VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP946/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Retail leases Act 2003 – s.52 - obligation of landlord to carry out structural repairs – obligation to maintain structure in condition as at start of tenancy – quiet possession – breach of covenant by Landlord – repudiation of lease by Landlord – what constitutes – failure of Landlord to comply with notice served under *Building Act* 1993 – consequences – exterior of demised premises barricaded by Council and full scaffolding to be erected – actual and prospective effect on Tenants' business carried on in the premises – Tenants vacating premises – whether termination by Tenants valid – assessment of damages suffered by Tenants

APPLICANTS	Anita Loughran, Myles Loughran
RESPONDENT	Sharon Hasham
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	10 – 13 October 2017. Submissions received by 20 October 2017
DATE OF ORDER	11 December 2017
CITATION	Loughran v Hasham (Building and Property) [2017] VCAT 2067

ORDERS

1. Order the Respondent to pay to the Applicants the sum of $63,993.51.
2. The counterclaim is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr K. Hickie of Counsel
For the Respondent	Mr D. Epstein of Counsel

REASONS

Background

1. At all material times the Respondent ("the Landlord") was the owner of a two storey building in Queen Street Melbourne ("the Building").

2. The Building is very old. It is thought that the lower storey was built sometime in the 1860s and the upper storey, which is clad in sandstone, was built in the early part of the last century. It is classified by the National Trust and is listed on the Historic Buildings Register.

3. In March 2014, not long after purchasing the Building, the Landlord entered into negotiations with the Applicants ("the Tenants") to lease the Building for use as a "Cat Café". I am told that this is a concept that originated in Japan, where customers can enjoy coffee and other refreshments while watching cats play. The negotiations were carried out on behalf of the Landlord by Knight Frank, a firm of estate agents ("the Agents").

4. Following the negotiations, and on the instructions of the Agents, the Tenants attended the office of the Landlord's solicitors on 15 May 2014, signed a lease ("the Lease") and a disclosure statement and paid a security deposit of $35,200.00 that was required under the terms of the Lease. At that time they did not receive a copy of the Lease signed by or on behalf of the Landlord. The Tenants entered into possession of the Building on the same day.

5. The Lease was for a term of four years commencing on 15 May 2014. It provided for a rent of $110,000.00 plus GST per annum, payable monthly in advance. There were two rent-free periods, one being for the 1st month of the tenancy and the other being for the 13th month of the tenancy.

6. A number of disputes then arose between the parties, principally relating to the condition of the Building, which was quite dilapidated. Following a number of orders under the *Building Act* 1993 of increasing severity that were made by the Melbourne City Council ("the Council") and which were not complied with by the Landlord, the Tenants alleged that the Landlord had, by her conduct, repudiated the Lease. They purported to accept the repudiation, vacated the Building and moved their business to another location a short distance away.

7. The Tenants then commenced this proceeding to recover their security deposit of $35,200.00, the cost of emergency repairs for which they alleged the Landlord was responsible, amounting to $4,759.57 and trading losses and relocation costs, totalling in all $77,596.94.

8. The Landlord disputed the Tenants' purported termination of the Lease. She counterclaimed for what she asserted was unpaid rent, damages for an alleged failure by the Tenants to carry out Tenants' works required by the Lease and various other sums.

Hearing

9. The matter came before me for hearing on 10 October 2017 with four days allocated. The Tenants were represented by Mr K Hickie of counsel and Landlord was represented by Mr D. Epstein of counsel.

10. I heard evidence from each of the Tenants, from their employee, Miss Bowen, and from Mr Aldred of the Council. The Landlord gave evidence on her own behalf but called no other witnesses.

11. The Tenants' witnesses gave a detailed account of what they said had occurred and their evidence was supported by the documents that were produced. Mr Aldred gave evidence about the inspections of the Building that he carried out and the orders that the Council made. I see no reason to doubt the accuracy of any of the evidence given on behalf of the Tenants.

12. I thought that the Landlord was a most unsatisfactory witness. She provided no satisfactory explanation for the strange emails that she sent to the Tenants and to the Agents or for her behaviour, as described by the other witnesses.

13. Her allegation that the rental was in arrears was contrary to the other evidence.

14. Although the Tenants had signed the Lease and Disclosure Statement that had been prepared by her solicitors, she refused to provide a copy of the Lease signed by her to the Tenants and ultimately, she produced a copy of a lease document that she had signed with substantial differences that had been made in her favour. In one email that she sent, she alleged that there was no lease at all.

15. She said in her oral evidence that she did not know whether there was any lease document that was signed by both herself and the Tenants. Yet on the following day of the hearing she produced a document that she claimed was such a lease. On careful examination it was quite obvious that the signature page of this alleged lease had been taken from one of the other lease documents in order to create the document that she produced. I am satisfied that this was not a genuine document but something the Landlord had constructed for her own purposes.

16. Shortly after the commencement of the tenancy, the Landlord terminated the services of the Agents and thereafter purported to manage the tenancy herself. She obtained the security deposit of $35,200.00 from the Agents. By s.24 of the *Retail Leases Act* 2003 ("the Act") it was required to be paid into an interest bearing account. She said that she paid it into a bank account with the Bank of Melbourne in which she has other money. It appears therefore that she has mixed the security deposit with her own money. She also refused to provide tax invoices to the Tenants for the payments they made under the Lease, even though those payments included GST.

17. In general, I prefer the evidence of the Tenants' witnesses to that of the Landlord.

The issues

18. The main issue in the case was whether the Landlord repudiated the Lease as the Tenants alleged. In order to determine that it is necessary to deal with the subsidiary issues.

The Lease

19. The main differences between the Lease and the document relied upon by the Landlord relate to the Tenants' works.

20. The previous negotiations leading up to the preparation of the Lease documents are relevant in determining what the agreement between the parties was and what those documents were intended to implement.

21. On 8 April 2014, the Tenants sent the Agents a copy of a leasing proposal with handwritten amendments they had made to the scope of the fit-out that they were prepared to agree to.

22. On 14 April 2014 the Agents sent an email to the Tenants stating that the Landlord had accepted their offer to lease and attached a copy of the leasing proposal signed by the Landlord. Amendments the Tenants had made to this document were initialled.

23. On 10 May 2014 the Agents sent to the Tenants a copy of a proposed lease and a disclosure statement setting out a list of works for the Tenants' fit-out which was different from the list previously agreed to. The Tenants did not agree to the changed list and further negotiations then followed.

24. On 12 May the Agents sent a further copy of the disclosure statement and lease schedule setting out the list of tenants' works the Landlord had agreed to. The changes requested by the Tenants that the Landlord had agreed to were marked with a tick and those she did not agree to with a cross.

25. On 15 May 2014, the Agents sent an email to the Tenants attaching a further lease document and disclosure statement. Following further corrections that were made that day, the Tenants attended the office of the Landlord's solicitors and signed the Lease and Disclosure Statement. They then handed over the security deposit of $35,200.00 and a certificate of currency of their insurance policy and received in exchange the key to the Building. That occurred on 15 May 2014, which is the commencement date of the tenancy.

26. Thereafter the Tenants made several attempts through the Agents to obtain a copy of the Lease signed by the Landlord but were unsuccessful. It was not until 10 November 2016 that the Tenants finally received a copy of a lease document from the Landlord bearing her signature ("the Landlord's Version of the lease"), but this was in different terms.

27. The main differences between the Lease and the Landlord's Version of the lease related to the list of the Tenants' works. The latter document does not have the qualifications to some of the requirements that the Tenants had requested which had been agreed upon. In addition, the provision concerning the rent free period has the following added qualification. It is said that the period had been allowed:

> "…to enable the tenant to make good the premises including renovation of damage floor ceiling and walls to the whole of the premises, including providing the Landlord with receipts of such work to the value of the rent free period in which amounts to more than $22,000 twenty two thousand dollars, and accordingly rent will not be payable by the tenant to the Landlord during the following months:" (sic.)

28. It seems unlikely that the Landlord's solicitor would have used such poor English. Further, such a wide reaching obligation to repair the Building was never discussed in the email exchanges which preceded the preparation of the lease documents. Moreover, when the Lease was signed it was not known that the floor required repair. That was only discovered after the Tenants had moved in.

29. In her witness statement, the Landlord alleged that she never agreed to the terms of the Lease, even though her solicitors had prepared it. She said that, after the disclosure statement had been signed, she executed the Landlord's Version of the lease and said that she understood that a copy of it was sent to the Tenants to sign. That account does not tally with the fact that the Tenants attended her solicitors' office and signed a copy of the Lease that she had not signed. She gave no explanation for that and she did not call either her solicitor or anyone from the Agents' office to support her evidence.

30. In the case of *Jones v. Dunkell* [1959] HCA 8, there was a question as to inferences that should be drawn from the limited evidence able to be provided by the Plaintiff as to the cause of a motor accident in which her husband was killed. The driver of the other vehicle, who would have been expected to know what occurred, was not called to give evidence. Kitto J said (at para 5) that:

> "... any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence."

31. In coming to a similar conclusion, Menzies J said (at para 9):

> "…where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he

> chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference."

32. In the same case, Windeyer J adopted the following passage from *Wigmore on Evidence* 3rd ed. (1940) vol. 2, s. 285, p. 162:

> "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

33. No explanation was given for the failure or the Landlord to call either her solicitor or anyone from the Agent's office and so I infer that their evidence would not have supported the Landlord's case.

34. It was not suggested that her solicitors were not authorised to prepare the Lease in the terms they did or obtain the Tenants' signatures to it. There was no contemporaneous objection by the Landlord to the terms of the Lease after the Tenants had signed it. The evidence that she gave of it becoming lost in the post seems unlikely, given the surrounding circumstances. It is also unlikely that a solicitor would draw different versions of the same lease and provide one copy to the Landlord and a different copy to the Tenants.

35. In addition:

    (a) the terms of the Lease are generally consistent with the disclosure statement that was prepared by the Agents. The disclosure statement itself states in Clause 19 that it reflects all agreements that had been made by the parties; and

    (b) the description of the Tenants' works in the Lease accords with the evidence that was given on behalf of the Tenants which I prefer to that of the Landlord. It is apparent that the extent of these works was heavily negotiated by the Tenants with the Agents and, considering that the cooking facilities were not to be used by the Tenants and the limited scope they were making of the Building, the scope of those works is much more likely to be that sworn to by the Tenants than the greater scope claimed by the Landlord.

36. I am satisfied that the Lease, which was signed by the Tenants in the offices of the Landlord's solicitors, sets out the agreed terms of the tenancy. The Tenants entered into possession of the Building and paid the security deposit, rental and outgoings in reliance upon the Lease. It is not now open to the Landlord to assert that some other terms applied to the tenancy.

The floor

37. Before agreeing to lease the Building the Tenants inspected it in the presence of a representative of the Agents and also a carpenter employed by the Landlord. They noticed some unevenness of the flooring on the ground floor under the carpet and the carpenter told them that there were some floorboards that needed to be nailed down. Since the floor was carpeted, it was not possible for the Tenants to verify the correctness of the carpenter's advice.

38. Part of the Tenants' works was to remove the floor coverings and polish the floorboards. Upon removal of the floor coverings it was discovered that the problem was not simply loose floorboards. In one section, some floorboards and bearers supporting the floor were rotten and required replacement. In another section, part of the floor was missing altogether and had been replaced by a sheet of metal. Since the rotten bearers and the missing flooring were considered to be structural, the Tenants contacted the Agents and, at their request, sent photographs of the damage together with a quotation for $4,759.57 to repair it that they had obtained from the tradesmen that were doing their fit out. No response was received from the Landlord.

39. The Landlord sent two tradesmen on two separate occasions to look at the work but in an email to the Agents she said that she would not pay for it.

40. On 7 March 2014 Mrs Loughran sent an email to the Agents stating that the Landlord had been given a reasonable time to inspect the damage and that unless the Tenants heard back from her as to what she wished to do, they would go ahead and organise the repairs themselves and seek reimbursement from the Landlord. The Landlord refused to repair the floor and since the business was to open in a few weeks thereafter and the floor was in an area where members of the public would be walking, the Tenants accepted the quotation from their tradesmen and the work was carried out. They now seek to recover the sum of $4,759.57 that they paid as part of their claim.

Non-payment of outgoings by the Landlord

41. Under the terms of the lease, the Tenants were to pay the outgoings.

42. On 22 December 2015 Mrs Loughran transferred $638.80 to the Landlord's bank account in order to pay the rates to City West Water. On 29 January 2016 she paid a further sum of $75.53 to the Landlord, which was also for City West Water. Shortly afterwards, the Tenants were informed by City West Water that the water rates had not been paid and they were threatened with disconnection. Mrs Loughran said that she was told by City West Water that the unpaid amount that was due was the total of those two sums that she had paid to the Landlord.

43. The water was not disconnected and so the payment appears to have been made by the Landlord. However I accept that the Tenants were concerned that they may have been left without water.

The condition of the facade

44. The main issue in the case related to the condition of the sandstone facade on the upper storey and the failure of the Landlord to do anything about it.

45. The Tenants rely upon Clause 6.4 of the Lease, which provided:

> "The Landlord must keep the structure (including the external faces and roof) of the building and the Landlord's installations 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 under clauses 3.1, 3.2 and 3.3.2."

46. The upper storey of the Building is clad in sandstone. There is no evidence as to its condition at the start of the tenancy but in August 2015 parts of the facade were crumbling and dropping onto the footpath adjacent to the Building. It was said that, by allowing parts of the facade to crumble and drop to the footpath, the Landlord failed to maintain the structure as required by this clause.

47. Moreover, Clause 3.3.3 of the Lease provided that the Tenants were not obliged to carry out any work that applicable legislation made the responsibility of the Landlord.

48. On 6 August 2015 the Municipal Building Surveyor for the Council inspected the Building and on 11 August 2015 issued a Building Order requiring the Landlord to engage a structural engineer to conduct a survey, prepare a report on the condition of the entire facade, engage a builder to carry out any necessary work and have the structural engineer confirm in writing that all works had been carried out in accordance with the recommendations made in the engineer's report.

49. On 3 September 2015 the Landlord sent the order to the Agents together with an email in the following terms:

> "I have received the enclosed Building order for minor work from the City of Melbourne.
>
> Please advise the tenant to pay for this work.
>
> Please call me regarding other matters that need to be discussed.
>
> I have requested on several occasions for you to call me and I have not heard from you. At this stage I have no contract with you to continue handling my property nor does the Tenants have a lease. So it is important for this matter to be sorted out properly."

50. In reply, the Agents advised her that the work required by the notice was structural, and not the Tenants' responsibility. In addition, they informed

her that there was a management agreement in place and that the Tenants did in fact have a lease.

51. Sometime in September 2015, the Tenants were advised by a passer-by, who said that he was a builder, that pieces of the facade were falling onto the footpath.

52. The Landlord engaged an engineer, Mr Kroenert, who inspected the Building on 23 September 2015 and provided a report. The report recommended removal of parts of the façade and demolition of the chimney on the west side of Building.

53. No work was done by the Landlord, notwithstanding Mr Kroenert's report and two extensions of time granted by the Council, nor was any work done by her to make the Building safe.

54. By s.251 of the *Building Act* 1993, it was open to the Tenants to carry out the work themselves and recover the cost from the Landlord but they were under no obligation to do so. That section (where relevant) provides as follows:

> "Occupier or registered mortgagee may carry out work
>
> (1) If the owner of a Building or land is required under this Act or the regulations to carry out any work or do any other thing and the owner does not carry out the work or do the thing, the occupier of that Building or land or any registered mortgagee of the land or the land on which the Building is situated, may carry out the work or do the thing.
>
> (2) An occupier may—
>
> (a) recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the occupier; or
>
> (b) deduct those expenses from or set them off against any rent due or to become due to the owner.
>
> (6) This section applies despite any covenant or agreement to the contrary."

55. On 27 May 2016 the Municipal Building Surveyor conducted a further inspection and issued an emergency order requiring the construction of a gantry or full-face scaffolding by 10 June 2016 in order to protect the public from what he described as "…a danger to life or property…" presented by the Building. Again, the order was not complied with by the Landlord.

56. On 27 May 2016, the Council put up barriers around the outside of the Building to keep people away from it. At the request of the Tenants, they left a small entrance way to the front door to enable customers to enter the cafe, although this was agreed to be on an interim basis until the scaffolding was erected. According to Mrs Loughran's evidence, Mr Aldred told her that when the scaffolding was erected it would block all access to the cafe.

57. Mrs Loughran said that from the time the barriers were erected until they vacated the Building on 30 June 2016, the Tenants received enquiries from customers and members of the public asking whether they were open for business because they had seen the barriers around the Building. She said that the barriers were an eyesore and she was concerned that they might drive customers away. She said the Tenants were also concerned for the welfare of the cats because the scaffolding would cut out light from the windows of the rooms where the cats were kept. A document entitled *Code of Practice for the Private Keeping of Cats (Victoria)* was tendered ("Exhibit D"), which, by Clause 12, recommended that cats be provided with exposure to sunlight.

58. On 3 June 2014, the Tenants informed the Landlord by email that they would be vacating the Building. The Landlord's behaviour thereafter is said to have been a breach of her covenant of quiet enjoyment.

Quiet enjoyment

59. The Tenants complain of various matters which they claim to have been a breach by the Landlord of the covenant of quiet enjoyment.

60. Mr Epstein submitted that, to be actionable, an interference with quiet enjoyment must be substantial. He referred me to the Court of Appeal decision in *Specialist Diagnostic Services Pty Ltd v. Healthscope Ltd* [2010] VSC 443 in which the court said (at paragraph 110):

> "110 The trial judge held correctly that:
>
> 'In order to establish that the obligation has been breached, it must be established that the disturbance or disruption in breach of the obligation is 'substantial', though the law does not now insist on 'practical frustration' of the purpose of the lease. Further, the obligation has been applied in circumstances where there has been no direct physical impact or interference with the leased premises.'"

61. I was also referred to *Gordon v. Lidcombe Developments Pty Ltd* [1966] 2 NSWR 9 as authority for the proposition that substantial interference means conduct that renders the premises unfit from a reasonable point of view for the purpose for which the lease was granted. However in *Aussie Traveller P/L v Marklea Pty Ltd* [1997] QCA 2 the Queensland Court of Appeal said:

> "The decision in *Gordon v. Lidcombe Developments Pty. Ltd.*, or some of what was said by Street J. in his judgment, is not easy to reconcile with the decision of the English Court of Appeal in *Owen v. Gadd* [1956] 2 Q.B. 99, where the erection of scaffolding in front of a "lock-up" retail shop was held to constitute a substantial interference with access to the shop amounting to a breach of the covenant for quiet enjoyment. The lease in that instance was for a term of 10 years, and, no special damage having been proved, the plaintiff lessee was awarded nominal damages of 40 shillings for a disturbance which lasted only 11 days. *Owen v. Gadd* was applied in *J.C. Berndt Pty. Ltd. v. Walsh* [1969] S.A.S.R. 34, where Walters J. awarded damages

> in the sum of $2,400 for interference caused by the erection by the lessor of a hoarding in front of the lessee's retail jeweller's shop in a city centre, which obstructed the view of the shop frontage and had an adverse effect on the plaintiff's business. The lease was for a term of five years and the disturbance lasted for four or five months. Likewise, in *Martin's Camera Corner Pty. Ltd. v. Hotel Mayfair Ltd.* [1976] 2 N.S.W.L.R. 14, at 27, Yeldham J. held a lessor liable in damages or breach of covenant for quiet enjoyment arising from the entry on to the demised premises of rainwater caused by the failure of the lessor to keep roof gratings and downpipes clear of rubbish. In none of these cases could it be said that the interference complained of had rendered it impracticable or uneconomic to carry on the lessee's business. Cf. also *Kalmac Property Consultants Ltd. v. Delicious Foods Ltd*. [1974] 2 N.Z.L.R. 631.

62. I accept that, to be actionable, an interference with quiet enjoyment must be substantial but I do not think that it is necessary for the Tenants to show that the conduct of the Landlord rendered the Building unfit for the use for which it was intended. Indeed, the descriptions of what occurred in the cases referred to above bear some similarity to the present case.

The conduct complained of

63. On 8 June 2016, the Landlord sent the following email to the Tenants:

> "You have not paid any rent for more than 2 month and have not paid out goings of an amount of more than 10,000.
>
> Regarding the on going bitching from day one why the hell do you want to be in that premise when you had more then a couple of month of rent unpaid and spent a minimal amount of money to get the business going. Can you please list the expenditure that you have incurred from your own account to improve the Building?
>
> I have asked of you to provide these items for more then 7 month.
>
> Please list your expences for the works done on the property including invoices copies of tradesmen's.
>
> Today we were outside your property recording the foot traffic. It was apparent that the Barricades had not deterred any customers from entering the cafe.
>
> Take notice that recording of your internall space have being recorded via camera inside your premises, we wil give these document ect: to the courts of law when time comes, like no sign outside, no coffee/sandwiches any sort of cafe trading that you have not complied as per lease, and much much more that you will get to know once the courts gets active in your breaking of lease, we will attend your premises on Friday at 3 PM
>
> Please have all doors unlocked for inspection
>
> We will take about one hour to go through to see all defects with the building, should you need to get in touch please let us know if you

choose a better time that suits both parties thanks all the same for your attention" (sic.)

64. There was no evidence that the Tenants had failed to pay rental or outgoings. Indeed, it was established at the hearing that all rental and outgoings were paid. Consequently, I am satisfied that the allegation in this email that the Tenants failed to pay rent or outgoings was false. As to the allegation that there had been requests by the Landlord for information concerning the payments for the Tenants' fit out, information concerning the Tenants' works had been given to the Agents who forwarded the documents onto the Landlord in October 2014.

65. The Tenants said they were most concerned to learn that they were being spied upon by cameras within the Building. They also gave evidence that they believed that the Landlord might enter the Building. In the course of her evidence, the Landlord denied having cameras inside the Building. There is no evidence that there were any such cameras but I accept the evidence of the Tenants that they were concerned at the time that they were being spied upon.

66. The Landlord visited the Building on the following occasions:

    (a) At around midday on 10 June 2016 she visited the Building as a customer of the café. Because of the special nature of the business, customers were required to sign a waiver and rule agreement form in a book. The Landlord signed the book with the name "Chadie Smith": She was on the premises for approximately an hour and then left. She returned at 4:30 PM on that day without any prior arrangement and spent about an hour inspecting the Building with a builder. Later that evening she sent an email to the Tenants alleging that they had not paid rent and complaining about various matters concerning the Building.

    (b) On 14 June 2016, the Landlord arrived unannounced with another builder. Mrs Loughran took them around the Building after which the builder left. The Landlord asked to use the bathroom and when she came out she remained in the Building and asked for a taxi to be called. She then asked for the taxi to be sent away and returned to the bathroom, refusing to come out. She telephoned the police from inside the bathroom and told them that the Tenants would not give her keys or allow her entrance to the Building for inspections. She also claimed to the police that she was being threatened. The police arrived just after 6 PM and told the Landlord to come out of the bathroom. Upon being shown a copy of the Lease the police told the Landlord to move on and leave the Tenants alone. Mr Loughran said that, before she left, he offered to have a key cut for her but that she was not happy with that.

    (c) At 11 AM on 15 June the Landlord came to the Building without notice and demanded that Mrs Loughran give her the Tenants' key.

When Mrs Loughran refused she initially refused to leave the Building but left after Mrs Loughran called the police.

(d) On 16 June Mrs Loughran saw the Landlord outside the Building. When she asked the Landlord why she was there she said that she was waiting for a taxi. Mrs Loughran subsequently called the police and when they arrived, the Landlord was still there. The police said they were responding to a complaint by the Landlord that there was a young woman squatting in her building. The Tenants showed the police a copy of the Lease. While the police were there, a locksmith arrived to change the locks. He said that he had been asked to do so because the Landlord had said that she had locked herself out. The police informed the Landlord that since the Tenants had a lease she could not change the locks. Mrs Loughran said that the Landlord began yelling at the police who told her that she should move on and that she would be arrested if she refused to cooperate. Mrs Loughran said that she was very concerned about the Landlord's conduct. Thereafter, the Tenants had someone remain in the Building after hours.

(e) On the night of 21 to 22 June the Tenants' employee, Miss Bowman who was staying in the premises overnight, heard a sound of drilling and the voices of a man and a woman. She telephoned the police to say that someone was breaking into the Building. The front door was chocked to prevent it from being opened. After the lock had been drilled out, she heard the male voice ask why the door would not open because he had drilled through the lock. Miss Bowman said that she then heard drilling at the back door. When the police arrived it was found that a locksmith and the Landlord were outside and that the locks on the front and rear doors had been drilled through. Miss Bowman said that the locksmith told her that the Landlord had told him that she had locked herself out of her house and needed new locks and keys. He agreed to replace the lock on the front door and after he had done so he gave a key to the Tenants. The Landlord then left.

67. The Landlord's explanation for this rather bizarre behaviour was that she did not have a set of keys and she thought she would require them because the Tenants were about to vacate the Building. It is understandable that the Landlord would want keys to her own building but it seems unlikely that the Agents would not have returned the keys to the Building to her when their authority was terminated. The Landlord said that the Agents had sent their keys to the Building to the Tenants. It seems unlikely that a large commercial estate agency would have done that.

68. Further, the evidence would suggest that the Landlord wanted to obtain the Tenants' keys, not just copies of them. When Mr Loughran offered to have a key cut for her she was not happy with that.

Failure to provide tax invoices

69. After the Landlord took over the management of the Building herself, she did not provide any tax invoices to the Tenants for rental or outgoings, even though GST was charged by the Landlord and paid by the Tenants.

70. By Clause 17.5 of the Lease, the Tenants were not obliged to pay the GST on a taxable supply to them under the Lease until given a valid tax invoice for the supply. Notwithstanding this provision, the Landlord collected and retained GST from the Tenants without providing them with a valid tax invoice.

71. Mr Hickie submitted that it was an implied term of the Lease that the Landlord provide the Tenants with a tax invoice within a reasonable time after an amount been paid. I do not think that such a term would fit with Clause 17.5. However I think that a term should be implied that, before receiving any GST from the Tenants with respect to a taxable supply under the Lease, the Landlord must give the Tenants a valid tax invoice for the amount sought. The implication of such a term would be reasonable and equitable, it would give business efficacy to the Lease and it would give effect to Clause 17. Further, I think Mr Hickie was correct when he said that it was so obvious that it went without saying.

72. By failing to give the Tenants valid tax invoices for the amounts paid the Landlord was in breach of the implied term.

Failure to invest the Security Deposit

73. Clause 13.2 of the Lease required the Security Deposit to be invested in an interest bearing account and interest accruing was to be treated as a supplementary payment of security deposit.

74. The Landlord did not say in her witness statement what was done with the security deposit after she had received it from the Agents. No banking records were produced by the Landlord to prove that the Security Deposit was in an interest-bearing account as required.

Termination

75. The email the Tenants sent to the Landlord on 3 June 2016, was in the following terms:

> "Due to the ongoing and unresolved issues listed below, we are notifying you that we are breaking the lease as of the 30th June 2016 due to:
>
> the Landlord not upholding their legal obligations as stated under the lease agreement and the retail leases act for repairing structural damages (flooring) within a reasonable timeframe,
>
> the Landlord has failed to act when notified by the city council of unsafe structural issues arising from crumbling roof facade,

failing to act has resulted in barriers being erected around the Building on the 27th May by the city council which has resulted in a loss of business and customer access to the Building,

the Landlord has failed to pay City West Water bills that the tenant has paid to the Landlord,

the Landlord has failed to supply any invoices to the tenant for rent and outgoings paid.

We demand the Landlord return in full the bond amount of $35,200, as well as the flooring costs of $4,759.57. If we do not receive the full amount owing by Friday, 17 June 2016 we will take further legal action."

76. The amounts sought were not paid to the Tenants by the Landlord. This email seems to have prompted the visits to the premises and the conduct by the Landlord referred to above.

77. On 30 June 2016 the Tenants moved out of the Building and sent the keys to the Landlord's address in Queensland. Mr Aldred from the Council gave evidence that when he attend the Building on 12 August 2016 he found that the Landlord was living there. The Landlord denied that at the hearing, but:

    (a) in an email to Mr Aldred dated 19 August 2016, the Landlord informed him that she was then living in the Building and asked that a parking permit be organised for her; and

    (b) the photographs Mr Aldred took show what appears to be furniture and clothing consistent with habitation.

78. The Landlord continued to ignore the orders of the Council. She was prosecuted in the Melbourne Magistrates Court for non-compliance and pleaded guilty.

79. In about May 2017 full scaffolding was erected around the Building. The photographs of the Building ("Exhibit 4") taken afterwards show that, had the Tenants still been an occupation, it would not have been practicable for them to continue to operate their business.

Repudiation

80. The Tenants contend that, in all the circumstances, the Landlord repudiated the Lease, that they were entitled to accept the repudiation and bring the tenancy to an end and they did so.

81. The principles concerning repudiation of a lease by a Landlord were recently considered in the case of *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515, where Croft J. said (at para 121 et seq):

> "121 It is well established that the legal test with respect to repudiatory conduct is perspicuous, and that repudiation is a serious matter which is not to be lightly inferred. It was said in the oft-cited decision in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* that what must be present to support a

finding of repudiation is conduct, verbal or otherwise, which conveys to the innocent party the defaulting party's inability, or unwillingness, to perform the contract, or, an intention to perform it only in a manner substantially inconsistent with that party's obligations.

122 In that case, Brennan J expressed the test as follows:

'The question whether an inference of repudiation should be drawn merely from continued failure to perform requires an evaluation of the delay from the standpoint of the innocent party. Would a reasonable person in the shoes of the innocent party clearly infer that the other party would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with that party's obligations and in no other way? Different minds may easily arrive at different answers.'

123 More recently, in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*, the High Court again framed the question of whether there has been repudiation by reference to how a reasonable person would view the conduct of a defaulting party:

'The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.'

124 It is clear then that a finding of repudiation is not to be ascertained by an inquiry into the subjective state of mind of the defaulting party. …" (*references omitted*)

82. In the present case the evidence establishes a continuing refusal by the Landlord to carry out structural works to the chimney and facade of the Building which were her responsibility and which were necessary to enable the Building to be used for the permitted use. As from the beginning of June 2016 there were also a number of breaches by the Landlord of the covenant for quiet enjoyment, sometimes necessitating the involvement of the police, which are detailed above.

83. The Landlord denied the validity of the Lease and she maintained that denial throughout the hearing. In one email to the Agents she denied that the Tenants had a lease at all. She also made various representations to locksmiths on at least two occasions and also to the police that she was herself in occupation of the Building, she asserted that the Tenants were squatters and that there was no lease.

84. She would not give the Tenants the tax invoices to which they were entitled in order to claim the payments of GST as input credits for their business, she made intrusive visits to the Building and it seems clear that she was trying to break into the Building and lock them out.

85. I find that all of this this behaviour would have conveyed to a reasonable person in the position of the Tenants that she was unwilling to substantially perform the Lease or was willing to fulfil it only in a manner substantially inconsistent with her obligations as Landlord.

86. That being so I find that the Landlord repudiated the Lease and that the Tenants were entitled to accept the repudiation by moving out of the Building as they did.

The damages claimed

87. The Tenants seek the return of their security deposit of $35,200.00 and also damages. The damages sought are set out in paragraph 34 of the Amended Points of Claim as follows:

    (a) $4,759.57 inclusive of GST being for the repairs to the flooring;

    (b) $660.00 inclusive of GST for bookings refunded to customers;

    (c) $20,322.11 in relocation costs and fitting out the new premises, rent, rates and other charges; and

    (d) loss of profits for the month of July 2016 of $16,655.26.

Repairs to the flooring

88. The claim in regard to this item is partly based upon Clause 6.4 set out above, but although I am satisfied that this is structural work, the defects were present at the start of the tenancy.

89. Reliance is also placed upon s.52 of the act which, where relevant, is as follows:

> "Landlord's liability for repairs
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (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.
>
> (3) However, the Landlord is not responsible for maintaining those things if—

(a) the need for the repair arises out of misuse by the tenant; or

(b) the tenant is entitled or required to remove the thing at the end of the lease

(4) The tenant may arrange for urgent repairs (for which the Landlord is responsible under this section or under the terms and conditions of the lease) to be carried out to those things if—

(a) the repairs are necessary to fix or remedy a fault or damage that has or causes a substantial effect on or to the tenant's business at the premises; and

(b) the tenant is unable to get the Landlord or the Landlord's agent to carry out the repairs despite having taken reasonable steps to arrange for the Landlord or agent to do so.

(5) If the tenant carries out those repairs—

(a) the tenant must give the Landlord written notice of the repairs and the cost within 14 days after the repairs are carried out; and

(b) the Landlord is liable to reimburse the tenant for the reasonable cost of the repairs and may not recover that cost or any part of it as an outgoing."

90. As stated above, the deficiency in the flooring was present at the start of the Lease and so the provision in this section would not appear to impose upon the Landlord an obligation to alter that condition by repairing the floor.

91. Mr Hickie submitted that a term should be implied into the Lease to the effect that the Landlord was liable to repair structural damage to the floor.

92. As to whether a covenant on the part of the Landlord to repair structural damage can be implied, in *Carbure Pty Ltd v. Brile Pty Ltd* [2002] VSC 313 Balmford J. said (at para 29), after reviewing the authorities:

> "Considering the cases and texts as they stand, I would have some doubt as to whether, under the law of Victoria, it is possible to imply into a simple lease, where there is no relationship between the parties other than that of landlord and tenant, an obligation on the landlord to repair and maintain the structure of the leased premises. However, assuming for the present, without deciding, that such a covenant can be implied into the lease, the question then is whether such an implication is possible in this case, having regard to the ordinary principles of contract law."

93. The learned judge then proceeded to adopt the following passage from the judgment of Mason J in *Codelfa Constructions v State Rail Authority of NSW* where his Honour said:

> "The conditions necessary to ground the implication of a term were summarised by the majority in *B.P. Refinery (Westernport) Pty. Ltd. v.*

> *Hastings Shire Council* [1977] HCA 40; (1977) 52 A.L.J.R. 20, at p. 26: "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ´it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

94. These conditions are difficult to satisfy. In *Carbure*, no such term was implied and I cannot see how it could be said in the present case that it is necessary to imply a term into the Lease requiring the Landlord to carry out structural repairs of defects present in the Building at the start of the tenancy in order to give it business efficacy. It was known at the time the Lease was executed that the Building was in a poor state of repair yet although the parties negotiated for some work to be done by the Tenants, there was no agreement that anything would be done by the Landlord about its condition.

95. In those circumstances, I do not find that the Landlord was under any obligation to repair the floor so this part of the claim fails.

96. Having left it to the Tenants to repair the flooring, the Landlord now complains that the replacement floorboards did not match the original boards and wants the Tenants to pay her what would have been the cost of replacing them, even though she did not replace them before selling the Building.

97. Mrs Loughran said that she was told by Heritage Victoria that they were not expected to match the other floorboards and that they (Heritage Victoria) were only interested in the original boards. From what I can see in the photographs, the match is quite good although the patch is noticeable. In any case, since the sections of flooring were previously missing altogether and the Tenants were not obliged to replace them, the Landlord has not suffered any loss but rather, has benefitted from the work done.

Refunds to customers

98. Mrs Loughran gave evidence that they had to refund $660.00 inclusive of GST to customers who had booked to come to the cafe. There is no contrary evidence and no reason not to accept what she said. The amount claimed will be allowed.

Relocation costs

99. A list of relocation costs totalling $20,322.11 is set out in Appendix 1 to the updated particulars of loss and damage filed on 23 September 2016 which was verified by the Tenants in evidence. This comprises a great many small items with a limited description, many being purchases from Bunnings in Collingwood.

100. Despite the lack of detail, the claim seems relatively modest for the moving of a substantial business into new premises and fitting those premises out to accommodate the business. Moreover, the Tenants had lost the benefit of all

the money they had spent on the Building, including the amount they had spent on the floor. A natural and foreseeable consequence of forcing them to move their business to other premises is the cost of rendering those premises suitable for the business to operate. The amount claimed will be allowed.

Loss of profits

101. The Tenants claim loss of profits for the month of July 2016 which they have calculated at $16,655.26. The figures given are precise but no accountant or other expert was called to verify the claim.

102. Mrs Loughran was cross-examined about the figures, particularly in regard to the fact that the amount claimed accounts for a substantial proportion of the profits that would be earned by the business for a whole year. Her explanation was that the month of July is generally very busy due to school and University holidays and her evidence in that regard was supported by Miss Bowen.

103. Mr Epstein pointed out that the amount sought was equivalent to one third of the annual income of the business which he suggested was excessive. He said that although Mrs Loughran and Miss Bowen both said that it was the busiest time of the year they could not say how much more intense it was than the Christmas period and other school holidays.

104. The accounts that were produced to justify the claim were done by the Tenants' bookkeeper based upon a MYOB program that they had. The bookkeeper did not give evidence. The annual net profit of the business for the 2015 year was $47,738.76 and for the 2016 year it was $45,997.83, which is an average of $3,905.70 per month over that two year period.

105. Although it seems odd that the business would be busy in July, which is in the middle of winter, I must accept the evidence of both Mrs Loughran and Miss Bowen that July was a particularly busy period because they have sworn to it, they were not shaken in cross examination and there is no contrary evidence. However the claim is for expectation damages which must necessarily be based upon an estimation of what might have been received if the Tenants had remained in possession of the Building. It seems to me that one third of the annual profit is likely to be a substantial over-estimation.

106. Allowing for the undisputed evidence that July was a particularly busy month I will add a loading of 100% to the average monthly income, giving a figure for loss of profits for the month of July 2016 of $7,811.40.

The Landlord's counterclaim

107. The Landlord claimed that the Tenants never carried out the Tenants' works and seeks the cost of having them carried out herself which she said would have cost her $70,740.00 plus GST if she had had it done. This is the amount of a quotation which was tendered, although she did not accept the quotation.

108. She also claimed:

(a) the cost of engaging a roof tiler to remove ivy and carry out repairs to the roof claimed to have been caused by the ivy, which she estimated would have cost $8,000.00;

(b) $1,000.00 to service and repair a grease trap;

(c) $3,450.00 for cleaning the Building;

(d) the cost of replacing the blinds and drapes with new blinds and drapers, which she said would have been $24,430.00;

(e) refund of two months' rent because, she said, the rent free period was given on the condition that the Tenant's works would be carried out and they were not; and

(f) ongoing rental for the remaining period of the Lease.

The Tenants' works

109. The evidence given by the Landlord in support of this claim are bald denials that the Tenants' works were done. Her claim is also based upon the more onerous list of Tenants' works as contained in the Landlord's version of the lease whereas it was the list in the Lease that applied.

110. Mrs Loughran's evidence in regard to the work done is as follows:

(a) Servicing and maintenance of heaters and toilets

She engaged a heating company to service the radiators at a cost of $1,318.82 but the three toilets were all in working order and did not require servicing or maintenance.

(b) Replacement of rear door leading into courtyard with secure door

On 31 August 2014 she engaged a company to supply and install a new door at a cost of $495.00.

(c) Removal of floor coverings and polishing floorboards

On 29 April 2014 she engaged a company to install new carpet on the staircase and linoleum flooring in the ground floor bathrooms at a cost of $306.00. In around May 2014 the Tenants removed the floor coverings and during June and July 2014 they polished the floorboards.

(d) Fix, maintain or replacement of leaking skylight in kitchen

She pointed out that, in the disclosure statement, this work was only required "if necessary". She said that the Landlord had agreed to this alteration and initialled it in her email of 12 May 2014. She said that the work was not necessary because it was not leaking although she did clean it. Whether this qualification applied or not, there is no contrary evidence to the effect that the skylight was leaking and so there is nothing for this requirement to operate on. The Landlord

alleged in her evidence that she had to pay to replace a skylight in another room, but not the kitchen. There was no obligation on the Tenants in regard to any other skylight.

(e) Repair of leaking gas line and reconnection of any gas appliances as required

She said that they did not require any gas appliances and so no repair or reconnection was undertaken. She did not say whether or not there was a leaking gas line but, apart from this clause, there is no evidence that there was.

(f) Reconnection and servicing of dishwasher

All foods and snacks sold in the Building were pre-packaged or wrapped and so no food was prepared and no dishes were used in the Building. Consequently, the dishwasher was not required and was not reconnected. She said it was left in the same condition as at the start of the tenancy. This condition seems to contemplate an initial reconnection of the dishwasher and it is unclear whether it could have been serviced if it were not connected.

(g) Replacements and installation of water taps over gas cooker kitchen as required

As no food was prepared in the Building, the work was not required.

(h) Re-connection of small hand basin kitchen

She said that the water to the basin was not disconnected.

(i) Servicing of all light fittings

On about 21 June 2014 she engaged an electrical contractor to service the lights of the Building at a cost of $388.30.

(j) Removal and replacement of cupboards at rear entry if required for fit out

She said that the Tenants did not require the removal or replacement of the cupboards for the fit out.

(k) Tidy up and servicing of all communications cable

She said that they did that

(l) Plaster and paint all upper and lower areas as required for use of purpose of premises with all areas used for cats to be painted with a sealing coat

She said that between May and July the Tenants plastered and painted the walls at a cost for materials and equipment of $1,761.10. She said that there were discussions with the Landlord and the Agents concerning the colour, resulting in a number of emails passing back and forth and advice from Heritage Victoria.

The Landlord complained that she did not approve of the colours the Tenants had used, and initially wanted the interior painted red. Shortly before the café opened she changed her mind and wanted it painted white and ivory. She visited the café on a number of occasions and does not appear to have complained about the colour. I cannot see any requirement in the Lease for her consent to the colour to be obtained, but if her consent was required, then by Clause 9.1 of the Lease, the Landlord was not to unreasonably withhold her consent. The colours used were approved by Heritage Victoria. The Building was subsequently sold without any repainting being done.

(m) Repair of lower toilets

The toilet was in working order and did not require repair.

(n) Replacement of rear entry gate as required

There was no rear entry gate. There is a notation in the lease next to this item that the Tenants were unaware of a gate at the rear entry. No such gate was identified.

(o) Replacement floorcoverings rear toilet areas

The floorcoverings of the rear toilet were replaced on about 12 June 2014.

(p) Servicing of all fridges

In about August 2014 she engaged a refrigeration company to service the ground floor fridges. She said that she was advised that one was in perfect working condition, another could not be serviced because the correct gas was no longer available for it and the other had no motor and so could not be serviced and could only be used for storage.

(q) Servicing of grease trap

In June 2014, City West Water inspected the premises and, since there was no food prepared in the Building, the requirement to have the grease trap serviced was waived.

(r) Clean-up of ivy growing on rear wall of premises

In about June 2014 the Tenants cut back and tied up the ivy including poisoning the roots and they continued to clean it up and poison it until they left the Building.

(s) Replacement of pot plants and window sills with flowering plants (optional)

As these works were optional, they elected not to undertake them. She said further that, by an email dated 14 May 2014 the Agents confirmed that the Landlord had agreed to waive the requirement regarding the pot plants.

(t) Attend to climbing roses

There were no climbing roses to attend to.

(u) Arrange for the repair of all pelmets and curtains on all windows

No repair was needed and since they did not use the curtains they removed them and stored them in garbage bags in the cool room which was not used.

111. That was the evidence given by Mrs Loughran. The Landlord's evidence as to these matters is not as detailed. She said that the Tenants failed to carry out "many" of the works specified in the Lease to her satisfaction or at all and that she obtained quotes from a builder to have the work carried out at a cost of $70,740.00.

112. An examination of the scope of works in this quotation, which is Exhibit "SH 14" to her witness statement, shows that it does not match the list of Tenants' works. It allows for substantial work to repair damage that is said to have been caused by the ivy to the roof and drains of the Building and includes the repainting of much of the Building.

113. No expert evidence was called to justify the various amounts of the assessment, the necessity for the work or how it was connected with the list of Tenants' works said to have been left incomplete. There is also no expert evidence that the Tenants' works listed in the Lease were not done.

114. In a table in paragraph 38 of her Amended Points of Defence and Counterclaim, the words "Works not carried out" appear next to each item without any further annotations except for the plastering and painting, where she says that they were not carried out to her satisfaction in that no sealing coat was applied, the work was of inferior quality and her consent to the colours was not obtained. The Tenants' evidence was that a sealing coat was applied.

Removal of the ivy

115. The Landlord alleged that the ivy had caused damage to the roof of the Building and blockages to a sewer pipe under the flooring. She said that it would cost upwards of $8,000.00 to erect scaffolding to repair the roof, remove the ivy and unblock the sewer pipe. There is no expert evidence at all about this.

116. The Tenants did not agree to repair any damage that had been caused to the Building by the ivy, nor did they agree to remove it. The requirement was stated to be: "clean up of ivy growing on rear wall of premises". The wording is imprecise but I am unable to find from Mrs Loughran's description of what they did and the Landlord's own evidence that the Tenants failed to do that.

Service and repair of grease trap

117. There was no requirement to repair the grease trap. The Tenants were required to service it. The requirement to service it appears to be imposed by City West Water and the Mrs Loughran said that that requirement was waived. There is no contrary evidence.

118. In practical terms there would seem to be no point in servicing something that is not used. There is no evidence that it was serviced but equally, no evidence of any loss that resulted from that. The Landlord did not suggest that she had to get anybody in to service the grease trap as a consequence of the failure of the Tenants to do it.

The blinds and drapes

119. The Landlord claims $24,430.00, being the cost of replacing the blinds and drapes in the Building with new drapes and blinds. She has produced a quotation in that amount but she sold the Building without replacing the blinds and drapes.

120. The Tenants' works included arranging repair of the pelmets and curtains on all windows. The only evidence that I have as to their condition is that of Mrs Loughran who says that they did not require repair. Although it is clear that they were old and in poor condition, there was no obligation to replace them and there is no evidence that they needed to be repaired. One can only repair something that is in a state of disrepair. I accept the Tenants' evidence that they put the curtains into plastic bags, stored them in a room in the Building and that they were still there when they left. They were never replaced by the Landlord before the Building was sold.

Cleaning the Building

121. The Landlord said that it cost her $3,450.00 to clean the Building after the Tenants left. Photographs show a climbing frame for cats that the Tenants left behind and some furnishings of unknown origin but no invoice has been produced for the amount claimed to verify that cost or to show what it was for or when it was incurred.

122. It is also apparent from the photographs that the Building was in very poor condition at the start of the tenancy and that there were some furnishings there. The Landlord moved into the Building and lived there for an unknown period after the Tenants left and then had to prepare it for sale. It is impossible to assess this claim on the evidence that I have.

Refund of the rent free period

123. The Landlord claims two months' rent on the ground that the Tenants' works were not done and that the two months' rent free period was only agreed to on the basis that the work would be done.

124. It was not a term of the Lease that the rent free period was conditional upon those works being performed. In any case, I am satisfied that the Tenants' works were performed insofar as they could be or needed to be.

Ongoing rental

125. Since I am satisfied that the Tenants validly terminated the Lease the claim by the Landlord for ongoing rental fails.

Conclusion

126. There will be an order on the claim that the Landlord pay to the Tenants the sum of $63,993.51, calculated as follows:

Security deposit	$35,200.00
Refunds to customers	$ 660.00
Relocation costs and fitting out alternate premises,	$20,322.11
Loss of profits for the month of July 2016	$ 7,811.40
Total	$63,993.51

127. The counterclaim will be dismissed. The questions of costs and interest will be reserved, although the parties will be aware of the very limited circumstances in which costs can be awarded in this jurisdiction.

SENIOR MEMBER R. WALKER