VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1770/2018

CATCHWORDS

Retail Leases Act 2003: landlord failed to provide disclosure statement under s 17(1); tenant alleged it had served notice under s 17(2); determination of preliminary issue as to whether this notice was served; preliminary question critical to landlord's contention that it had terminated lease; issue of where burden of proof lies considered.

APPLICANT	Sleep Overs Group Pty Ltd (ACN 612 184 728)
RESPONDENT	Monreale Holdings Pty Ltd (ACN 084 322 903 RECEIVERS AND MANAGERS APPOINTED)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	11 and 21 December 2018, 18 February, 15 March and 17 April 2019
DATE OF ORDER	31 May 2019
CITATION	Sleep Overs Group Pty Ltd v Monreale Holdings Pty Ltd (Building and Property) [2019] VCAT 796

ORDERS
(AS AMENDED UNDER AN ORDER MADE IN CHAMBERS UNDER S 119 OF THE *VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998* ON 13 JUNE 2019)

1. **The Tribunal declares that the preliminary point** as to whether the letter dated 22 December 2016 from the applicant to the respondent, being the exhibit marked for identification NM 3.3 appended to the affidavit sworn by Nikolaus Kudeweh on 21 November 2018 **("the letter of 22 December 2016"),** was validly served under s 17 of the *Retail Leases Act 2003* is resolved against the applicant, that is to say it was not validly served.

2. **The listing of the proceeding for a hearing at 10.00 a.m. on 3 June 2019 is confirmed.** The hearing will be at 55 King Street Melbourne,

before Member Edquist, with the whole day allowed.

3. Liberty to apply.

4. Costs reserved.

5. The name of the applicant is amended to "Sleep Overs Group Pty Ltd (ACN 612 184 728)".

6. The name of the respondent is amended to "Monreale Holdings Pty Ltd (ACN 084 322 903 RECEIVERS AND MANAGERS APPOINTED)".

7. **The Principal Registrar is directed to send a copy of these Orders to the parties by email.**

C. Edquist
Member

APPEARANCES:

For Applicant	Mr E Sgargetta, director with Mr N Kudeweh, operations manager
For Respondent	Mr S Hopper, of Counsel

REASONS

INTRODUCTION

1 For many years the property at 81 The Crescent, Olinda, Victoria ("the property") was operated as a bed and breakfast business by Mrs Cheryl Johnston and her husband Karl Seatins. The business was owned and operated through two companies, Monreale Holdings Pty Ltd ("Monreale Holdings") and Monreale Estate Pty Ltd ("Monreale Estate"). Towards the end of 2016 they decided to sell the business. They entered into negotiations with representatives of Sleep Overs Group Pty Ltd ("Sleep Overs") and 14 November 2016 Sleep Over and Monreale Holdings entered into a contract ("the sale contract") under which Sleep Overs was to purchase the property for a price of $2,200,000. On the same day, the parties entered into a side agreement ("the side agreement") which provided, amongst other things, that Sleep Overs would be entitled to a rebate of $400,000 against the purchase price at settlement on certain terms, including that settlement occurred by 28 December 2018. As the sale contract was conditional, and was not expected to settle for a considerable time, Monreale Holdings also on the same day granted a lease to Sleep Overs in respect of the property (**"the lease"**). The principal issue in this proceeding is whether Sleep Overs is still entitled to possession of the property under the lease.

Venue Management Agreement

2 The end of 2016 was evidently a very difficult time for Mrs Johnston. Her husband had become ill. Notwithstanding, to enable Mrs Johnston to continue to work in the business during the period that it was being handed over to Sleep Overs, she was engaged under a venue management agreement to provide day-to-day management services in respect of the business.

3 In 2017 Mrs Johnston's husband died. Mrs Johnston continued to work in the business until September 2017, when the venue management agreement was terminated. Mrs Johnston continued to live in one of the residences at the property until mid-2018.

Appointment of receivers to Monreale Holdings

4 Monreale Holdings had taken out a loan with the National Australia Bank (**"the NAB"**). On 27 April 2018 NAB appointed receivers and managers to the respondent, including Ross Andrew Blakeley.

Service of notice of default

5 Mr Blakeley formed the view that Sleep Overs was in arrears under the lease, and on 21 July 2018 delivered a notice of default to Sleep Overs asserting that rent was due.

6 The precise circumstances in which the notice of default (**"the notice of default"**) was issued were not made clear to the Tribunal. Sleep Overs contends that it was served on a "without prejudice" basis. Whether a notice of default can actually be served on a "without prejudice" basis is an interesting question. It is not one I have to answer, because Monreale Holdings argues that even if the notice of default was served on a without prejudice notice (which it apparently does not accept) no notice had to be served anyway because of the operation of s 146(12) of the Property Law Act 1958 (**"the PLA"**) when read in conjunction with clause 34 of the lease. We return to this point below.

Landlord takes possession

7 According to an affidavit sworn on 13 November 2018 by Nikolaus Kudeweh, the operations manager of Sleep Overs, the receivers "ambushed the venue" and allegedly broke in. They demanded that occupants and staff leave, and commenced changing the locks. The police were called, but they could not resolve the situation. On 15 November 2018 Sleep Overs' representatives attended the property with a security guard and a locksmith and re-entered the house and cottages to allow staff members and occupants back in. Later that day the police attended again. Mr Blakeley later attended the property. The police were called yet again that evening. On 17 November 2018 Mr Kudeweh attended the property to find that the receivers had broken locks and disconnected a security camera and had a security guard blocking access.

8 The re-taking possession by the receivers caused Sleep Overs to initiate this proceeding and apply to the Tribunal for an order for access. The application came on before me on 26 November 2018. Upon Sleep Overs providing, through Elliot Sgargetta (a director) the usual undertaking as to damages, and on the condition that Sleep Overs pay $3,536.03 by way of rental, orders granting access and possession to it were made on an interlocutory basis.

9 The proceeding was set down for a further hearing to determine whether the injunction granting access and guaranteeing Sleep Overs' quiet enjoyment of the property should be extended. Following a suggestion from the receivers' counsel, Mr Hopper, it was ordered that this issue should be determined at the same time as a preliminary issue. The preliminary issue was whether Sleep Overs' letter to Monreale Holdings dated 22 December 2016 that constituted a notice under s 17(2) of the Retail Leases Act 2003 (**"the RLA"**), had been validly served.

The procedure set out in s 17 of the RLA

I0. Because of its centrality to the proceeding, it is necessary to explain the context in which the preliminary issue arises. Section l7 of the RLA is concerned with landlord's disclosure statements. Under ss 17(1) a landlord must give the tenant at least seven days before entering into a

retail premises lease a disclosure statement in the prescribed form together with a copy of the proposed lease. Under ss 17(2), if a tenant has not been given the disclosure statement before entering into the lease, the tenant may give the landlord within 90 days a written notice to that effect. Under ss 17(3), if the tenant has not been given a disclosure statement as required by ss 17(1), but has in a timely manner given a notice under ss 17(2) to the landlord, the tenant may, under ss 17(3)(a), withhold payment of rent until the day on which the landlord gives the tenant the disclosure statement.

11. It was conceded on behalf of Monreale Holdings that a disclosure statement under ss 17(1) of the RLA was not given to Sleep Overs. The preliminary issue is concerned with the second issue, namely whether a notice under ss 17(2) was ever given by Sleep Overs to Monreale Holdings to enliven a right to withhold rent under ss 17(3).

The significance of the preliminary issue

12 The importance of the preliminary issue is that it will determine the question of whether the lease was validly terminated by Monreale Holdings. On the one-hand, if a ss 17(2) notice was given, then Monreale Holdings concedes that Sleep Overs had no legal obligation to pay rent for the period after the notice came into effect. This would be the case irrespective of any term of the lease obligating the tenant to pay rent without deduction. On the other hand, if a ss 17(2) notice was not given, Monreale Holdings contends the termination of the lease must, on any view of the evidence, have been legal.

The hearings

13 Because of the importance of the issue, it was heavily contested. Apart from the short hearing on 26 November, when the order for possession was first made, there were hearings on 11 and 21 December 2018, 18 February, 15 March, and 17 April 2019. On each day of the hearing, Sleep Overs was represented by its director Mr Sgargetta and Monreale Holdings was represented by Mr S Hopper of counsel. ·

14 Apart from Mr Kudeweh, who adopted affidavits sworn respectively on 21 November 2018 and 3 December 2018, and was cross-examined, Sleep Overs called Mr Sgargetta. He adopted his affidavit of 3 December 2018 and was also cross-examined.

15 On behalf of Monreale Holdings, Mr Blakeley was called. He had sworn an affidavit on 26 November 2018, and was cross-examined. Mrs Johnston, who swore an affidavit on 10 December 2018, was also put in the witness box, and was then extensively cross-examined. The Tribunal heard from Mr Ming Cai, who went into the witness box on 11 December 2018. His evidence was later confirmed in a written

statement, and he was recalled for further cross-examination on a subsequent day of the hearing.

16 In addition, both sides filed submissions, which included references to transcript. Both sides also presented relevant authorities to the Tribunal.

The burden of proof

17 The question of where the burden of proof lay in the proceeding was raised by the Tribunal, and the parties were given an opportunity to make submissions about the issue. Sleep Overs clearly considers that the burden of proof lies with the landlord, even if that means that Monreale Holdings has to prove a negative.[1] Understandably, Monreale Holdings contends that the burden of proof lies with the tenant.

18 The question of where the burden of proof lies in a proceeding under the RLA came up before me in *Charcoal Chicken & Souvlaki Xpress Pty Ltd v Stamatakos*.[2] That particular case concerned s 57 of the RLA which mandates that a retail premises lease is taken to provide that if the rented premises, or the building in which the premises are located, is damaged, then, except if the tenant caused the damage, the rent and outgoings or other charges under the lease will be abated for the period that the premises cannot be used or are inaccessible due to that damage. The issue in that case relevant to the present proceeding was whether the tenant bore the burden of proof in establishing that it had not caused the relevant damage. I held, at [32], that the burden of proof lay with the tenant, stating:

> This is consistent with the usual rule that the legal burden of proving all the facts essential to a claim rests on the claimant. As explained in Cross on Evidence, 9th Edition, Australian Edition at [7060]:
>
>> [a] fundamental requirement of any judicial system is that the person who desires the court to take action must prove the case to its satisfaction*. This means that the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.
>>
>> * *Dickinson v Minister of Pensions* [1953) 1 QB 228 at 232; [1952) 2 All ER 1031 at 1033.

19 This conclusion was accepted as correct by Croft J of the Supreme Court of Victoria in *Casa Di Iorio Investments Pty Ltd v Mina Guirgas*[3] at [55]. Relevantly, Croft J in that case also accepted the following submission made by the landlord:

> [T]he question of whether a tenant has damaged the demised premises is something that is peculiarly within the knowledge of the tenant. The tenant is the party who has the best capacity to adduce

[1] Sleep Overs' submissions dated 16 April 2019, page 4, fifth paragraph.
[2] (Building and Property) [2015] VCAT 1017 (8 July 2015).
[3] [2017] VSC 266.

the evidence relevant to that question. Accordingly, a construction of the statute that places the burden of proof on the party with the best capacity to discharge that burden in practical terms is to be preferred over an interpretation that would have the opposite result.

20 Bearing these matters in mind I now turn to s 17 of the RLA. The relevant provisions are as follows:

Landlord's disclosure statement

(l) At least 7 days before entering into a retail premises lease, the landlord must give the tenant-

(a) a disclosure statement in the form prescribed by the regulations (but the layout of the statement need not be the same as the prescribed disclosure statement); and

(lA) Not applicable

(2) If a tenant has not been given the disclosure statement before entering into a retail premises lease, the tenant may give the landlord, no earlier than 7 days and no later than 90 days after entering into the lease, a written notice that the tenant has not been given the disclosure statement.

If the tenant gives the landlord a notice in accordance with subsection (2)-

(a) the tenant may withhold payment of the rent until the day on which the landlord gives the tenant the disclosure statement; and

(b) the tenant is not liable to pay the rent attributable to the period from and including the day on which the notice was given until and including the day on which the landlord gives the tenant the disclosure statement; and

(c) the tenant may give the landlord a written notice of termination at any time before the end of 7 days after the landlord gives the tenant the disclosure statement.

21 From a plain reading of these provisions, it is clear that if the landlord has failed to give a prescribed disclosure statement at least three days before entering into a retail premises lease and the tenant wants to enliven ss 17(3) in order to legally withhold rent, the tenant must give a written notice under ss 17(2) that the tenant has not been given the disclosure statement within 90 days of entering into the lease.

22 In these circumstances, the burden of establishing both that the landlord has not given a disclosure statement *and* that the tenant has given the required ss 17(2) notice lies on the tenant, as both these facts are essential to the establishment of the tenant's claim of entitlement to abate rent.

23 As Monreale Holdings concedes that a disclosure statement under ss l7(1) was never served on Sleep Overs, the critical point to be determined is whether Sleep Overs can establish that it served the required ss 17(2) notice.

The evidence of Mr Kudeweh and Mr Sgargetta regarding the delivery of the 17(2) notice

24 Mr Kudeweh in his first affidavit, at [5], deposes that on or about 22 December 2016 "I was made aware that we wrote to the Respondent for a Disclosure Statement". He then added that this had not been provided. Later, at [12], he referred to an agreement reached at mediation at the VSBC (the Victorian Small Business Commissioner) pursuant to which "Cheryl" was to provide an up-to-date disclosure statement.

25 In his second affidavit, he addressed the circumstances surrounding the creation of the letter of 22 December 2016, at [2]. Relevantly, he deposed that:

(a) it was drafted by one of Sleep Overs' approved service providers named Gaurav Saxena;

(b) the work of all approved service providers were undertaken through Sleep Overs' systems "for security and privacy reasons";

(c) the letter of 22 December 2016 was drafted then uploaded to our server for final checks and edits.

26 As to the service of the letter, Mr Kudeweh deposed:

(a) at [2(f)] "I can recall reviewing the 22 December 2016 letter and that Mr Sgargetta had confirmed that he was to give the letter to Ms Johnston (the Respondent's director) upon one of his many attendances to the venue... ";

(b) at 2[(h)]"We had also raised and again presented the letter of 22 December 2016 in mediation at the VSBC in November 2017, and an earlier meeting and discussions with Ms Johnston's solicitor (Mr Gavin Rodda) throughout September 2017."

27 Mr Sgargetta set out the following history in his affidavit sworn 3 December 2018, at [3-9];

> 3 During November 2016 through to February 2017 I was assigned to facilitate the takeover and set-up of the accommodation venue at Monreale Cottages (81 The Cresent, Olinda).
>
> 4 During this period, I met often with the Respondent's co-director, Ms Cheryl Johnston to finalise contracts and agreements and to implement booking systems, payment systems, training of the Applicant's processes and so forth.
>
> 5 In some of those meetings the Respondent's estate agent (Mr Trevor Pickens) was present and [also] Mr Nikolaus Kudeweh ...
>
> 6 I had the Applicants checklist to follow, and merely coordinated the standard processes used when transitioning the takeover over a venue.

> 7 At this time the engaged lawyers and personnel of the Applicant's Legal Division were also requesting information and advising on matters due to the intricacies of the arrangements.
>
> 8 I recall that material was uploaded to the Applicant's server, (One Drive system) in where all the Applicant's material is loaded to, in which I have access, and had printed a variety of material off to provide to the Respondent (sic)... All material of the Applicant, whether it be marketing, legal, finance etc. is always uploaded to Applicant's One Drive system so that it is easily accessible by staff from anywhere on essentially any device.
>
> 9 I recall one of the documents on the server was this 22 December 2016 letter, which I reviewed on screen and printed it off and provided it to the Respondent (Miss Johnston) directly, without the material at the time....

28 Later in his affidavit, at [13] Mr Sgargetta added:

> I recall that this letter of 22 December 2016 was one of the documents I had provided to Mr Johnston in one of these venue attendances. I cannot recall which one of those attendances it was, as there were many. ·

Inconsistency in the matter of timing between Mr Kudeweh and Mr Sgargetta

29 In final submissions, Mr Hopper highlighted that over time Sleep Overs' case had shifted from the proposition that the letter of 22 December 2016 had been served in December 2016 to the contention that it had been delivered later.

30 I note that there was no ambiguity about Mr Kudeweh's evidence in his first affidavit, in which he deposed that on or about 22 December 2016 he had been made aware that the request for a disclosure statement had been made. The ambiguity in Sleep Overs' position arises out of Mr Sgargetta's affidavit, because he is not definitive about the date the notice was given. The lack of clarity is heightened by Sleep Overs' written submissions dated 16 April 2019, as they indicate the notice was given "in early 2017".

Lack of documentary evidence

31 Sleep Overs' case is not improved by the absence of any evidence in the nature of a covering letter or email that might actually establish delivery of the letter of 22 December 2016. Equally notable is the absence of any follow-up correspondence with Monreale Holdings, which might have been expected had a notice under ss 17(2) been served. Mr Sgargetta gives no indication that the lack of a disclosure statement was 'highlighted, even when issues began to escalate in 2017. Mr Kudeweh's evidence about following-up the disclosure statement is limited to saying that it was raised with Ms Johnston's solicitor in September 2017, and at the mediation at the VSBC in November 2017.

32 The next point, which I regard as telling, is that there is no documentary evidence after 22 December 2016 in which Sleep Overs was contending

that it was entitled to a rebate in rent. On the contrary, Mr Kudeweh in his first affidavit deposed at [16] that on 18 December 2017 Sleep Overs sent an email to Monreale Holdings advising that a number of adjustments were to be made against the rent. This suggests that at this date Sleep Overs accepted that rental payments were still payable.

33 Finally, it is to be noted that no rent was actually withheld, and accordingly Sleep Overs did not behave in a manner consistent with the service of a ss 17(2) notice. Instead, it continued to pay rent at the rate it contends was required by the lease.

34 For all these reasons, I cannot be satisfied on the basis of the evidence of Mr Kudeweh and Mr Sgargetta that the letter of 22 December 2016 was served within 90 days of the creation of the lease on 9 December 2016, or at all.

The evidence of Mrs Johnston

35 The fact that the law places the burden of proof on the tenant is an important matter in the present case because if the converse was true, it would be necessary for Monreale Holdings to establish the negative proposition that it did not receive the required ss 17(2) notice. To do this, the landlord would have had to rely almost exclusively on the evidence of Mrs Johnston. Relevantly, Mrs Johnston in her affidavit sworn on 10 December 2018 deposed at [8]:

> (a) I was first provided with a copy of a letter dated 22 December 2016 from Sleep Overs to Holdings (**Purported Request Letter**) by the receivers of Holdings and Estate on 26 November 2018.
>
> (b) At no time have I been provided with a copy of the Purported Request Letter by Mr Sgargetta or any other representative of Sleep Overs.

36 Later in her affidavit, at [10]. Mrs Johnston states "[a]t no time has Mr Sgargetta, Mr Kudeweh or any other representative of Sleep Overs made a request to me for a disclosure statement in relation to the Lease".

37 It is to be noted that at [15(a)] Mrs Johnston deposes that during the entire period of her dealings with Sleep Overs that Mr Sgargetta's preferred method of communication was email, and that he, Mr Kudeweh and Mr Bluck always appeared to be typing notes on their laptops during scheduled meetings. If this evidence were to be accepted at face value, the lack of any documentary evidence from Sleep Overs establishing service of the letter of 22 December 2016 would appear to be surprising.

38 However, if the case turned on a credibility contest between Mrs Johntson on the one hand and Mr Kudeweh and Mr Sgargetta on the other, I would prefer the evidence of Mr Kudeweh and Mr Sgargetta. I say this because I did not form a favourable impression of Mrs Johnston as a witness. In this connection, I observe that her evidence in her

affidavit is generally detailed and unambiguous. In sharp contrast, her oral evidence at the hearing on 18 February was much less precise. She repeatedly said the details of agreements and documents could not be clearly recalled because her husband Karl had had the carriage of negotiations with Sleep Overs' representatives. She gave clear evidence that the bore water at the property was being tested annually and was good water, but later retreated when pressed about testing of the water, and said that the testing was in the hands of her late husband, and she relied on what he had told her.

39 Furthermore, Sleep Overs' representatives, through a painstaking analysis in their submissions of inconsistencies in Mrs Johnston's oral evidence when compared to other evidence presented, cast doubt over her credibility.

Mr Blakeley's evidence

40 The significance of the weakness of Mrs Johnston's evidence was amplified by the fact that the evidence of Mr Blakeley, about whether Monreale Holdings had received the letter of 22 December 2016, appears in his affidavit at [16] as follows:

> A forensic review of the records of Holdings conducted by my staff did not locate any written request from Sleep Overs for a disclosure statement in respect of the Lease from Holdings pursuant to section 17(2) of the Retail Leases Act 2003. The sole director and shareholder of Holdings and (Monreale) Estate as at the date of our appointment, Ms Cheryl Johnston **("Ms Johnston")** has also advised me and I believe that she cannot recall being requested at any time by Sleep Overs to provide a statement of this nature.

41 Two comments are required. Firstly, while I accept Mr Blakeley's evidence that the letter of 22 December 2016 is not in the files in his possession, that does not necessarily mean that the letter was not received by Mrs Johnston. It may have been misfiled, lost or discarded before he took possession of the files. Secondly, Mr Blakeley's statement that he believed Mrs Johnston's advice that she cannot recall being requested at any time by Sleep Overs to provide a ss 17(2) notice merely takes us back to the issue of Mrs Johnston's lack of reliability as a witness.

Did Monreal prove the negative proposition anyway?

42 Even though Monreale Holdings did not carry the burden of establishing a negative, it did in fact make significant headway in discharging that burden in any event.

43 On 26 November 2018 Sleep Overs was ordered to send to the Tribunal and to Monreale Holdings a further affidavit exhibiting physical or electronic copies of the letter of 22 December 2016, or to explain why such copies could not be produced. On 3 December 2018 Sleep Overs

forwarded to the Tribunal and to Mr Blakeley a further affidavit of Mr Kudeweh and an affidavit sworn by Mr Sgargetta.

44 On 5 December 2018 Monreale Holdings' solicitors wrote to the applicant complaining that the further affidavits did not exhibit the original word document in electronic form or any other contemporaneous record of the creation of the letter. Nor did the affidavit provide any explanation as to why such document has not been produced.

45 Monreale Holdings' solicitors' in this letter highlighted that in paragraph 8 of his affidavit Mr Sgargetta had deposed "all material of [Sleep Overs], whether it be marketing, legal, finance etc, is always uploaded to [Sleep Overs] One Drive System so that it is easily accessible by staff from anywhere on essentially any device". The letter also highlighted that Mr Kudeweh stated in paragraph 2(c) of his affidavit that the letter of 22 December 2016 was "drafted then uploaded to our server for final checks and edits by the Acquisitions Div. in accordance with our policies." An intention to make an urgent application to the Tribunal for production of the One Drive file and for electronic versions of the letter of 22 December 2016 was flagged.

46 Monreale Holdings' solicitors on the same day emailed the Tribunal on 5 December. asking for an urgent directions hearing on 7 December 2018 "so as to allow sufficient time for the material to be produced and analysed over the weekend prior to the further hearing on 11 December 2018".

47 That application was opposed by Sleep Overs in an email also sent later that day.

48 The Tribunal listed the proceeding for an urgent directions hearing for 7 December 2018. Sleep Overs' representatives had to attend by telephone. At the conclusion of that hearing Senior Member Farrelly ordered that Sleep Overs email to Monreale Holdings a link to Sleep Overs' One Drive file in respect of the letter of 22 December 2016, alternatively provide an explanation as to why they were unable to do so. Sleep Overs was also directed to bring to the next hearing any original and copies they possessed of the letter.

49 At the next hearing, Sleep Overs was called upon to produce a hard copy of the letter. It produced a document which was said to be a hard copy of the letter. When this was shown to Mr Sgargetta in cross-examination, he conceded that it did not look like a copy that had been filed in so far as it had no filing holes punched in the margin, it had no folds or creases, and did not look like it had been handled. When I examined it closely, it looked to me like a freshly printed document. Mr Sgargetta's explanation was that the letter had been found in a manila folder. I am not convinced by this explanation. I am not satisfied on the

balance of probabilities that the letter produced as an original copy created on 22 December 2016 was in fact such an original.

The inconsistent use of the template

50 A further point is to be made about the copy of the letter produced by Sleep Overs. In a detailed analysis, Mr Hopper indicated that there were a number of differences between the alleged copy document and the alleged template from which it was said to have been created. The letter was also compared to another document signed off by Gaurav Saxena. The differences between the documents highlighted included different margins, different gaps between sentences, and different email addresses.

51 Mr Kudeweh, under cross-examination, argued that as each subsequent user of the template could make changes to it, these changes meant nothing. I am not convinced by this evidence. The whole purpose of creating a template is to assist subsequent authors to produce a document based on the template with a minimum amount of work. It would be counterproductive for a subsequent author to adjust margins, and the spacing between lines in the standard parts of the letter.

Failure to call Mr Saxena or submit an affidavit from him or explain why he did not giveevidence

52 Finally, much is made of the failure by Sleep Overs to call the author of the alleged ss 17(2) notice. Mr Gaurav Saxena. The only formal evidence about Mr Saxena's role given by Sleep Overs was in Mr Kudeweh's second affidavit, where at [2] he explained that Mr Saxena no longer works or provides services to Sleep Overs and that he was of the understanding that Mr Saxena was residing overseas.

53 At the first hearing I gave a warning about the rule in *Jones v Dunkel*[4]. Sleep Overs was reminded of this warning in the letter from Monreale Holdings' lawyers dated 5 December 2018. An explanation of the role of Gaurev Saxena was sought.

54 The need for an explanation of Gaurav Saxena's role was apparent, as Mr Kudeweh's evidence was that the letter of 22 December 2016 had been created by him. Despite the fact that there were several hearing dates after 5 December, no evidence was given as to any attempts made to contact Mr Saxena or obtain from him an affidavit or statutory declaration setting out any evidence about the critical issues surrounding the ss 17(2) notice, including a basic statement that it had actually been created by him.

55 In circumstances where a formal warning had been given about the rule in *Jones v Dunkel,* where Mr Saxena's absence had been noted, and yet there was no explanation as to why he had not given evidence in any

---

[4] (1959) 101 CLR 298

form, I consider this is a case where it is appropriate for me to draw an inference that had Mr Saxena been called as a witness, alternatively given evidence in sworn written form, his evidence would not have been of assistance to Sleep Overs' case.

56 Taking this adverse inference into account, and having regard to the real doubt created by Mr Hopper's analysis regarding the issue of whether the alleged ss 17(2) notice had been created from the template from which Sleep Overs' representatives insisted it had been created, I cannot on balance be satisfied that the ss 17(2) notice was created on 22 December 2016 by Mr Saxena as contended by Sleep Overs.

The evidence of Mr Cai

57 I have formed this conclusion this without having regard to the evidence of Mr Cai. Mr Cai's initial evidence was oral, but as noted he reduced his evidence to writing and at a later hearing was further cross-examined. He conceded that if data was moved from one One Drive account into another, the history would be lost and previous versions would not appear in the new account. Sleep Overs' representatives sought to make much of this.

58 Mr Hopper's submitted in response that this concession was not fatal to Monreale Holdings' case, because it explained only the fact that the history of the document was not available in the file that had been transferred over. It did not explain where the original file was, and what that file contained.

59 In circumstances where Mr Cai's evidence was not conclusive, I propose to draw nothing from it. In the circumstances, is not necessary for me to address the question of whether his evidence in any event should have been discounted because he was not independent. In this respect I note that Sleep Overs contended that he was not an appropriate expert witness having regard to the fact that he was employed by the same consultancy as Mr Blakeney.

Implication of the finding that the ss 17(2) notice was not served

60 Mr Hopper submitted that if the Tribunal found that the ss 17(2) was not served, then inevitably the Tribunal would have to rule that the termination of the lease was valid. This was because, in Monreale Holdings' submission, there was no doubt that the notice of default been validly served. Moreover, because the only default referred to in the notice of default was a failure to pay rent, technically no notice of default was required anyway. Once it was accepted either that the notice of default had been validly served, or that no default notice was required, then a finding that there had been a valid termination of the lease was inevitable. This was because:

(a) the obligation of Sleep Overs as tenant under the lease was to

pay the rent without deduction;

(b) under the terms the lease there was to be no set off, against rent, even an equitable set-off;

(c) although Monreale Holdings accepted that the words of the lease could not override any entitlement of the tenant to set off against rent arising under a provision of the RLA, only one of the categories of expense which Sleep Overs was seeking to set off against rent arose by reason of a covenant in the RLA.

I proceed to analyse the submissions in turn.

WAS A NOTICE OF DEFAULT REQUIRED AT ALL?

Relevant terms of the lease

61 Clause 1.1 of the lease requires the tenant to pay the rent in advance during the term and any over-holding by equal, consecutive calendar monthly instalments starting on the rental commencement date and then on the first day of each month.

62 Clause 34.1 provides:

> The landlord may terminate this lease by re-entry or forfeiture if the tenant fails to remedy a breach of this lease within 14 days after being given a notice complying with section 146(1) of the Property Law Act 1958, but no notice is required before re-entry or forfeiture in the case of non-payment of rent.

63 It may be observed that the lease accordingly parallels s 146 of the PLA. In particular, ss 146(1) requires a landlord, before exercising a right of re entry or forfeiture under any proviso of a lease or otherwise by operation of law for breach of any covenant or condition of a lease without first giving at least 14 days notice of the breach requiring the tenant to either remedy the breach or pay compensation for the breach. Sub-section 146 (12) in effect provides that no such notice is required were the breach complained of is non-payment of rent only.

64 As the breach of the lease complained of by Monreale Holdings is non payment of rent only, no notice of breach had to be given prior to re-entry. It may be that a notice of breach was given on a without prejudice basis well before the actual re-entry in November 2018, perhaps as a matter of commercial common sense, or even courtesy, but it is idle to speculate about this.

Alleged breach of the lease

65 Monreale Holdings contends that Sleep Overs was obligated to pay the rent due under the lease without deduction. Sleep Overs responds that it is entitled to set off against its obligation to pay rent a range of expenses it has incurred, including expenses incurred in carrying out necessary

repairs to the property. This raises the question of whether there are circumstances in which a tenant can claim a set off against rent.

Can a tenant claim a set off against rent?

66 As noted by the Full Court of the Federal Court of Australia in *Norman*; in the matter of *Forest Enterprises Ltd v FEA Plantation Ltd*[5] (*Norman)* [137]:

> At common law, no set-off will be allowed against a landlord's claim for rent: see Meagher, Heydon and Leeming, *Meagher, Gummow, & Lehane's Equity Doctrines and Remedies* (Butterworths, 4th ed,, 2002) at 1056 [37-045]. However, the decision of Forbes J in *British Anzani (Felixstowe) Ltd v International Management (UK) Ltd* [1980] QB 137 ("British Anzani"), is authority for the proposition that the tenant may claim an equitable set-off against rent provided that the tenant's equity "impeaches" the landlord's title to the demand for rent.

Equitable set-off

67 The Full Court in *Norman* went on in [138] to observe that the formulation of the principle of equitable set-off in *British Anzani* is in accordance with the statement made by Lord Cottonham LC in the seminal authority *Rawson v Samuel (1841)* Cr & ph 161, 178-179. The Full Court also noted at [147] that in more recent times courts in England and Wales had moved away from a reinterpretation of the impeachment test to its complete abandonment. The Full Court at [157] affirmed as correct the proposition which Forbes J distilled from the authorities. At [158] the Full Court noted that an indispensable requirement of an equitable set-off is that it "must 'go to the root' of the claim and must impeach the title to the legal demand".

68 It follows from this discussion that in Australia, as a matter of principle, equitable set-off against rent is allowable in appropriate circumstances.

69 In the present case, Sleep Overs contends that it is:

> well-established practice to allow a set off of the liquidated sum incurred by a tenant in meeting a repair obligation owed by the landlord and reducing the rental liability accordingly.

70 In this respect Sleep Overs refers to the decision in this Tribunal of Deputy President Macnamara in *C & A Delaveris Pty Ltd v Bretair Pty Ltd* at [84] where he was prepared to allow a set off against rent of a liquidated sum incurred by the tenant for repairs. In doing so, the Deputy President referred to *Lee-Parker v Izzet [1971]* 1 WLR 1688, 1692-3 per Goff J.

Monreale Holdings' contention that the lease precludes any equitable set-off

71 In response, Monreale Holdings contends that Sleep Overs was obligated to pay the rent due under the lease without deduction, including any equitable set-off. It relies on clause 1.2 of the lease, which provides:

---

[5] [2011] FCAFC 99

Each instalment of rent will be paid-

(a) without demand, deduction, or set-off (whether legal or equitable);

and

(b) in the manner required by the landlord from time to time.

72 *Delaveris v Bretair* is not, in my view, authority for the proposition that a right to set off, including an equitable right, cannot be excluded by clear words in a lease. In that particular case, the covenant to pay rent was a covenant to pay "without deductions". Deputy President Macnamara observed at [79] that:

> The authorities are not at one as to whether the inclusion of these words is sufficient to prevent any equitable set-off being relied upon to impeach the demand for rent. For the reasons which I gave in *Wytell Pty Ltd v Glowinski* [2006] VCAT 454 the balance of authority in Victoria favours the view that the words "without deduction" exclude a tenant from relying upon equitable set-offs to impeach the demand for rent.

73 In *Wytell Pty Ltd v Glowinski* Deputy President Macnamara considered a number of authorities, including the decision of the Court of the Appeal in England in *Connaught Restaurants Limited v Indoor Leisure Limited*[6], which held that the obligation of the tenant to pay rent "without deduction" did not comprehend the concept of an equitable set-off and therefore to exclude deductions was not to exclude equitable set-offs. He also noted that that decision was contrary to the decision of the Victorian Supreme Court in *Citibank Savings Pty Ltd v Simon Fredericks Pty Ltd*[7] where Beach J. considered a rental covenant for retail premises including the phrase *'without any deduction whatsoever'* and concluded that it excluded the possibility of the tenant effectively relying on an equitable set-off. Moreover, Deputy President Macnamara also referred to *MEK Nominees v Secure Parking*[8] where Gillard J accepted that the word *'deduction'* included an equitable set-off in the lease.

74 I accept, as Deputy President Macnamara did in *Wytell Pty Ltd v Glowinski* at [20], that "[t]his Tribunal is bound by decisions of the Supreme Court", and on this basis I am in a position to resolve the divergence of authority by ruling that the words "without deduction" are apt to cover equitable set-off.

75 However, I note that although it was not necessary for the Full Court of the Federal Court in *Norman* to decide the question of the meaning. and effect of the words "without any deductions whatsoever" in the rent clause, it dealt with the issue briefly in any event. The Full Court identified four relevant propositions from the authorities, namely:

---

[6] [1994] 1 WLR 501
[7] [1993] VicRp 66; [1993] 2 VR 168, 175
[8] [2000] VSC 406

> At [184]: "a tenant's right of equitable set-off-off against rent may be excluded by the terms of the lease but clear words are needed to do so";
>
> At [185]: "the word "deduction" is a flexible term, the meaning of which is heavily dependent upon its context;"
>
> At [186]: "in the absence of contextual considerations to the contrary, the words "without deduction" are not sufficiently clear to exclude a tenant's equitable right of set-off against rent"; and
>
> At [187]: "added words of exception or qualification are relevant to the construction of the phrase in question, but they are also subject to the general requirement of clarity".

76 The Full Court then referred to a number of authorities, and concluded at [194]:

> The weight of appellate authority therefore does not support the view that "without deduction" excludes equitable set-off.

77 Having made that point, the Full Court observed that the rent clause in the case before it created an obligation to pay rent "without any deduction whatsoever", and noted at [195] that the word "whatsoever" was "an added word of exception which is relevant to the construction of the phrase". Applying at [197] the modern approach to construction of commercial contracts which requires interpretation in a way which is consistent with business common sense, the three judges of the Full Court at [201] indicated that had it been necessary for them on the facts to have decided the point, they would have concluded that the tenant's entitlement to an equitable set-off was excluded by the phrase.

78 Under clause 1.2(a) of the lease in the present case, the tenant is obligated to pay rent "without demand, deduction, or set-off (whether legal or equitable)". In other words equitable set-off is expressly excluded. Applying the dictum that "added words of exception or qualification are relevant to the construction of the phrase in question", I find that the lease excludes the right to equitable set-off.

The right to set off any amount arising under a covenant created by the RLA

79 Quite properly, Monreale Holdings concedes, in accordance with the decision of Deputy President Macnamara in *Delaveris v Bretair* that where the lease is "taken to provide" for any covenant, that is to say where the statute implies the covenant, any provision in the lease will be void to the extent that it claims to exclude the application of any provision of the Act. Under the RLA, this result follows from s 94 which relevantly provides:

> 1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act

(including anything that the lease is taken to include or provide because of a provision of this Act).

(2) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it purports-

(a) to exclude the application of a provision of this Act; ...

80 The practical effect of this concession is limited, as Monreale Holdings went to some trouble to point out. We shall return to this issue below.

THE ARGUMENT THAT MONREALE HOLDINGS HAD AGREED TO VARY THE LEASE

81 Because Monreale Holdings was arguing that the effect of clause 1.2 (a) of the lease was that there could be no set off against rent, Sleep Overs developed an alternative argument. The argument, as I understand it, was first put forward in Sleep Overs' submissions dated 16 April 2019 when it was contended (at page 8) that:

> [T]he strict performance of the no set-off clause can no longer be enforced or relied upon where clear evidences show that it has been compromised by the parties, either formally or by virtue of their own conduct, in making adjustments to rental payments almost monthly for the last 2-3 years. (Sic)

82 In support of this argument reference was made to Mr Blakeley's affidavit at page 8 and exhibit 5 appended to Mr Bluck's affidavit.

83 Sleep Overs reinforced its argument in supplemental submissions dated 26 April 2019. Under the heading "Variation of the lease in writing &/or part performance" at [1] it asserted:

> It is clear that as early as 20 February 2017 (Adrian Bluck Affidavit exhibit 2b) and continuously thereafter the tenant wrote to the landlord to advise that due to certain requirements not being met and further issues and matters that were occurring (e.g. Non-GST registration, no NAB statements, revenue being obtained etc.) which the tenant was enduring loss and damage as a result, the proposition to adjust/vary the rental amount was made.

84 Sleep Overs then submitted that it behaved consistently and provided its landlord with a statement each month outlining how monies had been allocated. It concluded:

> It is therefore incongruous for the respondent to submit now at the Tribunal that they had disputed these arrangements when they were clearly occurring every month for 3 years.

85 As Mr Blakeley’s affidavit was referred to by Sleep Overs, it is appropriate to refer to the evidence of set-off contained in it. This starts at [25], where Mr Blakeley deposes:

> In the course of the receivership of Holdings, I have been in correspondence with Sleep Overs in respect of set-offs they claimed to make against rent due pursuant to the Lease. Sleep Overs has variously:
>
> (a) claimed a set off on the basis that Estate, rather than Holdings, owes it monies on the basis of dealings between Estate and Sleep Overs relevant to the venue management agreement pursuant to which Estate managed the Business for a period;
>
> (b) claimed a set-off in respect of a variety of expenses that are not properly the liability of Holdings at all.
>
> Holdings does not accept that rent is not owed because of amounts purportedly set-off against the rent owed for a number of reasons…

Evidently, Mr Blakeley did not regard those set-offs as valid.

86 I turn now to the two references to exhibits to Mr Bluck's affidavit. The first is exhibit 2(b). As far as I can see, this appears to consist of an email from Mrs Johnston to Mr Bluck dated 17 February 2017 attaching a statement from NAB from September 2016 reflecting the interest rates in that six-month period, and the response from Mr Bluck dated 20 February 2017. These emails do not refer to any set-off arrangement, and I accordingly put them to one side.

87 The second Bluck exhibit referred to is an email dated 25 June 2018 from Mr Blakeley to Mr Bluck which is said to confirm an arrangement to off-set against rental payments. It reads:

> I am willing to preliminarily authorise up to $300 plus GST for the works to be carried out, without the need to revert to me.
>
> As I appreciate the works need to be co- ordinated around guest stays, which I have no vision over, I also authorise for you to coordinate and pay for the works, which will be adjusted against the rent due.

88 I accept that this is evidence of consent by Mr Blakeley to set off repairs required against rent. However, three comments are warranted. The first is that the arrangement was limited to repairs to a value of up to $300 plus GST. It was not a licence to carry out major repairs and back charge the landlord. Secondly, it was limited to repairs, and not other types of set-off. Thirdly, there is a question as to whether the arrangement - being a variation of a lease - complied with the requirement of the *Statute of Frauds 1677* (England), which in Victoria is to be found in s 126 of the *Instruments Act 1958.* This is discussed in detail below.

89 Monréale Holdings certainly contends that the arrangement is not enforceable.

The Statute of Frauds argument

90 Monreale Holdings' first response to Sleep Overs' assertion was to argue that any variation of a written lease was subject to the formalities required by the Statute of Frauds reflected in s 126 of the *Instruments Act.* This provision requires that certain agreements, including a contract

for the sale or other disposition of an interest in land, are only enforceable if the agreement, or a memorandum or note of the agreement, is in writing signed by the person "to be charged "or by a person lawfully authorised in writing by that person to sign.

91 In supplementary submissions filed by leave on 26 April 2019 Monreal Holdings acknowledged that it could not locate a Victorian decision confirming that a lease (being a contract for the disposition of an interest in land) could only be varied by an instrument in writing, but referred to an extract from *Woodfall Landlord and Tenant* (loose-lease service, Butterworths LexisNexis) Para 4.05 0.2 to this effect. There was no submission put forward by Sleep Overs, and I accept Monreale Holdings' contention.

Have the formalities required by s126 of the *Instruments Act* been complied with?

92. The purported agreement to vary the lease was evidenced by the making of a number of set-off's which are documented in monthly statements, and in an email from Mr Blakeley to Mr Bluck in June 2018 which expressly authorised setting off of amounts incurred in making repairs to a value of $300 plus GST.

93 Mr Bluck's evidence at [13] of his affidavit sworn 20 December 2018 is that each month he issued a statement of adjustments to Monreale Holdings. These statements may have been signed by Mr Bluck, but they were certainly not signed on behalf of the party "charged" with the burden of the set-off, which I find to be Monreale Holdings. Accordingly, the statements do not constitute relevant memoranda or notes of the variation agreement.

94 The email, having being sent by Mr Blakeley, may well stand in a different position. It may be that under s 9 of the *Electronic Transactions (Victoria) Act 2000* the requirement for Mr Blakeley to sign the document on behalf of Monreale Holdings is taken to have been met because he was identified as the author of the email of 25 June 2018, he clearly indicated his intention in respect of the information communicated, the method used was as reliable as appropriate for the purpose for which the email was generated in all the circumstances, and Sleep Overs, being the person to whom the signature was required to be given, relevantly consented. However, this issue was not argued before me, and I make no finding about it at this point. For present purposes I proceed on the assumption that the email is deemed to be sufficient to meet the requirement of s 126 of the *Instruments Act.*

95 If I proceed on the basis that the email was an effective memorandum in writing to vary the lease, Sleep Overs' case is not greatly advanced. This is because the terms of the email are limited to the setting-off of repairs to a value of $300 plus GST against rent. The email does not put Sleep Overs in a better position than it stands in any event by reason of the operation of s 52 of the RLA.

Part performance

96. This not the end of the matter, because Mr Hopper also acknowledged that in some circumstances equity would intervene to compel performance of an agreement subject to s126 of the *Instruments Act* notwithstanding the absence of a memorandum in writing, if the consequence would be a fraud arising from part performance of the agreement.

97. In Monreale Holdings' supplementary submissions I was referred to a passage from Croft, Hay and Virgona *Commercial Tenancy Law* (LexisNexis Butterworths) at [4.5] where the learned authors explained:

> The doctrine of part performance was evolved by the courts of equity to prevent the defendant escaping from a contract on the defence of lack of a statutory requirement of writing when the plaintiff had done something in performance of his or her obligations thereunder which rendered it unconscionable for a defendant to rely upon the want of form, that is to say, the party seeking the performance of a contract which should have been, but was not evidenced by writing had to show some act of performance on his or her part: *Colman v Golder* [1957] VR 196 at 197-8.

98. My attention was also drawn to the following passage in Bradbrook, MacCallum & Moore: *Australian Real Property Law* (sixth Edition, 2016) at [8.155]:

> The basis of equitable intervention in part performance cases can be clouded because the party seeking enforcement is often asserting simply that the contract should be enforced. The Statute of Frauds is often described as an evidentiary rule, but it is clear that part performance does not avoid the impact of the statute because there is some independent evidence of the contract. Rather, the actions done in execution of the contract by the party seeking to enforce the contract make it unjust to deny enforcement of the contract....
>
> If part performance is a doctrine relating to the inequity to a party who has changed position on the basis of the contract, then focus should seemingly turn to the definition of a sufficient detriment to require enforcement of the contract.

99 This aspect of the argument was not fleshed out in Monreale Holdings supplementary submissions, but I think that the requirement that Sleep Overs must identify some detriment to it arising from part performance of the alleged variation of the lease gives rise to an insurmountable hurdle. Put in its most elementary form, Sleep Overs' argument must be that:

(a) it is not obligated to pay rent strictly in accordance with clause 1.2(a) of the lease, that is to say "without demand, deduction or set-off (whether legal or equitable)", because the lease has been varied.

(b) The variation of the lease is to the effect that amounts due to

be paid or credited by Monreale Holdings to Sleep Overs can be set off against rent. ·

(c) If the legal position is that a variation to the lease of this nature must be effected by an instrument in writing under s 126 of the *Instruments Act,* this does not matter because the variation to the lease has been part performed.

100 In my view, Sleep Overs argument fails at point (c), because it cannot be the case that the statutory requirement for a variation of lease to be implemented by an instrument in writing can be avoided merely because there is evidence that the agreement to vary has been part performed. In common parlance, that would be to allow Sleep Overs "to pull itself up by its bootstraps". Something more is required, that would make it unfair or unjust for Monreale Holdings to rely on the statutory defence.

101 It is hard to see how Sleep Overs could ever demonstrate that it relied on the part-performed agreement to its detriment. On the contrary, as it was the party receiving relief from rent by reason of the set-offs it was raising, it benefited from the arrangement rather than suffering a detriment from it.

Estoppel

102 Sleep Overs did not expressly refer to the doctrine of estoppel. However, in asserting that "strict performance of the no set-off clause can no longer be enforced or relied upon where clear evidences show that it has been compromised by the parties, either formally or by virtue of their own conduct", Sleep Overs is clearly suggesting that the conduct of the parties has affected their contractual relationship.

103 In brief, to establish an estoppel, Sleep Overs would have to demonstrate that their legal relationship was affected by some representation, promise or course of conduct on the part of Monreale Holdings that it relied upon to its detriment, and that it would be unconscionable for Monreale Holdings to now alter its position.

104 In the light of my comments in the context of the doctrine of part performance about the difficulty of Sleep Overs establishing detriment, it is hard to see how an estoppel could arise.

Summary and conclusion regarding set-off other than for breach of a covenant arising under the RLA

105 I have concluded above that the email from Mr Blakeley to Mr Bluck in June 2018 validly authorised setting off of amounts incurred in making repairs to a value of $300 plus GST.

106 I have considered whether the doctrine of part performance could assist Sleep Overs. I have concluded that as Sleep Overs could not make out any relevant detriment, it cannot invoke the doctrine.

107 I have also considered whether the doctrine of estoppel could assist Sleep Overs, even though it did not argue the point. Again, I have concluded that an estoppel could not be made out.

108 The upshot is that I find that the only binding agreement made on the part of Monreale Holdings, either by Mr Blakeley, or Mrs Johnston or her husband before the receivers were appointed, to the effect that clause 1.2 (a) has been varied, was the agreement by Mr Blakeley evidenced by the June email that set-offs could be effected in respect of amounts spent on repairs up to $300 plus GST.

109 This variation of the lease is unimportant because Sleep Overs' entitlement to make a set off against rent for repairs is similar to its entitlement to make a set off in respect of claims it can make for breach of s 52 of the RLA.

110 It is necessary to address Sleep Overs' respective claims of set-off.

The claims to set off made by Sleep Overs

111 The first set of amounts that Sleep Overs seeks to have credited to it were identified by Mr Kudeweh in his affidavit of 21 November 2018 at [45] and repeated or clarified in his affidavit sworn 3 December 2018 at [3]. The clarified claims were as follows:

(a) cancelled/refunded/reimbursed monies 13 November 2018-1 December 2018: $5,757.49
(b) security guard on 13 November 2018 due to concern by staff: $379.50
(c) personal attendance on 13 November 2018 to assist venue staff documents: $1,650
(d) locksmiths to attend venue on 13 November 2018 in order to repair locks and provide access to staff documents: $627
(e) security guard on 17 November 2018 due to concern for safety of staff: $379.50
(f) personal attendance on 17 November 2018 to monitor and protect staff: $660
(g) legal costs to compile notices and address VCAT for injunction: $2,175
(h) VCAT filing fees: $687.90
(i) cost of attendance at VCAT by managers (allow four hours): $440

Subtotal **$12,756.39**

112 These claims were addressed by Mr Hopper at the hearing on 11 December 2019. He acknowledged that the claims for refunded accommodation fees $5,757.49, for the hire of security guards and locksmiths, and for personal attendance might be claims for damages, but they were not made under any statutory covenant.

113 These claims were addressed again in Monreale Holdings' April written submissions where they were referred to as "damages for re-entry". It was pointed out, at [35], that these amounts could only be claimed after it was demonstrated that the landlord re-entry was wrongful. They could not be taken into account in determining whether the landlord was acting properly when it sought to take possession of the leased property.

114. I accept this submission, and accordingly will not allow a set off against rent of the claimed sum of $12,756.39.

115. In his second affidavit, Mr Kudeweh also pressed claims for repairs made under s 52 of the RLA. To provide context for this claim, this section is now set out:

> **52 Landlord's liability for repairs**
>
> (I) 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.

Note
Section 39 regulates the ability of the landlord to recover outgoings (including the cost of repairs). Section 41 provides that capital costs are not recoverable from a tenant.

116 Mr Kudeweh then listed the following claims:

(a) total repairs paid for by Sleep Overs without reimbursement: $13,290.45;
(b) total repairs to be undertaken, estimated at $60,109-$65,354, noting that other works were still to be quoted;
(c) repairs undertaken and due for payment: $5,312;
(d) capital improvements: $29,101.82;
(e) occupancy cost of Monreale Holdings 14 September 2017- 1 July 2018: $38,284.13;
(f) theft of booking payments by Monreale Holdings: $30,690;
(g) consequential damages and losses to business: to be advised.

Repair costs

117 In oral submissions on 11 December 2018 Mr Hopper acknowledged that the repairs already paid for by Sleep Overs of $13,290.45 and $5,312 respectively might be categorised as having arisen under a statutory covenant, but he observed that repair work yet to be undertaken could not be categorised in this way.

118 I consider that Mr Hopper's contention that future repair costs cannot be set off against rent is unassailable. However, I am prepared to proceed on the basis that the two claims for repairs already performed, which total $18,602.45, are allowable, subject to proof.

Capital improvements

119 At the hearing on 11 December 2018 Mr Hopper queried the nature of the capital improvements claimed of $29,101.82. However, by the time Monreale Holdings filed its written submissions for the hearing on 17 April 2019, it had been able to identify this figure as relating to "set-up costs". These were said to have been identified in Sleep Overs' letter of 1 December 2018 which showed that this sum included tenant's chattels but also included a number of items totalling $12,490.53 which appeared to relate to marketing and training costs. Monreale Holdings in written submissions noted, at [32]:

> It is unclear how the applicant alleges that these are costs that can be claimed from the respondent. They are not landlord's capital costs under s 41 of the RLA 2003.

120 I accept the thrust of this submission. It may be that Sleep Overs can ultimately seek damages for set up costs incurred in vain in an action for breach of the lease, but it cannot set off these damages against rent.

Occupancy costs of $42,504.95.

121 Mr Bluck refers to a claim against Mr Johnston for occupancy costs at [24- 25] of his affidavit. The occupancy referred to is Mrs Johnston's residency in the guesthouse. Sleep Overs in its written submissions of 16 April 2019, contends at [4] that:

> The respondent (Ms Johnston) was terminated in September 2017 as venue manager but refused to vacate the premises, despite confirming in her oral evidence (pt.41) that she did agree in November 2017 to do so. Despite no notice of arrears or breach the respondent on 15 September 2017 locked down the whole venue preventing guests and staff from entering. The applicant immediately engaged mercantile agents and locksmiths to regain access costing thousands.
>
> Again as a means to extended a sense of reasonability (sic) the applicant allowed the respondent to reside on site in the main guesthouse and again made necessary adjustments to the rent accordingly which was calculated using the VM agreement occupancy rates. Again these were submitted to the respondent in September 2017 and calculated and outlined to the respondent in the respondent's monthly remittance statements.

122 Monreale Holdings raises a series of defences against this claim. Firstly, it contends that the claim must be made against either Mrs Johnston or Monreale Estate. In relation to the second option, it points out that Sleep Overs made the venue management agreement with Monreale Estate, not Monreale Holdings. Accordingly, any claim made for breach of that agreement is not a claim made under the lease. Either way there is no claim against Monreale Holdings. I accept these contentions.

123 The next defence raised is that according to Mr Bluck's affidavit the occupancy costs were calculated on the basis of the valuation prepared by Charter Keck Cramer. Monreale Holdings asserts that the claim is accordingly one for use and occupation, and does not arise under the lease. I consider this to be self-evident.

124 Finally, Monreale Holdings contends that the claim does not arise under any covenant implied by the RLA, and accordingly even if Sleep Overs could otherwise establish an equitable set-off, it would be defeated by clause 1.2(a) of the lease. I accept this submission also.

125 For all these reasons, I find that Sleep Overs cannot set off the occupancy costs against the rent due under the lease.

The booking fee

126 Mr Bluck deposed at [5] of his affidavit sworn on 20 December 2018 that Monreale Holdings received $30,690 in booking fees for the period 1 December 2016-27 February 2017 without notifying Monreale Holdings. When this anomaly was picked up, the full amount was not disgorged, and $9,292.80 had to be adjusted against the rent.

127 Monreale Holdings contends that the claim "appears to be a claim against either of Mrs Johnston or Estate".

128 It is to be inferred from Mr Bluck's evidence that he considers that Mrs Johnston was acting as the agent of Monreale Holdings when the money was put into the account. I accept that the money may have been diverted by Mrs Johnston to an account other than one belonging to Monreale Holdings, but when she took that action, it is hard to understand why it is said that she did so as the agent of Monreale Holdings. She seems to have been performing services under the Venue Management Agreement for Monreale Estate at the relevant time.

129 Mrs Johnston's evidence at the hearing on 15 March 2019 was not conclusive. She did not accept the proposition that $21,397.20 paid by the Lido Group had been taken by her.[9] She merely acknowledged that the sum had been "put into our account and that was obviously Lido's fault".[10]

130 On balance, I find that the claim for disgorgement of the balance of the booking fees of $9,292.80 banked in the wrong account cannot be maintained against Monreale Holdings. Accordingly the sum cannot be set off against the rent.

Consequential damages and losses to business

131 This claim can be dealt with briefly. The first point to be made is that there is a paucity of evidence about the alleged loss of profits claim. Initially it was not quantified. However, in Sleep Overs' 16 April submissions the claim was qualified at $59,235.72. This figure was referred to again in a further affidavit sworn by Mr Kudeweh dated 2 May 2019 under the heading "Orders sought". At the hearing held on 14 May 2019, which was concerned with an application made by Sleep Overs to vary the undertaking upon which the injunction had been granted and subsequently continued, it was indicated that this claim was to be substantially reduced to $28,535.74. The basis for this adjustment was not explained.

132 Turning to the substantive issue, as pointed out by Monreale Holdings in its April submissions at [42], a claim for damages arising after the re-entry cannot impeach the debt that justified the re-entry itself. Accordingly, the claim, even if it can be sustained following a finding of unlawful termination of the lease, is not relevant to the question of set-off against rent. Moreover, the claim is not statutory, and accordingly cannot overcome clause 1.2(a) of the lease in any event. I accept these submissions.

---

[9] Transcript page 257, line 131.
[10] Transcript page 258, lines 30 – 31.

New claims made in Sleep Overs April submissions

GST

133 In its written submissions dated 16 April 2019, Sleep Overs at [2] asserts that Monreale Holdings was claiming GST despite not being registered for GST. This was raised in a letter dated 11 October 2017, and adjustments were subsequently made.

134 On the basis that the relevant adjustments appear to have been made, it is not appropriate to make any further allowance for this issue.

New total for repair payments

135 The amount claimed for repairs was stated to be $15,140.45. No details were supplied to explain the figure. At a further hearing Sleep Overs may apply to give further evidence about these items.

Reimbursement for rent paid

136 Sleep Overs further submitted that as at 31 March 2019 it was entitled to a refund of "rental payments". This may be an update of a claim previously flagged by Mr Kudeweh for a refund of rent and outgoings paid of $138,550. Monreale Holdings queries at [38] of its April submissions how this claim is or can be put, in the light of the Court of Appeal's decision in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*[11]

137 I consider this is academic as any claim by Sleep Overs for a refund of rent is presumably contingent on a finding being made that the letter of 22 December 2016 was served, with the effect that Monreale Holdings' entitlement to rent was suspended under ss 17(3) of the RLA from the day on which the notice was given. As I have found that the letter of 22 December 2016 was *not* served, the question does not arise.

Claims for venue management payments and other expenses

138 In its 16 April submissions Sleep Overs indicates that as at 31 March 2019 it was entitled to a refund of payments made under the venue management agreement of $32,574.81, and other expenses including staff, capital works and furnishings totalling $407,967.65.

139 These claims are clearly claims for damages contingent upon a finding that the lease has been lawfully terminated by Monreale Holdings. They are not claims made for breach of any covenant deemed to be in the lease by operation of the RLA, and accordingly they cannot be the subject of any set-off against rent.

Issue by Monreale Holdings of false financial reports

140 An assertion was made at [6] that it was discovered by Sleep Overs that:

[11] [2006] VSCA 6, especially at [22]

> the respondent [Monreale Holdings] had provided overly inflated financial reports of the 2015 financial year. The initial report provided showed an income of $399,005 where later it was discovered that the actual revenue was $242,063.

141. It may be that in due course Sleep Overs will mount a claim against Monreale Holdings and possibly other parties for misleading and deceptive conduct on the basis of this allegation. However, such a claim was not articulated in the April submissions. In any event, a claim for damages of this type is not a claim arising for breach of a covenant implied by the RLA, and accordingly could not be set off against the rent.

Claim based on a quantum meruit

142 Finally, I note that in the final section of its supplementary submissions, Sleep Overs seems to be suggesting that as no rent was payable because a disclosure statement had not been provided by Monreale Holdings, the way is open for the Tribunal to assess the entitlements of the parties outside the terms of the lease on a quantum meruit basis. I do not understand this argument. I will treat the issue as remaining open, and Sleep Overs may seek leave to make submissions regarding it at the next hearing. For present purposes, it is clear that if relief is sought by Sleep Overs on a quantum meruit basis, that is a matter for determination at a final hearing.

Summary so far

143 For the reasons given above, I consider that the two claims for repairs already performed, which total $18,602.45 are, conceptually available to be set- off against rent as they can be categorised as arising under a statutory covenant, namely s 52 of the RLA. Whether they are actually to be set- off, will turn on the expenditure being established.

144 Mr Hopper, at the April hearing, contended that the claims had not been established by appropriate proof. I note there is material contained in the exhibits to Mr Bluck's affidavit relating to repairs. However, that material has not been collated and presented clearly. As Sleep Overs is not represented by a professional advocate, I will, as matter of fairness, allow it a further opportunity to properly present this aspect of its case.

145 Notwithstanding, I am now in a position to form an evaluation as to whether the lease has been legally terminated. I say this, because there is sufficient evidence before me to allow me to make a determination as to whether rent was outstanding at the time of the re-entry by Monreale Holdings in November 2018.

146 Before we turn to an analysis of the setoffs claimed by Sleep Overs, it is appropriate to consider the key question of the level of rent

payable under the lease.

WHAT RENT IS DUE UNDER THE LEASE?

147 Monreale Holdings relies on the evidence of Mr Blakeley in his November affidavit at [24] to make two contentions about the rent. The first is that if the rent is calculated "in accordance with the terms of the Lease" the arrears of rent is $173,618.23. In the alternative, if the rent is calculated "in accordance with the terms of the Side Letter" the total arrears of rent is $113,598.32. This discrepancy highlights the importance of making a finding about the rent due under the lease before any set-off.

148 Sleep Overs acknowledges that the rent referred to in the schedule to the lease is $8,800. However, it contends that this figure has been amended by the side agreement contained in the letter from Monreale Holdings to Sleep Overs dated 14 November 2016. Clause 11 of the side agreement provides:

> The Rent paid monthly in arrears shall be equal $6,500.00 per calendar month plus the difference in interest payable by the Landlord on its existing borrowings with the mortgagee of the property, up to an additional $2,300.00 per calendar month, such interest to be evidenced by production to the Tenant by the Landlord of a Statement from its mortgagee. (Sic)

149 In its primary written submissions, Monreale Holdings contends that the rent should be calculated at $8,800 per calendar month plus GST because:

a. the rent on the face of the lease is that sum, and has been amended in hand from $6,500;

b. the lease is subsequent to the side agreement, as it is dated 9 December 2016;

c. the arrangement in clause 11 of the side agreement allocates $6,500 to rent and up to $2,300 to the payment of interest, and is accordingly in substance, an agreement about the method of payment, not an agreement to reduce the rent; and .

d. Sleep Overs is not making contributions to the interest payable on Monreale Holdings' loan account in accordance with the side agreement.

150 Sleep Overs' response is that the lease and the side agreement are to be read together as they were initially executed on the same day. It contends in its 16 April submissions at [5] that the effect of clause 11 of the side agreement is to fix the rental at $6,500 and that the rental would be increased to $8,800 only if interest statements were provided each month. As Monreale Holdings did not provide interest statements, the interest component was not payable.

151 If the only execution of the lease had remained the execution on 14 November 2016, there would have been some force in Sleep Overs' argument that the terms of the lease were modified by the terms of the side agreement. However, I accept Monreale Holdings' submission that the final execution of the lease post dated the execution of the side agreement. This is self evident from the schedule to the lease, which indicates that the lease was initially typed up with an execution date of 1 October 2016, but also indicates the execution date was altered twice. The first alteration was to 28 November 2016, and was typed. The second alteration was to 9 December 2016. This alteration was made by hand, and was initialled by two parties. The rent was also altered from $6,500 to $8,800, as noted. Whether this alteration was made on or before 28 November 2016 or on or before 9 December 2016 is not clear on the face of the document, but this is not material. The key point is that when the lease was finally executed on 9 December 2016, the face rent was stated to be $8,800. The execution of the lease superseded the side agreement by a number of weeks, and I find for this reason that the lease is not governed by the side agreement.

152 In its 16 April submissions Sleep Overs made a supplementary argument based on the appearance of additional words in clause 11. In the version of the side agreement exhibited to Mr Kudeweh's affidavit as NM 2, the additional words are added by hand:

> Any amount paid by the Purchaser or Purchasers nominated entity in excess of the amount of $6,500 per calendar month will be reduced from the purchase price at settlement not including GST.

This addendum appears to be signed by Mrs Johnston on behalf of Monreale Holdings, and by the individual who signed the side agreement on behalf of Sleep Overs, whose name is indecipherable.

153 Sleep Overs argues that as the sale agreement has now been terminated, the effect of the side agreement is that the rent must be limited to $6,500.

154 I do not accept this argument. Even if the side agreement does have scope for operation notwithstanding that it was executed weeks before the final version of the lease, the effect of these additional words in clause 11 is to create an obligation on Monreale Holdings to credit against the purchase price at settlement any amount of rent paid per calendar month in excess of $6,500. It does not follow, in my view, that the credit is to be made in circumstances where the sale agreement has been terminated.

155 Because I have formed this view, it is not necessary for me to make a determination about an ancillary matter, which is whether the additional words actually form part of the side agreement. This doubt arises because, as pointed out at the hearing, the version of the side agreement appended to Mr Blakeley's affidavit as "RB7" does not contain the

additional words.

Conclusions regarding rent

156 Because the face value of the rent in the lease executed on 9 December 2016 is $8,800 per calendar month exclusive of GST, and because I have found that the lease is not governed by the side agreement which was executed in November 2015, I find that the rent payable under the lease is $8,800 per calendar month exclusive of GST.

157 I have also found that there is nothing in the additional words allegedly inserted into clause 11 of the side agreement to create an obligation on Monreale Holdings to disgorge to Sleep Overs any rent paid per calendar month over $6,500.

THE AMOUNT OF RENT OUTSTANDING

158 Monreale Holdings in its written submissions refers to the evidence of Mr Bluck in his December affidavit where at [29] he concedes that even if the lease arrears are assessed under the side agreement at $113,598.32 for the period December 2016 to November 2018, set-offs claimed in respect of maintenance items reduced the arrears amount to $14,300 for the period September-October 2018 and October-November 2018.

159 Accordingly, I accept the submission made by Mr Hopper that on any view the termination of the lease must have been lawful. Accordingly, also I accept Monreale Holdings' contention that it was entitled to possession of the property on 13 November 2018.

160 I note that I have found above that two claims for repairs already performed, although the claims have not been substantiated yet by appropriate evidence, are theoretically available to be set -off against rent. The total of these claims is $18,602.45. Accordingly, if they were to be substantiated in full, and if the rent is calculated on the basis of the side agreement, Sleep Overs would be found to be in arrears of rent as of the date of termination in an amount of about $95,000. As I have found that the face value of the rent is $8,800, the shortfall of rent at the date of termination, even if the repairs were to be substantiated in full, is likely to be in the order of $155,000.

APPLICATION FOR RELIEF AGAINST FORFEITURE

161 Sleep Overs has indicated that if it were to be determined that the termination of the lease by Monreale Holdings was lawful, it would be making an application for relief against forfeiture. The proceeding has already been listed for a further hearing at 10.00 a.m. on 3 June 2019. Sleep Overs has through a director given the standard undertaking as to damages and given a specific undertaking to pay rent in arrears of $2,233.85 (inclusive of GST) each week on stipulated dates until that

hearing. On the basis of those undertakings, the injunction has been extended until 5.00 p.m. on 3 June 2019. In the light of Sleep Overs declared intention to seek, if necessary, relief against forfeiture, it is appropriate for Sleep Overs to remain in possession until at least the hearing on 3 June 2019.

162 The parties will be given an opportunity at the hearing on 3 June 2019 to make further submissions regarding the quantum of rent currently outstanding. This will be fundamental to making any determination regarding the application for relief against forfeiture.

163 With a view to ensuring that the application for relief against forfeiture is concluded, if possible, on 3 June 2019, the hearing will be scheduled for the whole day.

C. Edquist
Member