VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP366/2014

CATCHWORDS

Application to amend points of claim; relevant considerations; factors identified in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

APPLICANT:	Luchio Nominees Pty Ltd (ACN: 005 495 992)
RESPONDENT:	Epping Fresh Food Market Pty Ltd (ACN: 127 544 049)
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	8 September 2015
DATE OF ORDER:	25 September 2015
DATE OF REASONS:	30 September 2015
CITATION	Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd (Building and Property) [2015] VCAT 1535

ORDER

The application of the applicant for leave to amend its points of claim is dismissed.

MEMBER C EDQUIST

APPEARANCES:

For the applicant	Mr P Caillaird of Counsel
For the respondent	Mr L Hawas of Counsel

REASONS

1. The applicant ('Luchio') owns a property at 551 High Street, Epping which it has leased to the respondent ('Epping'). There is a significant dispute between the parties concerning the lease. They have been involved in this proceeding in the Tribunal since September last year. The proceeding is part heard, and the applicant has indicated that it wishes to amend its points of claim

2. Luchio currently says in its points of claim that it has validly terminated the lease following Epping's repudiation of it, and is in possession. Epping, in its points of defence, disputes that it has repudiated the lease, and says that Luchio is estopped from purporting to forfeit or terminate the lease without giving it and its banker 28 days notice of its intention to do so.

3. The proceeding is currently listed for further hearing on 4 November 2015, with an allowance of three days. Luchio's evidence has closed, save for the prospect that more documents may be tendered. Epping has given some evidence, but has not completed its evidence.

4. Luchio has given notice that it wishes to amend its points of claim. It has advised the Tribunal that it wishes to restrict the orders sought in the prayer for relief. Luchio confirms that the effect of the amendment is to withdraw the claim relating to repudiation of the lease and reliance upon the notice issued pursuant to s 146 of the *Property Law Act 1958* ('the PLA').

5. Luchio says the amendments have become necessary because Epping introduced seventeen documents into evidence after Luchio's sole witness, Mr Luigi Follachio, had completed his evidence, with the effect that the documents could not be put to him. Luchio says that some of these documents are relevant to new defences raised by Epping.

6. It is this application to amend the points of claim that I have to determine.

7. If leave to amend the points of claim is granted to Luchio, Epping will have to file an amended defence. Epping doubts that the hearing date of 4 November 2015 could be maintained in these circumstances.

8. The prospect of losing the hearing date is deeply troubling to Luchio because of Mr Follachio's significant health issues. It is important, in Luchio's submission, that Mr Follachio be given an early opportunity to give any further evidence that he has to give.

A brief history of the proceeding to 22 June 2015

9. On 17 September 2014, Luchio commenced proceedings against Epping seeking:

   (a) a declartion that the lease is a retail lease within the definition prescribed in the *Retail Leases Act 2003* ('RLA');

   (b) a declaration the lease was terminated and rescinded on 12 August 2014;

   (c) a declaration that Epping had repudiated the lease;

   (d) an order that Epping vacate the premises;

   (e) an order for immediate possession;

   (f) an order that Epping pay $66,112.93 being arrears in payments due under the lease;

   (g) damages and mesne profits;

   (h) interest;

   (h) legal costs under the lease;

   (i) alternatively, orders under s 91(1)(b) and (e)(ii) of the RLA for payment of damages by way of interest.

10. The proceeding first came before the Tribunal on 30 September 2014. Luchio's application, insofar as it sought a possession order, was listed for hearing on 12 November 2014. Orders for filing affidavit material and submissions by both parties were made, and costs were reserved.

11. On 12 November 2014, the proceeding came before the Tribunal again. Although it had been listed for a hearing, and the parties had prepared outlines of their submissions, the hearing was conducted as a directions hearing. Orders were made for filing affidavits and giving discovery of documents, and the matter was referred to a mediation. The matter was also listed for hearing on 5 February 2015.

12. On 16 December 2014, the mediation listed for 17 December 2014 was vacated because Luchio's solicitors had written advising Luchio would not be attending the mediation. The proceeding was listed for a directions hearing on 15 January 2015.

13. On 15 January 2015, directions were given for filing pleadings and a Tribunal Book containing all documents relevant to the hearing, and the hearing on 5 February 2015 was confirmed.

14. On 2 February 2015, Orders in Chambers by consent were made vacating the hearing date of 5 February 2015. The proceeding was set down for final hearing on 16 April 2015. Orders for filing pleadings and for discovery were also made.

15. On 17 March 2015, the matter came on again for a directions hearing. The date upon which Epping must file points of defence, a list of documents and any points of counterclaim was extended to 29 March 2015. The hearing date of 16 April 2015 was confirmed.

16. There was a further directions hearing on 13 April 2015. As Epping had failed to comply with the orders made on 17 March 2015, the Tribunal directed that the hearing set for 16 April 2015 was to proceed without points of defence being filed. Costs of $750 were awarded against Epping.

17. On 14 April 2015, the Tribunal in Chambers rejected an application by Epping for an adjournment of the hearing scheduled to commence on 16 April 2015.

18. On 16 April 2015, the hearing opened before me. An application for an adjournment was made again by Epping through the director who appeared, Mr Appleby. The application was made on the basis that Epping's solicitor was overseas, but had made no arrangement for counsel to appear. The Tribunal ordered that the matter be adjourned until 17 April 2015 in order to enable Epping to obtain legal representation. Costs were reserved.

19. At the opening of the hearing on 17 April 2015, Epping was represented by Mr Snow of Counsel. A further application was made by Epping for an adjournment. This further application for an adjournment was denied and costs associated with it were reserved. Mr Snow advised the Tribunal that he had no instructions to appear on behalf of Epping at the hearing, and after he had conferred with his client and confirmed those instructions, he was excused. Mr Appleby elected to stay and represent Epping.

20. The hearing continued throughout the balance of 17 April 2015 and continued on the following Monday, 20 April 2015.

21. At the opening of the hearing on 20 April 2015, Epping made yet another application for an adjournment. This was rejected.

22. On 20 April 2015, time ran out before the hearing was completed. The proceeding was adjourned for further hearing on 25 May 2015. An order was made that Epping must file and serve its points of defence by 7 May 2015 and orders were also made regarding further steps including the filing by each party by 18 May 2015 of a statement of contentions as to three legal issues. These were:

(a) whether the premises are 'retail premises' as defined in s 4 of the RLA;

(b) whether Luchio must give a notice under s 146(1) of the PLA if it seeks to enforce a right of re-entry or forfeiture for a breach of any covenant or condition in the lease amounting to repudiation;

(c) whether, in circumstances where Luchio is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture arising by reason of repudiation of the lease, Epping may apply to the Tribunal for relief under s 146(2) of the PLA;

('the RLA, repudiation and s 146(2) issues).

23. On 18 May 2015, the Tribunal in Chambers extended the time by which Epping must file and serve points of defence to 20 May 2015.

24. On 20 May 2015, Epping filed and served its defence.

25. On 22 May 2015, the Tribunal in Chambers vacated the hearing date scheduled for 25 May 2015. The reason for this was that there had been an issue with the recording of the hearing on 17 April 2015 and the transcript was not available, and it was sought by the Epping's new solicitors. In place of a hearing on 25 May 2015, a directions hearing was listed.

26. At the directions hearing on 25 May 2015, the Tribunal extended the time in which the parties would make submissions concerning the the RLA, repudiation and s 146(2) issues. It was also ordered that Luchio must, by 9 June 2015, file and serve a document setting out in respect of its claim that the lease had been repudiated, the clauses of the lease alleged to have been breached, the particulars of each breach, and the time of each breach. Directions were made in respect of the filing of affidavits, and documents to be relied on, and the matter was listed for a compulsory conference and also set down for further hearing.

27. On 29 May 2015, the Tribunal in Chambers adjusted the date for the compulsory conference to 29 July 2015, and the further hearing was re-scheduled for 5 August 2015.

28. On 15 June 2015, the timetable set on 25 May 2015 was adjusted by consent orders made in Chambers so that the submissions of the parties regarding the the RLA, repudiation and s 146(2) issues were to be filed by 15 June 2015. The compulsory conference scheduled for 29 July 2015 was confirmed.

Luchio's proposed amendment to its points of claim

29. Luchio, in a letter to the Tribunal from its solicitors dated 22 June 2015, advised the Tribunal that it wished to amend its claim by restricting the

orders sought in the prayer for relief. Luchio confirmed that the effect of the amendment was to withdraw the claim relating to repudiation of the lease and reliance upon the notice issued pursuant to s 146 of the RLA (sic). The letter went on to advise that Luchio had:

> served on the tenant a further notice under section 146 of the *Retail Leases Act 2003* (sic) requiring the tenant to address a number of breaches within 28 days. If the tenant fails to do so, [Luchio] will seek to amend the Points of Claim to seek a declaration that the lease has been terminated and rescinded in reliance upon that notice.

30. On 23 July 2015, Luchio's solicitors delivered to the Tribunal a letter bearing that date which addressed a number of matters. In relation to the proposed amendment to the points of claim the letter advised:

> As stated in our letter to VCAT dated 22 July 2015, the Lessor seeks leave to tho amend the Points of Claim by restricting the orders sought to paragraphs A and I-L of the Prayer for Relief only. In particular:
>
> 1 A declaration that the Lease between Luchio and Epping is not a Retail Lease within the definition prescribed in the *Retail Leases Act 2003*.
>
> 2 Payment of legal costs pursuant to clause 2.1.11 (d) and (e) of the Lease.
>
> 3 Further and alternatively, orders under section 91 (1) (b) and 91 (1) (e) (ii) of the *Retail Leases Act 2003*.
>
> 4 Such further or other orders as the Tribunal deems appropriate.
>
> 5 Costs.
>
> The need to determine whether the premises are "retail leases" remains. However, the claims relating to repudiation of the lease and reliance upon the previous notice have been withdrawn.

31. A directions hearing took place on 27 July 2015. A number of matters were addressed including the proposed amendment to the points of claim. Proposed draft amended points of claim were handed up by Luchio's Counsel, Mr Caillard, who explained that a new s 146 notice was now being relied on. He said the same underlying breaches of the lease were referred to, and that the amendments to the points of claim were 'minor'.

32. Counsel for Epping, Mr Hawas, objected to the document being filed and served. He argued that Luchio had run a renunciation case in April. A number of breaches of the lease were complained of and, in totality, it was said that the lease had been repudiated. However, no notice of the repudiation had been provided under s 146. Luchio had said that this was not necessary because of the *Apriaden* case.[1] Mr Hawas submitted that Luchio's case was misconceived because *Apriaden* was no longer good law.

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1 *Apriaden Pty Ltd v Seacrest* [2005] VSCA 139.

It had been overridden by legislation when s 146 of the PLA had been amended.

33. Mr Hawas further submitted that the amendment of Luchio's points of claim should not be allowed because the effect of the amendment was to make a new claim which was inconsistent with the previous claim. By relying upon a new s 146 notice, Luchio 're-enlivened the lease'. Mr Hawas submitted the case should be struck out, with costs awarded to it. He referred to the High Court case of *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27. He added that no late amendment should be made after Luchio had closed its case.

34. The orders ultimately made on 27 July 2015 included an order that Luchio's application for leave to amend its claim was listed for hearing on 8 September 2015. The compulsory conference listed for 29 July 2015 was confirmed, but the hearing scheduled for 5 August 2015 was vacated, and the proceeding was set down for hearing on 4 November 2015 with an allowance of three days.

35. To facilitate the application to amend, Luchio was directed to file and serve any application to amend its points of claim, together with affidavit material in support including the proposed amended points of claim, and submissions, by 10 August 2015. Epping was to file and serve any material, including submissions in reply, by 21 August 2015.

The hearing on 8 September 2015

36. Luchio's application to amend its points of claim duly came on for hearing on 8 September 2015.

37. At this hearing, Luchio was represented by Mr Caillard, who had appeared for Luchio throughout the hearing on 16, 17 April and 20 April 2015, and also at the subsequent directions hearings held on 25 May and 27 July 2015. He referred to submissions which had been filed on behalf Luchio on 10 August 2015, to further submissions dated 8 September 2015 and to a folder of authorities which he handed up at the hearing. In his opening, he drew the Tribunal's attention to a fresh version of the proposed points of claim which he said corrected some typographical errors appearing in the original version filed. In this minor way, he amended the application being made.

38. Epping was represented again by Mr Hawas. He had not appeared on behalf of Epping at the hearing, but he had appeared on behalf of Epping at the directions hearings on 25 May and 27 July 2015.

39. At the hearing on 8 September 2015, Mr Hawas made oral submissions but did not hand up written submissions. However, he referred to a part of the written submissions which had been filed by Epping dated 12 November

2014, and referred to portions of the transcipt of the hearing on 20 April 2015. He also handed up some authorities, and spoke to them.

40. As Mr Hawas did not have time to complete his submissions on 8 September 2015, Epping was given leave to file and serve further submissions by 10 September 2015. These submissions have been received and reviewed by the Tribunal.

41. Luchio, in turn, was ordered to file submissions in reply by 11 September 2015. These further submissions have also been received and read.

Agreed principles

42. Before consideration is given to the respective arguments advanced by the parties, it is convenient set out some matters which are not controversial.

43. The first of these is that the application is made under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

44. Section 127 of the VCAT Act provides:

> **Power to amend documents**
>
> (1) At any time, the Tribunal may order that any document in the proceeding be amended.
>
> (2) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

45. The parties appear to be in agreement that when considering a proposed amendment under s 127, the primary question is 'what does the interest of justice dictate?'[2]

Aon and case management princples

46. Both parties recognised that the High Court decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 ('*Aon*') was highly relevant to the consideration of any application to amend pleadings, and both referred to the case.

47. To give context to future references to *Aon*, it is convenient to set out the passage which deals with the importance of taking into account the issue of case management in any application to amend pleadings. The relevant passage, which appears in the joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ, reads as follows:

> The purposes stated in r 21 reflect principles of case management by the courts. Such management is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised

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[2] Luchio's response submission dated 11 September 2015, paragraph 7, quoting *Ultra Thoroughbred Racing Pty Ltd v Those Certain Underwriters at Lloyds* [2011] VSC 370.

> some time ago, by courts here and elsewhere in the common law world, that a different approach was required to tackle the problems of delay and cost in the litigation process.[3]

48. Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Aon* went on to say:

> An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.
>
> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.[4]

The *Aon* factors

49. Mr Caillard submitted, and Mr Hawas did not dispute, that *Aon* established a set of factors which are relevant to an application to amend, and that these factors have been applied in a number of Victorian Supreme Court cases including *Ultra Thoroughbred Racing Pty Ltd v Those Certain Underwriters at Lloyd's of London*,[5] *Namberry Craft Pty Ltd v Watson*,[6] *Belbin vLower Murray Urban and Rural Water Corporation (Ruling No 2)*[7] and *Virginia Surety Company Inc & Anor v Dumbrell & Ors* [2011] VSC 602.[8]

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3 *Aon* at [92].
4 *Aon* at [111, 112 and 113].
5 [2011] VSC 370.
6 [2011] VSC 136.
7 [2012] VSC 360.
8 [2011] VSC 602

50. In *Namberry*,[9] Vickery J usefully summarised the following factors which the High Court in *Aon* had referred to as needing to be weighed in the balance in the exercise of the discretion to grant an amendment to a pleading:

    (a) Whether there will be substantial delay caused by the amendment;

    (b) The extent of wasted costs that will be incurred;

    (c) Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressure placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;

    (d) Concerns of case management arising from the stage in the proceeding when the amendment is sought, including the fact that the time of the court is a publicly funded resource, and whether the grant of the amendment will result in inefficiencies arising from a vacation or adjournment of trials;

    (e) Whether the grant of the amendment will lessen public confidence in the judicial system; and

    (f) Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.

Luchio's contentions

51. In its written submissions filed on 10 August 2015, Luchio outlined the nature of the proposed amendments to the points of claim. It was pointed out that there was no change to the application insofar as it sought a determination of whether the premises were 'retail premises'. It was also said there was no change to Luchio's remaining points of claim in relation to forfeiture of the lease other than:

    (a) allowing the Landlord to rely on a notice issued under s 146 of the PLA dated 19 June 2015; and

    (b) reflecting that notices previously issued had been withdrawn.[10]

52. Luchio then went on to make its central point, which was:

> This case is unusual in that the Tenant did not reveal its defence until after Mr Follachio had given evidence. Further, it withheld seventeen documents on which it sought to rely until the third day of the hearing. This

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9 *Namberry Craft v Watson* [2011] VSC 136 at [38].

10 Luchio's submissions dated 10 August 2015, paragraph 2.

> necessitated a review of the Landlord's case and resulted in a new notice being issued under section 146 of the Property Law Act.[11]

53. In support of this contention Luchio reviewed the history of the proceeding, emphasising Epping's repeated failure to file points of defence in accordance with the orders of the Tribunal.

54. Luchio said:

> The issues in dispute would have been narrowed and cost reduced had the Tenant made its defence known at an earlier stage in the proceedings and disclosed documents as ordered by the Tribunal.[12]

55. Luchio then referred to several matters which were revealed as defences by Epping for the first time after Mr Follachio had given his evidence, including reliance on a document from Epping's bank headed 'Consent of Lessor to Mortgage of Lease'. It was said that the document raised a defence that had not been anticipated and potentially exposed Epping to considerable damages to Westpac (Luchio's bank) unless the notices previously issued were withdrawn.[13]

56. Luchio also chronicled the failure by Epping to discover documents in accordance with the Tribunal's orders and highlighted that Epping had withheld documents until after Luchio had closed its evidence. Luchio said that the prejudice caused denied Luchio procedural fairness.[14] For instance, regarding the 'Consent of Lessor to Mortgage of Lease', Luchio says it:

> was denied an opportunity to consider this document before the hearing or to put the document to its witness (Luigi Follachio) in evidence. This document and any defence to be made in reliance on this document should have been disclosed earlier in these proceedings.[15]

57. Another example given by Luchio was:

> [O]n the third day of the hearing the Tenant produced a number of documents relating to associated entities in an attempt to suggest that it had the financial capacity to pay the outstanding amounts the subject of this dispute or to proceed with development proposals for the property.
>
> In fact, all of the 17 documents tendered in evidence by the Tenant had been withheld until after the Landlord closed its case, effectively denying it a fair hearing and the opportunity to put those documents to its own witness.[16]

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11 Luchio's submissions dated 10 August 2015, paragraph 3.
12 Luchio's submissions dated 10 August 2015, paragraph 10.
13 Luchio's submissions dated 10 August 2015, paragraph 17.
14 Luchio's submissions dated 10 August 2015, paragraph 7; and paragraph 16.
15 Luchio's submissions dated 10 August 2015, paragraph 17.
16 Luchio's submissions dated 10 August 2015, paragraphs 18 and 19.

58. Another example of a new document which Luchio did not have an opportunity to put to its witness was a new version of the lease which Luchio says was referred to by Epping in July 2015 in response to the s 146 notice issued on 19 June 2015.[17]

59. Luchio's substantive submission concluded with these paragraphs:[18]

> Using the words of section 78, the Tenant has conducted the proceeding in a manner that unnecessarily disadvantaged the Landlord by failing to comply with orders and directions of the Tribunal without reasonable excuse (section 78 (1)(a)).
>
> The need to issue a new notice under section 146 of the *Property Law Act* on 19 June 2015 resulted from the way in which the Tenant has conducted these proceedings.
>
> The proposed amendment is not "by reason of a deliberate tactical or strategic decision"[19] by the Landlord. In fact, it was necessitated by the way in which the Tenant conducted these proceedings to the disadvantage of the Landlord in refusing to file any Points of Defence or to disclose any documents until after the commencement of proceedings.

60. Luchio then turned its attention to the timing of the application. It was pointed out that as the matter had been listed for hearing in November, there were almost four months until the hearing resumed which could be used to overcome any prejudice which might otherwise be caused to Epping. It was submitted that the proceedings have not concluded and that that there can be no prejudice to Epping as the facts dealt with in the proposed amendment are substantially the same. It was said Mr Follachio could be recalled.

61. The Tribunal was reminded of its obligation to act fairly,[20] to act in accordance with the rules of natural justice[21] and of its wide discretion as to how to conduct proceedings.

62. It was said that allowing the amendment would give the parties:

> a reasonable opportunity to examine, cross-examine or re-examine witnesses and make submissions in relation to all relevant issues.[22]

63. The Tribunal was referred to its own decision in *Seachange Management Pty Ltd v Bevnol Constructions & Development Pty Ltd* [2010] VCAT 269 at [94]-[96] where Judge Harbison VP, in applying *Aon,* said the Tribunal should have regard to not only the prejudice to be suffered to the Landlord

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17 Luchio's submissions dated 10 August 2015, paragraph 21. The lease on which Luchio relies is attached as Exhibit LG-2 of the affidavit sworn by Luigi Follachio on 16 September 2014.
18 Luchio's submissions dated 10 August 2015, paragraph 22.
19 The Applicant here cited *Clifford v Vegas Enterprises Pty Ltd (No 4)* [2010] FCA 326.
20 Section 97 of the VCAT Act.
21 Section 98 of the VCAT Act.
22 Luchio's submissions dated 10 August 2015, paragraph 26.

but also the public interest in the proper and efficient use of public resources allocated to the Tribunal. It was submitted that if the amendment was not allowed, then that:

> would necessitate another hearing based on the section 146 notice dated 19 June 2015 which would be a waste of time and resources to all concerned.[23]

64. Luchio then submitted:

> In this case, the interests of justice require that the Landlord be permitted to amend the Points of Claim so that it may rely on the notice dated 19 June 2015 issued because documents were withheld from the Landlord and defences not disclosed.[24]

65. Luchio returned to the theme of the broad powers of the Tribunal in its further submissions dated 8 September 2015. It was submitted that the powers of the Tribunal to manage its affairs were broader than those of a Court.[25]

66. It was emphasised that the Tribunal may allow an amendment to points of claim on application by a party '**at any time**' under s 127 of the VCAT Act.[26]

67. The Tribunal was reminded of the mandatory requirement to conduct proceedings with as little formality and technicality as the requirements of the Act, and the consideration of the matters before it, permit.[27]

68. Luchio said that the obligation to act fairly to both parties meant consideration of the manner in which Epping had conducted the case, specifically the prejudice caused to Luchio by Epping having ignored orders of the Tribunal regarding the discovery of documents and the filing of a defence.[28]

69. Luchio accepted that amending the points of claim at this stage was undesirable, but said that the question to be considered was:

> whether there is any real prejudice in the scheme of this hearing.[29]

70. In its submissions dated 8 September 2015 Luchio addressed the *Aon* factors as follows:

    (a) *Whether there will be substantial delay caused by the amendment*.

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23 Luchio's submissions dated 10 August 2015, paragraph 28.
24 Luchio's submissions dated 10 August 2015, paragraph 29.
25 Luchio's submissions dated 8 September 2015, paragraph 8.
26 Luchio's submissions dated 8 September 2015, paragraph 9.
27 Section 98 of the VCAT Act.
28 Luchio's submissions dated 8 September 2015, paragraph 10.
29 Luchio's submissions dated 8 September 2015, paragraph 11.

As the case is set down for a hearing for three days commencing on 4 November 2015 there will be no delay caused by permitting the amendment. The amendment will facilitate Mr Follachio being recalled.[30]

(b) *The extent of wasted costs that will be incurred*.

The issue of wasted costs should be considered in the context of the hearing, and in particular the time wasted by Epping in the first three days by not being represented and persistently seeking an adjournment. Further, the amendments do not involve new breaches of the lease. The facts remain the same, other than a new notice having been issued.

Luchio submitted that in *Ultra Thoroughbred Racing Pty Ltd*, Forrest J was prepared to give leave to recall witnesses who had already given evidence if this was necessary.

In this case, it was said:

> the only additional time required would be to recall Mr Follachio and to be cross examined. It will be necessary to recall Mr Follachio regardless because of the introduction of new documents by Mr Appleby after the Landlord had given evidence. These documents were never put to Mr Follachio and it would be procedurally unfair if he was not given an opportunity to respond and lead evidence in reply.
>
> If the amendment is not permitted, then it will take more of the Tribunal's time because additional proceedings will be required – based on substantially the same facts – to determine the real dispute between the parties.

Here, the proceedings are still at an early stage because Epping has not completed its evidence, and it only outlined its defence after the hearing had been adjourned.[31]

(c) *Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressure is placed upon corporations, which cannot be adequately compensated for, whatever cost may be awarded*.

Epping will not be prejudiced by the amendment in any event. Furthermore, Epping will have had five months to consider the amendment. And the facts (to be considered if the amendment is allowed) are substantially the same.

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30 Luchio's submissions dated 8 September 2015, paragraphs 16-18.
31 Luchio's submissions dated 8 September 2015, paragraphs 19-24.

Luchio concluded this part of its submissions by stating:

> If there was any prejudice caused then it can be cured by the parties being given leave to reopen their cases and give any relevant further evidence they intend to rely upon.[32]

(d) *Case management issues*.

Luchio accepts that case management issues and the Tribunal's resources are factors to be taken into account following *Aon*. However, Luchio says that many of the issues canvassed above are relevant to the issue. The amendment is necessary. As the hearing is scheduled to resume for three days in November, it is not anticipated that further hearing time will be required as a result of the amendment. In any event, any delay caused by having to recall Mr Follachio is unavoidable. Finally, the amendments arise out of the same facts as before.[33]

(e) *Whether the grant of the amendment will lessen public confidence in the judicial system*.

The amendments are necessitated by Epping's disregard for the Tribunal's orders to produce documents and disclose its defence. To allow Epping to benefit from this blatant disregard for its orders must lessen public confidence in the Tribunal and its willingness or ability to enforce the orders that it makes.[34]

(f) *Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought*.

The first submission made under this heading is that consideration of the late amendment was prompted by the 'trial judge's suggestion' (sic) and in this respect the case was similar to the Victorian Supreme Court decisions of *Namberry Craft Pty Ltd v Watson* [2011] VSC 136 and *Etna & Ors v Arif & Ors* [1999] VSCA 99. On the last day of the substantive hearing the Tribunal noted the possibility that Luchio may wish to issue a new s 146 notice and amend its points of claim. Luchio has done this.

Luchio then makes a submission which seems to contradict the first submission when it says the need for the amendment is because of Epping's breaches of orders made by the Tribunal relating to the provision of documents and the delivery of a defence.

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32 Luchio's submissions dated 8 September 2015, paragraphs 25-28.
33 Luchio's submissions dated 8 September 2015, paragraphs 29 and 30.
34 Luchio's submissions dated 8 September 2015, paragraphs 31and 32.

It is acknowledged that changes made to s 146 to overcome the decision in *Apriaden* were overlooked. This arose because new counsel came into the matter due to Senior Counsel's unavailability.

In connection with a change of counsel being an acceptable explanation for a late amendment, Luchio quotes Forrest J in *Ultra Thoroughbred* when he said that:

> a poor explanation by itself should not prevent a party from litigating a point, provided the interests of justice are protected.[35]

Luchio concludes this section of its submissions by saying that it does not seek to amend the points of claim only because of the amendments to the PLA which addressed the decision in *Apriaden*.[36]

Other matters raised by Luchio in the September submissions

71. Luchio raised a number of other matters. The first of these was the proposition that denying Luchio the opportunity to amend its points of claim would have the potential to prevent Luchio to ever relying on the matters it seeks to have determined by reasons of 'issue estoppel', based on *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.

72. Another matter was that s 74 of the VCAT Act provides that, where an applicant withdraws an application, then it cannot make a further application or request or require a further referral in relation to the same facts and circumstances without the leave of the Tribunal.

Epping's submissions

73. When Epping filed its written submissions on 10 September 2015, it usefully summarised the submissions which had been made orally on 8 September 2015, as well making further submissions.

74. In summary, Epping's oral submissions put on 8 September 2015 addressed the following topics: the hearing; the substance of Luchio's application to amend its points of claim; the relevant legal principles; relevant transcript references; and the hearing on 25 May 2015.

75. In respect of the hearing, the key points made were that:

    (a) the hearing proceeded over three days on 16, 17 and 20 April 2015;

    (b) on each of those days, Epping had sought an adjournment and Luchio had opposed each adjournment knowing that Epping had not filed and served a defence or completed discovery;

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35 [2011] VSC 370, at [10(c)].

36 Luchio's submissions dated 8 September 2015, paragraphs 33-38.

(c) during the hearing in April, Luchio's primary argument in relation to the termination of the lease and possession of the premises went as follows:

(i) by repeated and sustained breaches of the lease, and its conduct generally, Epping repudiated the lease;
(ii) Luchio accepted Epping's repudiation of the lease by commencing the proceeding and was entitled immediately to possession of the premises; and
(iii) 'common law repudiation' operated outside s 146 of the PLA. If a party to the lease wished to accept the other's repudiation it was not necessary for the accepting party to give the offending party notice of the breaches under s 146;

(d) at the conclusion of the hearing on 20 April 2015, the Tribunal adjourned the hearing part heard to 25 May 2015 in order to allow the following matters to be completed:

(i) Epping to complete its evidence;
(ii) Luchio to complete cross-examination of further evidence;
(iii) Luchio to present legal submissions arising out of further evidence from Epping;
(iv) the parties to address the Tribunal on key issues including whether s 146 of the PLA required Luchio to serve a notice on Epping asserting repudiation before purporting to terminate;

(e) but for these matters, Luchio had closed its case of repudiation or termination of the lease and claimed that it was entitled to possession of the premises.[37]

76. Epping noted that Luchio, by a notice dated 19 June 2015, had purported to serve notice under s 146 of the PLA alleging that Epping had breached certain terms of the lease and had repudiated the lease. The notice required Epping to remedy the alleged breaches within 28 days, failing which Luchio would re-enter the premises and forfeit the lease. Subsequently, and in reliance upon the s 146 notice, Luchio purported to effect re-entry and a forfeiture of the lease.[38]

77. Epping says that in the proposed amended points of claim Luchio now seeks to allege that:

(a) Epping breached the terms of the lease set out in the s 146 notice;

(b) Luchio served an effective notice on Epping under s 146 of the PLA;

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37 Epping's submissions, paragraphs 2-9.
38 Epping's submissions, paragraph 10.

(c) Epping failed to remedy the breaches of the lease alleged in the s 146 notice within 28 days;

(d) by reason of Epping's failure to remedy the breaches of the lease alleged in the s 146 notice, Luchio re-entered the premises and forfeited the lease.

78. Epping says that the application is not simply an application to amend a pleading at a late stage in the proceeding. It is an application to amend points of claim to allege a new cause of action that is inconsistent with the case that was run to its close at the hearing.

79. Furthermore, Luchio is now seeking to run a case which it 'deliberately spurned' at the hearing. Luchio made a deliberate decision to proceed with the original case notwithstanding that it was flawed because of the absence of a relevant s 146 notice, even though that problem had been flagged to it by Epping in its submissions of November 2014, and by the Tribunal at the hearing on 20 April 2015.[39]

80. Epping rejects Luchio's central proposition that the documents tendered on behalf of Epping at the hearing have given rise to the application to amend. Epping submits that the documents tendered at the hearing did not go to Luchio's obligation to serve Epping with an effective notice under s 146 of the PLA before accepting any repudiation of the lease. Epping contends:

> Luchio's failure to serve an effective s 146 notice was fatal to its case independent of any document that Epping tendered. Luchio could not have rescued its case if Epping had discovered the tendered documents before the hearing.[40]

81. Epping says that the relevant legal principles are those relating to the situation where a party seeks to amend its pleading and re-open its case after it has closed.

82. The Tribunal was referred to *Inspector General in Bankruptcy v Bradshaw* [2006] FCA 22 (Kenny J) as the 'seminal case' on the principles to be applied in such a situation. Epping explained that in *Bradshaw*, the applicants had tried to re-open their case on a bond after evidence and submissions had closed, even though the trial was continuing. The Court refused to grant the applicants leave to amend their case.

83. Epping submits that in *Bradshaw*, the Court recognised that a court or tribunal retains the discretion whether to allow a party to re-open its case. The overriding principle to be applied is whether the interests of justice are better served by allowing or rejecting the application. However, it was

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39 Epping's submissions, paragraph 11-15(d).
40 Epping's submissions, paragraph 15(e).

contended that the discretion is not unrestrained and is to be guided by the following four recognised classes of case where the court may grant leave to re-open:

(a) fresh evidence;

(b) inadvertent error;

(c) mistaken apprehension of the facts; and

(d) mistaken apprehension of the law.

84. Epping contends that in *Bradshaw* the applicants were not permitted to re-open their case because they had unequivocally elected at the hearing, in their submissions and in correspondence, to proceed on the basis that they did not need to prove their loss. In the event, the Court refused the application to re-open the case on the basis that the applicants could not run a re-opened case that was inconsistent with the case they had run at the hearing.

85. The Court in *Bradshaw* also upheld the respondent's submission that:

> Leave to reopen would not be granted where a party had made 'a conscious tactical decision not to lead evidence' or 'deliberately elected not to introduce the evidence earlier'.[41]

86. Epping submits that the *Bradshaw* test has been adopted by the Victorian Court of Appeal in *Spotlight Pty Ltd v NCON Australia Ltd* .[42] In approving the principles articulated by Kenny J in *Bradshaw* the Court of Appeal stated:

> The applicants [in Bradshaw] had 'from the commencement of the proceeding… determined to carry their case without seeking to quantify their loss.' They then sought leave to reopen their case for the purpose of pursuing the very quantification which they had originally spurned.[43]

87. Epping argues that in the present proceeding:

> Luchio now seeks to run a case – forfeiture of the Lease by reason of Epping's breach and failure to comply with a notice under s 146 – that it deliberately spurned at the hearing. That is not an appropriate circumstance for the grant of leave to reopen a case.[44]

88. Epping also submits that the present case is not one where there is a relevant misapprehension of the law. This is not a case where there was genuine doubt about the state of the law. It is, on the contrary, a case where there is

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41 *Bradshaw* is discussed at length in the Epping's submissions at paragraphs 16-23.
42 [2012] VSCA 232.
43 *Spotlight* is discussed in the Epping's submissions at paragraphs 24-29.
44 Epping's submissions, paragraph 29.

no doubt about the proper legal position, but Luchio proceeded on the basis of ignorance of the law. Luchio now concedes that a terminating party must first serve a notice under s 146 of the PLA before accepting a repudiation of a lease by the offending party.[45]

89. By the time the hearing concluded on 20 April 2015, Luchio was on notice regarding the flaw in its case, namely, the want of a proper notice under s 146 of the PLA, because:

    (a) Epping had raised the issue in its submissions filed in November 2014;

    (b) The matter was raised at the hearing on 20 April 2015.[46]

90. Notwithstanding, Luchio had on 18 May 2015, filed contentions that confirmed that Luchio asserted the lease was terminated on common law principles which operated separately to the statutory regime for re-entry in s 146.

91. On 20 May 2015, Epping filed a defence which expressly raised (at paragraph 49(e)) the failure of Luchio to serve a proper notice under s 146 of the PLA.

92. At the directions hearing on 25 May 2015 Luchio did not seek to amend its points of claim. It was still electing to proceed with its flawed case as argued at the hearing.[47]

93. In its fresh written submissions dated 10 September 2015, Epping reiterated that Luchio had proceeded deliberately with a flawed case at the hearing and maintained its position right up until 19 June 2015, when it served a new s 146 notice.

94. With respect to the application of *Bradshaw*, Epping said that none of the four requirements set out by Kenny J existed as there was no fresh evidence, no relevant inadvertent error, no misapprehension as to the facts, and no relevant misapprehension as to the law.[48]

95. Luchio elected deliberately to proceed with its repudiation case as argued at the hearing. Epping contends that in these circumstances:

> The interests of justice are not served by allowing Luchio to reopen its case to run a new case, which is inconsistent to the one that it ran at the hearing, which it deliberately chose not to press earlier. To allow leave in those circumstances would offend the principle of finality of

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45 Epping's submissions, paragraph 31.
46 Epping sets out relevant references to the transcript in section D of its submissions.
47 Epping's points arising out of the hearing on 25 May 2015 are set out in its submissions, paragraphs 32-35.
48 Epping's submissions, paragraph 39.

litigation, and run contrary to the authority of *Bradshaw* and *Spotlight.*[49]

96. Furthermore, Epping submits that to allow Luchio to amend its points of claim now would offend most of the factors set out by the High Court in *Aon*. In particular:

    (a) allowing Luchio to amend and re-open its case will substantially delay the disposition of the proceeding;

    (b) the wasted cost will be significant;

    (c) Epping will be prejudiced by the amendment as Luchio ran its case to close and Epping is entitled to insist on judgment on that case;

    (d) case management considerations favour the Tribunal refusing to grant Luchio leave to amend. If the amendment is allowed, any subsequent hearing will be more complex and time-consuming than the simple and quick hearing likely if amendment is not allowed;

    (e) allowing Luchio to press a new case inconsistent to the one it ran at the hearing will undermine confidence in the judicial system or the Tribunal's processes;

    (f) although the Tribunal is not a court, it still operates in an adversarial system where an applicant is required to articulate its case and run it to close, once and for all;

    (g) Luchio has not given a satisfactory explanation for wanting to amend its claim after close and seeking to re-open its case to run a new one.[50]

97. The possibility of *Anshun* estoppel is not relevant to an application to amend and re-open a claim after it has closed.[51]

Luchio's further submissions in reply

98. It is not necessary to reiterate each submission made by Luchio, as some merely repeat points which have been made before. However, it is relevant to note that the following fresh points were made in respect of Epping's submissions in reply.

99. First, it is submitted that an application to amend pleadings after proceedings have commenced must be distinguished from an application to re-open a trial. An example of a case which had closed and was awaiting judgment when a re-opening was attempted is *Spotlight Pty Ltd v NCON*

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49 Epping's submissions, paragraph 40.
50 Epping's contentions on the *Aon* factors are set out in its submissions, paragraph 41.
51 Epping's submissions, paragraph 42.

Australia Ltd. In the present case, the matter has been adjourned part heard, and new documents/unpleaded defences are being raised.[52]

100. Furthermore, Luchio submits that the hearing had not closed. It in support of this, notes that on 21 April 2015, the Tribunal specifically ordered:

> If the applicant proposes to rely at the further hearing on any document which is not in its Tribunal Book or which it has not yet put into evidence, it must provide a copy of that document to the respondent on or before 4 pm on 11 May 2015.[53]

101. At a later point, Luchio contends that, even if it had closed its case, the hearing had not concluded and there was no impediment to it re-opening its case if this would avoid a denial of natural justice.[54]

102. Luchio contests that the principles set out in *Bradshaw* apply in the present case. It acknowledges that it is attempting to amend its points of claim,but not that it is seeking to re-open the hearing.[55]

103. Luchio disputes the proposition that the proposed new pleading is inconsistent with the earlier pleading.[56] In doing so, it highlights Epping's failure to pay rent and the breaches of the lease which were outlined at the hearing.

104. Luchio disputes that 'the reopening is entirely of the landlord's own making'. It repeats that:

> The amendment is sought because the tenant withheld documents and refused to make its defences known until the case had commenced and attempted to take the Landlord by surprise.[57]

105. With respect to the *Anshun* estoppel point, which was rejected by Epping as irrelevant, Luchio notes that it was specifically raised by the High Court in *Aon* at [86-87]. Epping has never ruled out making an application for an order under *Anshun*. Luchio goes on:

> Anshun estoppel is particularly relevant to this particular amendment given that the hearing remains almost identical to that put to the Tribunal during the opening, save for relying on a new notice issued under s 146 setting out each of the breaches that were relied upon.[58]

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52 Luchio's submissions dated 11 September 2015, paragraphs 14 and 15.
53 Luchio's submissions dated 11 September 2015, paragraphs 16, 19 and 20.
54 Luchio's submissions dated 11 September 2015, paragraph 22.
55 Luchio's submissions dated 11 September 2015, paragraph 17.
56 Luchio's submissions dated 11 September 2015, paragraph 24.
57 Luchio's submissions dated 11 September 2015, paragraph 30.
58 Luchio's submissions dated 11 September 2015, paragraph 35.

DISCUSSION

PRINCIPLES APPLICABLE TO AN APPLICATION UNDER S 127

106. The power to make an order under s 127 is dicretionary. The nature of 'discretion' was considered by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at 204-205 [19] in these terms:

> 'Discretion' is a notion that 'signifies a number of different legal concepts'[78] . In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result' [79] . Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made [80] . The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion [81] . On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

107. The power of the Tribunal to amend documents was addressed by Mckenzie DP in *Yim v State of Victoria* [2000] VCAT 821 where she said:

> The power to amend under s 127 is discretionary. In exercising that discretion the Tribunal may take into account whatever factors it considers relevant. These may include factors similar to those which courts take into account in determining whether or not to amend claims. But they may also include factors that have to do with the objectives of the relevant enabling enactments.

108. In the present case, I was not addressed as to what factors affecting my discretion might be derived from the objectives of the RLA, which is the relevant enabling enactment, and I do not propose to consider that enactment further in this context.

109. As I have remarked above, there appears to be consensus that when considering a proposed amendment to a pleading the primary question is 'what does the interest of justice dictate?'[59] Furthermore, there was clear agreement that the *Aon* factors ought to be taken into consideration. It was in the application of those factors where the parties' views diverged.

110. There is controversy between the parties as to whether Luchio's application to amend its points of claim also amounted to an application to re-open its case, and therefore attracted the principles articulated by Kenny J in *Bradshaw*.

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[59] See paragraph 40 above.

111. I propose to address the *Bradshaw* test and the *Aon* factors in turn. Before I do so, it is appropriate that I make a comment about my view as to the underlying reason why Luchio has made this application for leave to amend its pleading.

Why is the application for leave to amend being made?

112. Luchio's key contention is that it has to amend its pleading because Epping breached orders of the Tribunal to produce documents and deliver its defence. Epping does not accept this contention. It argues that the need for the amendment has been driven by the realisation by Luchio that its original pleading that the lease had been repudiated is doomed to failure because it had not issued the required PLA s 146 notice.

113. I acknowledge the argument put by Luchio in its submissions of 10 August 2015 that that the late discovery of the 'Consent of Lessor to Mortgage of Lease' gave rise to a new defence which had not been anticipated and potentially exposed Luchio to considerable damages to Westpac (Epping's bank), unless the notices previously issued were withdrawn.[60]

114. The three s 146 notices it had issued prior to the institution of this proceeding were dated 13 October 2010, 7 July 2012 and 12 March 2014 respectively. None of those notices gave Epping's financier, Westpac, 28 days notice of Luchio's intention to terminate the lease. Luchio says in effect that after Epping put into evidence the 'Consent of Lessor to Mortgage of Lease', it became aware that it could only proceed to terminate the lease at the risk of having to pay significant damages to Westpac, and that it is accordingly obliged to amend its claim so as not to rely on these notices.

115. The difficulty I have with Luchio's argument that the amendment was driven by Epping's breaches of orders of the Tribunal to produce documents and deliver its defence, is that Luchio clearly said in its solicitor's letter to the Tribunal dated 22 June 2015 that:

> The effect of this amendment is to withdraw the claims relating to repudiation of the lease and reliance upon the notice issued pursuant to section 146 of the *Retail Leases Act* 2003.

116. This intention to withdraw the claim related to repudiation *as well as* those relying upon the existing s 146 notice was confirmed in Luchio's solicitor's letter to the Tribunal dated 23 July 2015.

117. It is critical to note the separate nature of the claim for repudiation as distinct from the claim for forfeiture of the lease based on the s 146 notice. The claim for repudiation, as conducted at the hearing, did not turn on the

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60 Luchio's submissions dated 10 August 2015, paragraph 17.

content of the s 146 notice. It was independent of them. And it was run as the principal argument.[61]

118. During the hearing in April, Luchio's Counsel strongly argued that the statutory regime for termination of the lease established by s 146 of the PLA did not apply to a claim for common law repudiation of the lease. Reliance was placed squarely on *Apriaden* in this respect. During the course of the hearing I expressed my concern about the language of s 146 to Luchio's counsel.[62]

119. Luchio filed contentions on 18 May 2015, which, as noted, confirmed that it was pursuing the original claim regarding repudiation.

120. When Epping filed its defence on 20 May 2015, it squarely raised the issue of the lack of a relevant s 146 notice. The key issue, Epping alleges, is that Luchio has not served a proper notice under s 146(1) of the PLA setting out the breaches of the terms of the lease, or the conduct, upon which Luchio relies to allege repudiation.[63]

121. At the directions hearing on 25 May 2015, counsel for Epping submitted that the repudiation claim was 'dead' on the basis that *Apriaden* had been reversed by legislation. He said that s 146 of the PLA had been amended because of *Apriaden*.

122. Luchio openly concedes that it 'overlooked' the changes made to s 146 to overcome *Apriaden*.[64] In making this concession, Luchio effectively acknowledges that s 146, as amended, presents a problem to its original claim based on repudiation of the lease, because there is no appropriate s 146 notice in existence to found the claim for repudiation pleaded in the original points of claim.

123. Luchio's proposal to change its original pleading regarding repudiation arose after Epping's points of defence were served. I agree with Epping's contention that the proposed amendment is driven by Luchio's realisation that the original pleading that the lease has been repudiated was likely to fail because Luchio had not issued the required s 146 notice asserting repudiation. Accordingly, I regard the withdrawal of the claim for repudiation as the central purpose of the proposed amendment**.**

124. I also conclude that the late disclosure of the 'Consent of Lessor to Mortgage of Lease' is not the reason Luchio wishes to abandon its original repudiation claim and then re-plead the claim.

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61 Transcript 20 April 2015 page 100, lines 1-13.

62 See transcript of the hearing on 20 April 2015, page 96, lines 18-30; p 97 lines 1-4; page 100 at lines 18-22.

63 Points of Defence dated 20 May 2015, paragraph 49(e).

64 See Luchio's submissions dated 8 September 2015, paragraph 37.

125. I note the late delivery of Epping's defence cannot be said to have caused the need for the re-pleading. The flaw in Luchio's repudiation claim, if it exists, has been there since the proceeding was issued. The timing of the delivery of the points of defence, as distinct from the efficacy of the defences raised, is not the reason for Luchio's application to re-plead.

126. Before I leave this topic, I acknowledge that I initially had a concern, as I indicated to the parties, that in the proposed amended points of claim the three original PLA s 146 notices are still pleaded, and I formed the view that the submission that the s 146 notice was withdrawn did not align with the proposed amended pleading. I note that this is an unfounded concern, as at a later point in the proposed amended points of claim, after the new s 146 notice issued on 19 June 2015 is referred to, it is asserted that Epping has been advised notices previously issued by Luchio had been withdrawn.[65] I remark that the confusion about the issue highlights the practical difficulties which can arise when a new claim based on new facts, is retrofitted into an existing pleading.

Finding as to why the application to amend is being made?

127. I find that it is Luchio's concern for the efficacy of the original pleading regarding repudiation of the lease that is the reason that Luchio now seeks to amend its points of claim.

128. This finding is relevant to a number of Luchio's contentions, including the proposition that natural justice considerations come into play because the amendment was driven by Epping's late discovery of documents and late delivery of its defence. Other contentions affected by this finding are discussed below.

The argument that the Tribunal prompted the amendment

129. At this juncture, having just made reference to some instances in the transcript where I drew to Luchio's Counsel's attention the problem for the repudiation claim arising from the wording of s 146, it is convenient to deal with one of the arguments put forward by Luchio. This is the proposition that the amendments to the points of claim should be allowed because they were prompted by comments made by the Tribunal.

130. I consider this argument misconceived. It is clear from the transcript of the hearing on 20 April 2015 that I raised the prospect of Luchio serving 'another notice'. A review of the transcript shows that I raised the question of whether another notice might be issued in the context that I had expressed concern about the efficacy of the existing notice. When I did so, I clearly made it plain that I could not advise the parties,[66] and I did not advise the parties. I also acknowledged that Luchio might wish to amend its

65 Proposed amended Points of Claim, paragraph 48.
66 Transcript 20 April 2015, page 102, lines 12-18.

points of claim.[67] My comment is not to be construed as a guarantee that if it was acted upon, an amendment of the pleading based upon any new notice issued would be allowed.

Bradshaw

131. I now make some comments about the applicability of *Bradshaw*. That case applies where there is application to re-open a case which has been closed, not merely where there is an application to amend a pleading.

132. I do not agree with Luchio's submission that the suggestion there are '*only four recognised classes of case where a trial will be re-opened*' contradicts the principles espoused in *Aon*.[68]

133. The four recognised classes of case in which a court may grant leave to re-open identified by Kenny J in *Bradshaw* were approved of by the Victorian Court of Appeal in *Spotlight*, which was decided in 2012, some three years after *Aon* was decided. So *Bradshaw* is still part of our law. The question is, does it apply to the present case?

134. In the present case, I think Epping is correct in arguing that the application to amend the pleading will necessitate a re-opening of Luchio's case. This is because because the new pleading centres on a new s 146 notice dated 19 June 2015, which obviously was not in existence when the the proceeding was commenced, nor when Mr Follachio gave his evidence in April.

135. It is self-evident that the new case which will result from the proposed re-pleading, which is premised on the lease still being in operation on 19 June 2015, is inconsistent with the old pleading, which asserted the lease had been repudiated by Epping, and then terminated by Luchio.

136. It is also apparent that the proposed re-pleading, which relies on a s 146 notice which lists breaches of the lease upon which the claim of repudiation is based, is a notice of a type which Luchio said at the hearing on 20 April 2015 it did not have to produce in order to successfully run its case.

137. I accordingly consider that if the proposed pleading is allowed, Luchio will be running a new case which is both inconsistent with its previous case and which relies on a view of the law which Luchio rejected or 'spurned' at the earlier hearing.

138. The present case does not fit into any of the four categories of case, identified in *Bradshaw*, where a re-opening will be allowed. I consider that Luchio's application to amend its points of claim should be dismissed on this basis.

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67 Transcript 20 April 2015, page 110, lines 18-19.

68 Luchio's submissions dated 11 September 2015, paragraph 17.

139. Before I leave *Bradshaw*, I acknowledge that Luchio argued that the suggestion that its case was closed was not correct. This of course is fundamental to the application of *Bradshaw*.

140. Luchio pointed to the order made by the Tribunal on 21 April 2015 that it could submit further documents upon which it proposes to rely at the further hearing.

141. The difficulty I have with this argument is that the order of 21 April 2015 contemplated the submission of documents relevant to the case as then pleaded. It was not a gateway through which Luchio could seek to bring an entirely new case which would require a fresh opening.

142. If I am wrong about the applicability of *Bradshaw*, I think the application should be dismissed in any event because of the effect of some of the *Aon* factors, which I now discuss.

The *Aon* factors

143. *Whether there will be substantial delay caused by the amendment*.

(a) In my view, to allow the amendment to the points of claim at this stage will cause a substantial delay in the disposition of this proceeding. The reason is that if the amendment is not allowed and Luchio persists in its determination to drop the repudiation claim, then the only substantive issue left will be whether the lease is a retail lease for the purposes of the RLA. This issue could be dealt with after a short hearing.

(b) If new proceedings are issued by Luchio, the points of claim could be delivered immediately, and points of defence could be delivered promptly as Epping is apprised of Luchio's proposed amended claim. It is possible use could be made of the days reserved for the further hearing of the present proceeding in November.

(b) The 'delay factor' accordingly weighs against allowing the application to amend.

144. *The extent of wasted costs that will be incurred*.

(a) I agree that unless the amendment is allowed, there will be some wasting of costs because some of Mr Follachio's evidence was addressed to the repudiation argument. However, Mr Follachio's evidence has, to a large extent, already been reduced to affidavit form. I expect that a further, short affidavit would effectively re-state the evidence given by Mr Follachio in April which is not covered by his existing affidavits.

(b) Accordingly, this factor is not of great weight, in my view.

145. *Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressure is placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded*.

(a) I do not consider that there will be any irreparable element of prejudice caused to Epping, or its directors, Mr Appleby and Mr Paras, if the amendment is allowed. The reality is that Epping has a serious dispute with Luchio over the lease. That dispute is presently the subject of this proceeding. The dispute was not resolved at the compulsory conference held at the end of July. Unless the dispute is resolved it can be expected that it will continue to be litigated.

(b) If Luchio is not allowed to amend its points of claim the present proceeding may come to an end quite quickly. However, Luchio will possibly issue fresh proceedings in order to pursue its claims. For these reasons, I propose to put to one side any concerns about unfair prejudice arising.

146. *Concerns of case management arising from the stage in the proceeding when the amendment is sought*.

(a) Case management issues are central to the formation of my view regarding this application. The Tribunal, like a court, is a publicly funded resource, and must manage its business with case management principles in mind.

(b) As noted above, I do not accept Luchio's central contention that the application to amend has been driven by the discovery by Epping of documents during the hearing, or the late delivery of its defence after Luchio's sole witness, Mr Follachio, had given evidence. Rather, as I have found, the primary driver is Luchio's realisation that the original repudiation case run during the hearing was very possibly flawed because it was not underpinned by a relevant PLA s 146 notice.

(c) In these circumstances, I think Epping is entitled, as a matter of fairness, to have the proceeding determined on the pleadings as they stand. Acting fairly and according to the substantial merits of the case, is an express responsibility of the Tribunal under s 97 the VCAT Act.

(d) The fundamental difficulty I see in allowing the amendment is that Luchio is not seeking merely to augment or clarify an existing claim. Rather, it is is seeking to cure the fact that its primary claim for repudiation may fail, by pleading an entirely new cause of action. I accordingly consider its decision is 'tactical'.

(e) To allow the claim to be amended in these circumstances would, it seems to me, militate strongly against principles of case management.

In particular, if every applicant who realised in the course of their hearing that their claim was likely to fail were to be given leave to amend, litigation would be greatly prolonged.

(f) The fact that the Tribunal is not a court of pleading, and that it has great discretion as to how to manage its affairs, does not outweigh the considerations outlined above.

147. *Whether the grant of the amendment will lessen public confidence in the Tribunal*.

(a) Luchio says in effect that granting the amendment is necessary in order to enhance public confidence in the judicial system. In particular, it is said that to allow Epping to benefit from its blatant disregarding of the Tribunal's orders must lessen public confidence in the Tribunal.

(b) I agree that it is very important that the Tribunal is seen to be taking a robust view regarding the enforcement of orders. However, this principle cannot justify the granting of leave to amend in circumstances where:

(i) I have found that the proposed amendment does not flow from any breach of any order of the Tribunal; and

(ii) the amendment cannot be justified in the light of the case management issues referred to above.

(c) If Luchio has complaints about the conduct of the litigation by Epping, then it can consider making an application for costs. It must take its own counsel about this. Recovery of costs cannot be guaranteed.

148. *Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought*.

As I have found that the real reason for the proposed amendment is Luchio's desire to get over the potential flaw in its repudiation case presented by the lack of a relevant s 146 notice, I reject the explanation put forward by Luchio to the effect the amendment is necessitated by Epping's breaches of orders of the Tribunal.

149. Luchio argued that denying it the opportunity to amend its points of claim would have the potential to prevent it from ever relying on matters it seeks to have determined by reason of 'issue estoppel' or an application for a stay based upon *Port of Melbourne Authority v Anshun Pty Ltd*.[69]

150. The issue estoppel point was not argued in depth. However, I do not consider that any fact in issue between the parties relevant to repudiation

[69] (1981) 147 CLR 589.

will have been determined by the Tribunal if I dismiss the application to amend the points of claim.

151. Turning to *Anshun*, I am at a loss to understand how, if the application to amend the points of claim is dismissed and Luchio brings fresh proceedings based on the notice issued under s 146 of the PLA on 19 June 2015, Epping could in the circumstance criticise Luchio for not having raised that claim in the present proceeding.

152. Finally, I note that Luchio says that s 74 of the VCAT Acty is relevant to the Tribunal's deliberations. I do not agree. The issue is hypothetical as at this stage no application to withdraw the current proceeding is before the Tribunal.

CONCLUSION

153. For all these reasons the Tribunal dismisses Luchio's application for leave to amend its pleading.

MEMBER C EDQUIST