's contention that the tenant conducted the proceeding in a vexatious way. I do not agree. It was not the responsibility of the tenant promptly to raise a defence that may have protected the landlord from incurring the costs of prosecuting a cause of action that was not sustainable in fact or law on a plain reading of the lease.

87 I find that, had the landlord properly considered the meaning and effect of clause 3.3.1, the claim may well not have been brought. I find that the landlord's claim in this respect was bound to fail, if reliance was at any time to be placed by the tenant (as it was, in the event) on clause 3.3.1 of the lease.

DID THE CONDUCT OF THE TENANT UNNECESSARILY DISADVANTAGE THE LANDLORD?

88 Before I make any order for costs under section 92 of the Act, I must also be satisfied that the vexatious way in which I have found that the tenant conducted its second cause of action "unnecessarily disadvantaged" the landlord.

89 I find that in conducting the proceeding on the unsupportable basis that it had, by its email dated 10 June 2015 renewed the lease, the tenant unnecessarily disadvantaged the landlord within the meaning of section 92(2)(a) of the Act.

90 That disadvantage was the cost of having to engage an expert Mr McCann, Chartered Accountant, to respond to the tenant's claim for damages, the cost of hearing time devoted to these issues (including an adjournment of the hearing, during his cross-examination, to enable Mr Wilkinson to amend his report), and, in particular, the landlord's not being able to offer the property for lease whilst the tenant's second cause of action remained undetermined.

IS IT FAIR TO AWARD COSTS TO THE LANDLORD?

91 For the reasons I have described, I consider that it is fair to award to the landlord his costs incurred defending the tenant's cause of action for damages relating to the period *beyond* the date of the end of the lease, 19 June 2015.

92 In coming to this view, I have also carefully considered the likely costs to the tenant of defending the claim by the landlord for rectification costs which, I have also found, was bound to fail if reliance was ever to be placed by the tenant on the express terms of clause 3.3.1. If there were costs of any substance incurred by the tenant, comparable to the landlord's costs in defending the tenant's renewal claim, I would have been minded, in fairness, to have made no order for costs in respect of each of the two misconceived causes of action.

93 I find, however, that the lesser time spent during the hearing in respect of the landlord's claim, the absence of reliance by the parties on experts' reports in respect of it and the fact that there was no consequential loss to the tenant in respect of it (comparable to the landlord's inability to offer the premises for lease, by force of the tenant's second cause of action) are all factors which differentiate the respective claims. I have concluded that the

tenant was not "unnecessarily disadvantaged" by the landlord's claim within the meaning of section 92 of the Act.

OTHER MATTERS RELIED ON BY THE LANDLORD

94 The landlord also relies on other aspects of the tenant's conduct of the proceeding for its submission that it was conducted by the tenant in a vexatious way.

95 Principally, the landlord submits that it was continued for collateral purposes, and not for the purpose of having the Court adjudicate on the issues to which they give rise.

96 The landlord submits that the continuation of the proceeding only makes sense if seen as a means of forcing the landlord to sell the property to the tenant.

97 The landlord relies on the contents of two emails from the tenant to a Mr Leiba, a person who the tenant thought was representing the landlord. The first email dated 26 August 2016 (about 3 months after my decision in respect of the second preliminary question) states, in part:

> I have been interested in purchasing the [premises]. As proof of [my] intent I signed purchase contracts on two separate occasions, first in 2012, when the [premises were] for sale through an agent, and most recently as part of a settlement agreement proposed by [the landlord] at the end of 2015.
>
> …If the building is for sale [I] would be interested in purchasing it.
>
> I know that the property is worth only land value because of the amount of work required to make good…and works related to [the Order]…and to get a Certificate of occupancy for the building.
>
> There are substantial works to meet building regulations related to emergency exits and other safety related matters…[There are] also substantial plumbing works required and works to cap a natural spring that discharges under the building.
>
> I do not know if you are aware of the full details of how degraded the state of the building is. It is unusable for any productive purpose without the investment of very considerable sums to restore it and due to heritage restrictions cannot be pulled down. You would be wise to ensure that your advice and information concerning the building is independent and accurate. Please note that the building is heavily mortgaged to the CBA and the state that [the landlord] has allowed the property to deteriorate to is well known to the CBA.
>
> **If [the landlord] wishes to continue with the purchase of [the adjoining property, owned by the tenant and used as a car park], including extinguishing the current lease and concluding all legal proceedings [I] will consider offers over $1,500,000** (*emphasis added, as being particularly relied on by the landlord*)...

98 A second email dated 26 August 2016 from the tenant to Mr Leiba states, in part:

> I invite you to read the findings of [Member Kincaid of VCAT] who has already found that the lease is on foot. I am also happy to provide evidence of the numerous independent witnesses who will be giving evidence that [the landlord] knew the building was in a dangerous and untenable (sic) state due to his negligence. No value or consideration can be given on the basis that [the landlord] will "win"; **it is only a question of how badly he will lose** (*emphasis added, as being particularly relied on by the landlord*)…

99 The landlord submits that these emails demonstrate that the tenant used the proceeding as a tool in negotiations for the purchase of the landlord's land at a low price, or for the sale of the tenant's adjoining land, and thus for a collateral purpose as to amount to vexatious conduct.

100 I do not agree. I also see no basis for making a finding of collateral purpose by the tenant's referring to the status of the proceeding, however incorrectly,[22] in commercial negotiations with the landlord's representatives.

101 In my view, there is no satisfactory evidence that, at the time of the tenant sending these emails, or at any other time, the tenant's purpose in maintaining the proceeding was simply to exact a commercial offer from the landlord in respect of the sale of the premises, or the purchase of the adjoining premises owned by the tenant.

102 Put another way, there would need to be some more persuasive evidence that the proceeding itself was brought for a collateral purpose, that is to say, not for the purpose of having the Tribunal adjudicate on the issues to which they give rise, before I could make such a finding. In this respect, the landlord also submits that the tenant never intended to re-occupy the premises as a tenant, as demonstrated by the tenant's alleged obstruction of works required to be undertaken by the landlord to the northern wall of the premises. Although there was evidence that the tenant was less than helpful with respect to these proposed works, I do not consider that the inference contended for by the landlord can fairly be drawn from the tenant's response to the proposals.

103 I have also considered the other aspects of the tenant's conduct of the proceeding relied on by the landlord for his submission that the tenant conducted the proceeding in a vexatious way, being:

(a) The tenant's witness statements did not comply with the relevant order of the Tribunal, and were inadequate, resulting in *viva voce* evidence having to be led;

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[22] The emails demonstrate that the tenant erroneously apprehended that the Tribunal had determined that the lease was on foot when, in fact, whether the tenant had duly exercised its option to renew beyond 19 June 2015 remained an issue for determination at the hearing.

(b) the Tribunal Book submitted by the tenant was completely unsatisfactory for the reasons submitted in the landlord's written submissions, adding to the length of the proceeding and consequential vexation of the parties and the Tribunal;

(c) the late amendment to the First Amended Points of Claim dated 28 April 2016;[23]

(d) the late attendance of witnesses and the need for Mr Wilkinson to revise his evidence, requiring him to give further evidence at a later date during the hearing; and

(e) the nature of the relief sought by the tenant being continually changed; and

(f) the allegedly misleading affidavit of Mr Shaw, and the fact that Mr Shaw had never seen the join in the gutter above the northern parapet from which, he opined, was the source of a leak resulting in high ambient moisture internally.

104 I have concluded that none of these examples of conduct, whether alone or taken together, is sufficiently contumelious as to justify a finding that the tenant conducted the proceeding in a way that was productive of serious and unjustified trouble to or harassment of the landlord, or was seriously and unfairly burdensome, prejudicial or damaging so as to amount to vexatious conduct. I therefore do not accept the landlord's submission.

105 I make the orders accompanying these Reasons.

106 I have done the best I can to calculate the time that would fairly have been incurred by the respondent in respect of the applicant's claim for damages based on the allegation that it had duly renewed the lease (including the applicant's related causes of action for relief from forfeiture and unconscionability).

A T Kincaid
Member

[23] A proposed second amended Points of Claim was tendered on the third day of the hearing 16 November 2017, and second amended Points of Claim were filed on 18 November 2017 with further minor changes to the body of the pleading and in the prayer for relief.