VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R103/2012

BUILDING AND PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Breach of Lease - whether previous orders constitute a contractual term of the lease - whether express terms of lease require the landlord to make the premises fit for occupation; Section 52 of the *Retail Leases Act 2003*; Estoppel – whether representations made after lease renewed give rise to an equitable compensation – *Walton's Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513; Repudiation of lease – whether s 54 of the *Retail Tenancies Act 2003* gives rise to right to terminate – Mould – whether premises are to be total free of mould; Damages – loss of goodwill value – loss of profits – Issue estoppel – whether findings made by Tribunal in earlier proceeding binding on the parties – whether calculation in earlier proceeding binding on subsequent proceeding - calculation of loss of profits; Evidence – whether speculation sufficient evidence upon which to draw inference.

FIRST APPLICANT	Versus (Aus) Pty Ltd (ACN 105 954 845)
FIRST RESPONDENT	A.N.H. Nominees Pty Ltd (ACN 005 796 378)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing (Remitted)
DATE OF REMITTED HEARING	27 and 28 February, 1 and 23 March 2017
DATE OF ORDER	15 June 2017
CITATION	Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd (Remitted) (Retail Tenancies) [2017] VCAT 859

ORDER

1. The Respondent must pay the Applicant $68,082 on the Applicant's claim, plus interest in the amount of $28,904 ($96,986 in total).
2. The Applicant must pay the Respondent $9,315 on the Respondent's counterclaim.
3. The parties must co-operate to arrange for the goods (either all or some) which are currently stored by the parties to be either disposed of or returned to the Applicant.

4. Liberty to apply until 14 July 2017 on the question of costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J D Barber of Counsel
For the Respondent	Mr R Hay QC with Mr B Harding of Counsel

REASONS

INTRODUCTION

1. On 22 April 2014, I pronounced orders and published *Reasons* in this proceeding, wherein I determined a dispute between the Applicant (**'the Tenant'**) and the Respondent (**'the Landlord'**) concerning retail premises located in Church Street, Brighton, from which the Tenant operated an exclusive lingerie business (**'the 2014 Hearing'**).[1]

2. The history of the dispute is set out in detail in my *Reasons* of the 2014 Hearing.[2] In essence, the dispute concerns damage caused to the retail premises, previously leased by the Tenant, as a result of water or moisture ingress. This state of affairs resulted in the leased premises (**'the Premises'**) experiencing elevated levels of mould ecology, which ultimately caused the Tenant to vacate the Premises in May 2011. The Tenant did not re-occupy the Premises after that date.

3. The Tenant contends that the Landlord failed to remediate the Premises to a condition where it was safe to re-occupy the Premises. It ultimately purported to determine the lease agreement by correspondence dated 27 March 2013 on the ground that the Landlord had repudiated its obligations under the lease. In response, the Landlord, by correspondence dated 9 April 2013, denied that it had repudiated its obligations under the lease but, nevertheless, accepted that the lease had come to an end.

4. The Tenant claimed compensation for loss and damage caused to its lingerie business, which included loss of profit, loss of goodwill to the business value, and damage to various goods, fixtures and fittings.

5. The 2014 Hearing followed an earlier hearing also in this Tribunal between the same parties and which canvassed many of the same issues that were in dispute in the 2014 Hearing; namely, compensation for disruption to the Tenant's lingerie retail business (**'the Earlier Proceeding'**).[3] However, the damages claimed in the Earlier Proceeding only extended to 31 December 2011, whereas the damages claimed in the 2014 Hearing covered the period from 1 January 2012 onwards.

6. In the Earlier Proceeding, the Tribunal ordered that the Landlord pay the Tenant $218,599.63 plus interest. In the 2014 Hearing, I ordered that the Landlord pay the Tenant $33,926.76. My determination of that measure of loss was premised on a finding that the Tenant's business had been disrupted up to 9 April 2013, at which point I found that the parties had mutually terminated the lease agreement. Accordingly, no damages or compensation were awarded after that period.

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[1] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd (No 2) (Revised)* [2014] VCAT 454.
[2] Ibid.
[3] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2011] VCAT 2273.

7. My determination of the 2014 Hearing was the subject of a successful appeal to the Supreme Court of Victoria by the Tenant (**'the Appeal Proceeding'**).[4] Following that successful appeal, orders were made by Croft J on 4 December 2015 that:

> 1. The orders made by the Victorian Civil and Administrative Tribunal on 22 April 2014 in proceeding R103/2012, as revised by the Tribunal's orders made 29 August 2014, be set aside.
>
> 2. The proceeding be remitted to the Victorian Civil and Administrative Tribunal which may be constituted by the member who heard the original proceeding for consideration of the question whether or not the defendant repudiated the lease and for the assessment of damages, such consideration and assessment to be in accordance with the reasons of the Honourable Justice Croft dated 1 October 2015 on the basis of the evidence already given before the Tribunal and such further evidence as the Tribunal by leave may allow.

8. As highlighted in the orders made by Croft J on 4 December 2015, the 2014 Hearing was remitted for further hearing by the Tribunal to determine whether or not the Landlord had repudiated the lease and to further assess damages. In so doing, his Honour stipulated that both the question of repudiation and the assessment of damages were to be undertaken in accordance with his Honour's reasons.

9. Both Mr Barber of counsel, who appeared on behalf the Tenant, and Mr Hay of senior counsel and Mr Harding of counsel, who appeared on behalf the Landlord, summarised the ambit of this remitted hearing into three broad categories, as follows.

ISSUES FOR DETERMINATION

Repudiation

10. The Tenant contends that the Landlord repudiated its obligations under the lease because it had failed to remediate issues of moisture ingress and excessive levels of mould ecology, which adversely affected occupation of the Premises.

11. By contrast, the Landlord contends that there was no contractual or statutory obligation requiring the Landlord to 'make good' damage in or to the Premises. It submits that the Landlord's obligations only required it to maintain the Premises in a condition commensurate with its condition as at the time when the lease was first entered into. It says that there is no evidence establishing that the condition of the Premises, at the time when the Tenant purported to terminate the lease, was any different to its condition when the lease was first entered into. Further, it contends that even if there was a contractual or statutory obligation requiring the Landlord to make good

[4] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515.

damage in or to the Premises, the evidence does not support a finding that the Landlord repudiated its obligations in that regard.

Damages

12. In this remitted hearing, there are a number of issues arising out of the Appeal Proceeding which alter the way in which damages are now to be considered and assessed, compared to the 2014 Hearing. These include:

    (a) If it is found that the Tenant lawfully terminated the lease on 27 March 2013, then damages are to be assessed on a different footing to the assessment of damages in the 2014 Hearing, which was premised on the lease agreement having been mutually brought to an end on 9 April 2013.

    (b) In the 2014 Hearing, the Tenant submitted that the assessment of loss of profit was to be calculated by reference to the same methodology adopted by the Tribunal in the Earlier Proceeding, notwithstanding that the claim for loss of profit covered a different accounting period (May 2008 to December 2011), compared to the accounting period, the subject of the 2014 Hearing (January 2012 to April 2013). In the Appeal Proceeding, Croft J held that the Tribunal was bound to follow the Tribunal's earlier finding that the Tenant's lingerie business was likely to grow in sales by 6% per annum but for the disruption to its business. Therefore, in this remitted hearing, any assessment of damages for loss of profit must adopt a growth in sales figure of 6% per annum for the whole of the period in which damages are to be assessed.

    (c) In the 2014 Hearing, the Tenant also claimed damages for the lost opportunity of not being able to open another lingerie store in Sydney. I dismissed this aspect of the Tenant's claim on the ground that it was speculative. However, in the Appeal Proceeding, Croft J found that this aspect of the Tenant's claim was to be given further consideration in the remitted hearing.

    (d) Similarly, in the 2014 Hearing, the Tenant claimed damages for loss of goodwill. I dismissed this aspect of the Tenant's claim, principally on the basis that there was insufficient evidence to support a finding that the goodwill of the business had been completely destroyed. In the Appeal Proceeding, Croft J found that it was possible to award compensation where the value of goodwill has been diminished, rather than completely destroyed. Accordingly, that aspect of the Tenant's claim is also to be given further consideration in this remitted hearing.

Undetermined issues

13. In addition, there are extant matters arising out of the 2014 Hearing, which were unable to be heard and determined in the 2014 Hearing, given that the

appeal process commenced before those matters could be listed for final hearing. Those outstanding matters related to an ancillary claim for compensation as a result of certain fixtures, fittings and personal goods belonging to the Tenant (**'the Goods'**) requiring remediation to remove mould or alternatively, the replacement value of those Goods. In addition, the Landlord has counterclaimed against the Tenant in respect of the costs associated with storing some of those Goods, whilst the proceeding remained on foot.

REPUDIATION

14. Mr Barber and Mr Hay both submit that where the Appeal Proceeding contemplates that the orders made in the 2014 Hearing be set aside, the findings that underpin those orders are quashed and no part of the hearing survives.[5] Therefore, the Tribunal is obliged to exercise its jurisdiction afresh, but on the basis that the issues before it have been limited by the remittal order. Mr Barber submitted that although the findings in the 2014 Hearing are not preserved, it is as though the only questions that arise for consideration are those, the subject of the remittal order. However, the parties are somewhat at odds as to how those remittal orders are to be construed.

15. In the Appeal Hearing, Croft J remitted the question of repudiation for further consideration by the Tribunal, having regard to his Honour's reasons and on the basis of the evidence already given and *such further evidence as the Tribunal by leave may allow*. His Honour stated:

> In my opinion, the Tribunal made errors of law with respect to the first, second and fourth propositions advanced by the Plaintiff in this context and thereby failed to find that the defendant had repudiated the lease. This failure to find repudiation flowed from too great significance being given to the asserted intention of the Defendant to rectify and address breaches – particularly in the context of the full picture of objective facts including those found with respect to the period Judge Lacava was considering [the Earlier Proceeding], as a result of the application of ss 52 and 54 of the Act, as well as the matters the subject of Judge Lacava's findings discussed above in the context of issue estoppel. The whole picture provided by an appreciation of the relationship between the operation of ss 52 and 54 of the Act is of significantly breached "statutory covenants" throughout the original and renewed terms where the factors which were to be properly considered with respect to repudiation were not to be taken out of the picture by reason of the renewal of the lease – whether as a result of the operation of s 54 (2) (e) (ii) or otherwise.[6] [Underlining added]

16. Although the above extract of his Honour's judgment seems to indicate that the question of repudiation has been determined in favour of the Tenant, both Mr Barber and Mr Hay submitted that this was not the case. Indeed, Mr Barber advised that the Appeal Proceeding was returned before his Honour in order to clarify the ambit of this remitted hearing, at which time his Honour

[5] *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324.
[6] Ibid at [135].

made it clear that the question of repudiation was a matter for determination by the Tribunal in this remitted hearing. Indeed, this remitted hearing has proceeded on that basis, with fresh evidence being adduced on the question of repudiation and written submissions being filed which address the question afresh.

Was there an entitlement to terminate for breach of the lease?

17. The Tenant contends that the Landlord breached the terms of the lease by failing to remediate the Premises of moisture and excessive levels of mould ecology in a timely manner. Implicit in that statement is the contention that the Landlord was under a legal obligation to undertake that remedial work. In that regard, the Tenant points to the Landlord's obligation to repair, imported into the lease under s 52 or alternatively, s 54 of the *Retail Leases Act 2003* (**'the RLA'**) and the Landlord's obligation to give the Tenant quiet enjoyment of its leasehold interest.

18. The Landlord argues that a contractual obligation to repair must lie at the very heart of the Tenant's entitlement to repudiate the lease. It contends that without establishing a fundamental breach of the lease covenants, there cannot be an entitlement to terminate for cause. That raises a threshold question; namely, whether the Landlord was under any contractual obligation to remediate the Premises of moisture and excessive mould ecology. That threshold question aligns, in part, with a critical aspect of the findings made in the 2014 Hearing. In particular, in the 2014 Hearing, I determined that there was no contractual obligation under the lease agreement requiring the Landlord to remediate the Premises of moisture and excessive mould ecology.

19. I now reconsider this question, in light of, and in accordance with, the judgment of Croft J in the Appeal Proceeding.

Section 52

20. Section 52 of the RLA, states, in part:

> **52. Landlord's liability for repairs**
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into –
>
> (a) the structure of, and fixtures in, the retail premises; and
>
> (b) plant and equipment at the premises; and
>
> …
>
> (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…

21. Mr Hay submitted that there is no evidence demonstrating that the condition of the Premises, when the lease was first entered into in June 2006, was any different to its condition on 27 March 2013, when the Tenant purported to terminate the lease. He argued that s 52 of the RLA, which imported the Landlord's repair obligations, only operated in circumstances where it can be shown that the damage or defect crystallised after the lease was entered into. In other words, the Landlord's obligation was to maintain, rather than to make good.

22. Mr Barber submitted that in the Earlier Proceeding, Judge Lacava had found the Landlord liable for breach of the covenant implied by s 52 of the RLA, by failing to remediate the Premises to remove moisture and excessive mould ecology. He submitted that the Landlord remained liable for its failure to remediate the mould and moisture ingress during the renewed term of the lease, which commenced on 18 May 2011. Mr Barber contended that the Landlord cannot now go behind Judge Lacava's judgment. He submitted that this, of itself, puts an end to the Landlord's argument about any breach of the covenant implied by s 52 of the RLA.

23. I do not accept that Judge Lacava determined the Tenant's claim in the Earlier Proceeding on the basis of a breach of s 52 of the Act. Indeed, the *Catchwords* used by him on the title page of his Honour's Reasons make no mention of s 52 of the RLA. The *Catchwords* state:

> Division 4 Part 10 of the Retail Leases Act 2003 – application of s 54(2) – landlord fails to take reasonable steps within the landlord's control to stop or prevent disruption to the tenant's trading at the retail premises – claim for compensation damages for loss of stock and loss of profits.

24. Moreover, there is only one reference to s 52 in his Honour's Reasons, where he states:

> Applicant's Other Claims to Damages
>
> Bank Overdraft Interest
>
> 314. The applicant claims interest paid on its overdraft. At the end of submissions this amounted to $60,783.00.[7] The basis of the claim is that, had it not been for the breaches of the lease and ss 52(2)(a) and (c) and 54(2) of the Act, the applicant would have traded profitably and would have been able to make the lease payments out of income and not from its overdraft.

25. Importantly, the orders made by Judge Lacava do not expressly require the Landlord to remediate the Premises of mould and moisture, notwithstanding that his Honour ordered that rent be abated until all mould had been eradicated. Further, there is no discussion or any finding made in the Earlier Proceeding as to the condition of the Premises at the commencement of the lease compared to any later point in time.

[7] Applicant's written submissions paragraphs 55 to 57.

26. Order 2 of the Tribunal's orders dated 1 December 2011 states:

> The rent and outgoings payable by the applicant to the respondent will continue to abate until all mould is eradicated from both the surfaces and in the air at the premises. Before the premises are re-occupied by the applicant, the respondent is to obtain a report, at its expense, from a qualified mould remedial specialist certifying that all mould has been eradicated from the surfaces and in the air within the premises.

27. I further note that the above order is expressed to require that all mould from both the surfaces and in the air of the Premises be eradicated before rent becomes payable. However, the expert evidence given in this proceeding makes it clear and uncontroversial that some airborne mould will always be present in the Premises, which is an entirely natural phenomenon. Indeed, comparisons were made with the airborne levels of mould found internally with those found externally in order to ascertain suitable levels of airborne mould. Consequently, I do not interpret the orders made by the Tribunal to mean that all mould needs to be eradicated but rather, the order needs to be read down to mean the removal of all excessive levels of mould ecology in order to make the Premises fit for occupation.

28. Moreover, the order relates to the abatement of rent. It provides that no rent is payable until excessive levels of mould ecology is eradicated. It does not necessarily follow that an order for the abatement of rent means that the Landlord is in breach of its obligations under the Lease. For example, it is not uncommon for there to be terms in a lease that provide for the abatement of rent where premises are destroyed or rendered unfit for occupation through no fault of either party. Similarly, s 57 of the RLA imports a term into the lease, which relieves a tenant of its obligation to pay rent in circumstances where the demised premises are damaged through no fault of the tenant. That provision operates irrespective of whether the damage was caused by any fault or neglect on the part of the landlord.

29. Consequently, I do not find that the orders made by the Tribunal in the Earlier Proceeding create any contractual or quasi-contractual obligation to make the Premises fit for occupation.

30. Similarly, I do not read the judgment of Croft J in the Appeal Proceeding as determining this issue. Indeed, none of the questions raised in the Appeal Proceeding, or in the grounds of appeal, suggest that the Tribunal, in the 2014 Hearing, was bound by any finding made in the Earlier Proceeding that the Landlord breached s 52 of the Act.[8] This is despite the fact that the findings in the 2014 Hearing were premised, in part, on a finding that the Landlord did not breach s 52 of the Act.[9]

[8] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515 [4-5].

[9] The Appeal Proceeding did, however, raise as a question on appeal, whether the comparator date was the date of renewal or the date when the original lease was entered into. However, the finding in the 2014 Hearing that s 52 of the Act was not breached was not said to have been already decided in the Earlier Proceeding.

31. Therefore, I find it open for the Landlord to argue that it had no contractual or statutory obligation to remove excessive levels of mould ecology and moisture ingress, other than to maintain the Premises in a condition consistent with the condition of the Premises when the original lease was entered into on 27 June 2006.

32. Mr Hay submitted that at common law there is no implied obligation imposed upon the Landlord to put leased premises into a proper state of repair at the commencement of the tenancy.[10] Further, it is common ground that there is no express covenant in the lease that requires the Premises to be free of mould or fit for purpose. Consequently, Mr Hay argues that the Tenant does not establish a breach of the lease merely because, at the time of the purported termination in 2013, an excessive level of mould ecology or moisture was or may have been present in the Premises.

33. Therefore, Mr Hay submitted that the only avenue by which the Tenant is able to establish that the Landlord breached its obligations under the lease is through s 52 of the RLA. Mr Hay submitted that to establish a breach of the covenants implied into the lease pursuant to s 52 of the RLA, the Tenant must prove that the Premises were in a worse condition on 27 March 2013, being the date that the Tenant purported to terminate the lease, compared to when the lease was entered into on 27 June 2006.

Condition of Premises in 2006

34. Mr Hay submitted that, in the absence of evidence concerning the condition of the Premises in June 2006, the Tribunal has no reference point by which to compare the condition of the Premises as at 27 March 2013. Therefore it cannot determine that there was any breach of s 52 of the RLA as at 27 March 2013. He argued that the evidentiary burden lies with the Tenant, being the party that seeks to rely on the provision.

35. I accept that the Tenant bears the evidentiary burden to prove that the Premises were in a worse condition than at the commencement of the lease. That proposition is consistent with the treatment of other remedial provisions of the RLA. In particular, in *Charcoal Chicken & Souvlaki Xpress Pty Ltd v Stamatakos*,[11] the Tribunal found that burden of proof applicable to a claim under s 57 of the RLA (in respect of damaged premises) lies with the party claiming the relief; namely, the tenant. Reference was made to the judgment of Walsh J in *Curry v Dempsey*,[12] where his Honour stated:

> The burden of proof in the sense of establishing a case lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g., if its existence is a condition precedent to his right to maintain the action.[13]

[10] Bradbrook, Croft & Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) 241 [8.6].
[11] [2015] VCAT 1017, [32](d)-[33]
[12] [1967] 2 NSWR 532.
[13] Ibid at 539.

36. *Charcoal Chicken* was recently considered by Croft J in *Casa Di Iorio Investments Pty Ltd v Guirguis*,[14] where his Honour confirmed that the onus of proof in an action under s 57 of the RLA lay with the tenant:

> 57 For the preceding reasons, I accept the Applicant's submissions with respect to the proper construction of s 57(1)(b) of the Act in that an essential ingredient of any "cause of action" under those provisions is proved by the claimant, the tenant, that the damage the basis of the relief claimed was not caused by the tenant.[15]

37. Similarly, where a tenant claims relief under s 52 of the RLA, the "essential ingredient", in order to establish that a cause of action lies against the landlord, is that the condition of the premises has changed from its condition when the retail premises lease was first entered into. Adopting the same logic as in *Charcoal Chicken* and in *Casa Di Iorio*, the burden lies with the tenant, being the party prosecuting that claim, to establish this "essential ingredient".

38. There is no actual evidence as to the condition of the Premises in June 2006. However, I am of the opinion that a reasonable inference can be drawn, based upon the evidence given in the Earlier Proceeding, the 2014 Hearing and this remitted hearing, that the condition of the Premises in June 2006 was no better, and in all likelihood, worse, than its condition in March 2013. In particular, the evidence of the Tenant's director and former director, Mr and Mrs Spaleta gives some indication as to the condition of the Premises close to the time when the lease was first entered into.

39. In her affidavit dated 16 July 2012, Irena Spaleta states:

> 3. During the period November 2006 and May 2011, at my workplace at the premises on a daily basis, I was exposed to toxic and carcinogenic mould, as established by the Tribunal in its decision of 1 December 2011, and Expert Mould Report of 27 May 2011, as the respondent refused and failed to:
>
> a) Rectify the issue of the water damaged western wall at the premises;
>
> b) Remedy the issue of airborne and surface toxic and carcinogenic mould and bacteria; and
>
> c) Refused and failed to maintain the premises.

40. In Mr Spaleta's affidavit dated 2 November 2016, he also recounts the condition of the Premises at the time the Tenant first occupied the premises in November 2006:

> 7. On 10 November 2006 the applicant purchased the existing gift shop business at the premises and took a transfer of the lease expressed to commence 18 May 2006 for a term of 5 years at a rent of $60,000 p.a. The lease contained an option for a further five

[14] [2017] VSC 266.
[15] Ibid at 38-9.

year term, from 18 May 2011 to 17 May 2016. A copy of the lease iready [sic] in evidence before the Tribunal.

8. The applicant then started on the refitting of the premises in order to conduct its luxury lingerie retail business. The applicant engaged a builder, Mr Eddie Scheruga, to construct the applicant's new fit-out at the premises. Mr Scheruga produced a quotation for labour and materials of $190,000. Irena and I told him that we accepted his quotation. Mr Scheruga's quotation was destroyed with other documents by flooding of the premises on 6 March 2010.

9. The first task was to remove the old shop fit-out. I participated in the removal of the old shop fit-out with Mr Scheruga in mid-November 2006. Upon removing the old shop fit along the western wall of the premises, I discovered water damage to a 5m+ section of the western wall. I took some photographs of the water damage. At pages 3-4 of exhibit BS1 is a true copy of the photographs I took.

10. Although the photographs I took show mould growth on the western wall, at the time my wife Irena Spaleta (who was then the director of the applicant) and I had no experience of mould infestations and we did not recognise the mould for what it was. We also did not understand that mould itself could cause a problem for occupants of the premises.

11. Mr Scheruga advised me that the water ingress at the premises was a structural issue and that the fit-out works could not proceed until it had been investigated and fixed by the landlord. I was concerned about this because Irena and I had planned that the applicant's new fit-out would be completed and the premises opened for trading on 8 December 2006 to take advantage of the Christmas trading period.

12. Between 25 November 2006 and December 2006, Irena and I contacted the respondent's agent many times via telephone, leaving messages to the effect that we had found water damage in the western wall of the premises and asking that they send someone to assess and fix the problem. There was no response.

…

16. On 11 December 2006, the respondent sent a plumber, Peter Hingston to the premises. Mr Hingston said there was rising damp in the western wall…

17. As a result of the water ingress and in the western wall and the delay caused by attempts to have the respondent fix the water ingress and in the western wall, Mr Scheruga ran out of time to continue his works at the premises and left for the Christmas break without the works progressing beyond removal of the old fit-out. Due to previous engagements after the Christmas break, Mr Scheruga was not able to continue with the works at the premises after Christmas.

18. Irena and I were unable to find a builder who would be able to do a shop fit at the premises in December 2006 at short notice.

19. With no other options, I constructed the shop fit at the premises with Irena. We made alterations to the design of the shop fit to deal with the structural/water ingress issue and water damaged walls in the premises.

20. Both Mr Hingston and Mr Scheruga advised us to leave a gap between the water damaged wall in the shopfront.

…

22. Irena and I built a plasterboard shell on 70mm pine studs affixed to the brick walls throughout the shop floor so the plasterboard did not touch the wall and to allow air to circulate behind the plaster shell. I hope that this would allow the wall to dry out. We also left a 10mm+ gap between the plasterboard shell on the floor. The plasterboard shell did not touch the floor…

41. Mr Eddie Scheruga, the contractor that provided the Tenant with a quotation to fit-out the Premises, gave evidence during the remitted hearing. He was asked questions concerning his involvement in the fit-out of the Premises in around November 2006:

> Mr Scheruga: Well, there was some issues with waterproofing, some water issues, and the job was delayed, and then I could not continue to do work after that, we had other commitments.
>
> Mr Barber: How were the water issues discovered?
>
> Mr Scheruga: Well, there were walls that I saw that were - they had caused damaged, there was - you could see water penetrating through, not in the sense that it was pouring through, but there was bubbles on walls, it looked there was some damp (indistinct) issues.[16]

42. Further, Mr Spaleta produced a letter dated 5 September 2012 from the solicitors acting on behalf of *Brighton Districts Masonic Hall Co Ltd*, being the owner of the adjoining property, which stated:

> The report prepared by Pure Protect is damning in its comment where it states "this moisture is now flowing freely through the porous brick wall and into the premise during heavy rain". This obviously would not occur if there was a waterproof membrane.
>
> Your client and its experts including the builder must have been aware that the wall was built without a waterproof membrane yet your client saw fit to attempt to join our client in the current proceedings.
>
> Further a previous tenant of 17 Church Street will give evidence that these moisture/mould problems were occurring years ago with these problems being made known to your client. In essence your client has been aware of

[16] Transcipt 230-1.

> the problems from the outset when it purchased 17 Church Street but failed to carry out the appropriate repairs…

43. The evidence of Mr and Mrs Spaleta and that of Mr Scheruga above suggests that the condition of the Premises at the commencement of the lease was likely to be no better than its condition in March 2013. This conclusion is reinforced by the findings made in the Earlier Proceeding, where Judge Lacava stated:

> 219. In its written submissions, the respondent admits the presence of mould in the premises, but only since 20 May 2011. I find that submission somewhat disingenuous. In my opinion the evidence (especially that of Mr Siket which I accept in full), invites an obvious finding that mould has been present in the premises for a long time. Probably since the premises were occupied by the applicant but certainly since March/April 2010 when the applicant observed and complained of the presence of a bad smell within.

44. Indeed, evidence given during the Earlier Proceeding and in the 2014 Hearing suggest that as at 27 March 2013, whatever remedial work that had been undertaken by the Landlord up until that date had improved the condition of the Premises, albeit that moisture and mould may have still plagued the Premises. In particular, when one compares the conclusions of David Lark in his report dated 22 February 2013, the mycologist engaged by the Landlord, to the conclusions in his subsequent report dated 23 April 2013, it would appear that there has been an improvement in the levels of airborne mould and surface mould detected in the sampling undertaken over that period.

45. In the *Mouldlab* report dated 28 February 2013, the conclusions drawn from sampling, which occurred on 21 February 2013, are set out by Mr Lark as follows:

> **4 CONCLUSIONS**
>
> 4.1 The level of airborne mould detected in the sample collected from within the premises was rated as **Elevated** and there was a spectral shift in the genera of mould detected between the outdoor and indoor environments.
>
> 4.2 The levels of surface mould detected in the samples collected from within the premises were rated between **Low and Below Detectable Limits** on microscopy.
>
> 4.3 With reference to the types and levels of mould detected in the sample submitted from the above site, genera of mould were detected which include species which are known to be either:
>
> - Allergenic and/or
> - Mycotoxins producers.
>
> 4.4 Based on the results of the limited number of sample submitted for analysis further assessment may be

warranted to determine the source of the mould amplification within the premises.

46. In the *Mouldlab* report dated 26 April 2013, the conclusions drawn from sampling which occurred on 20 April 2013 are set out by Mr Lark as follows:

> **4 CONCLUSIONS**
>
> 4.1 The levels of airborne mould detected in the samples collected from within the premises were rated as **Normal Mould Ecology** on microscopy.
>
> 4.2 The level of surface mould detected in the samples collected from within the premises were rated as:
>
> - sample 6 - **Low**; and
> - all remaining samples – **Below Detectable Limits** on microscopy.

47. By contrast, in the *Ecolibria* report dated 20 May 2011, Mr Siket, Building Biologist, engaged by the Tenant, observed:

> A general visual inspection was conducted and moisture readings as well as surface and airborne mould samples were taken. The entire floor slab area from the front to the rear of the store (including change room and storage areas was 100% saturated. Both sides in the centre of the floor area recorded maximum readings on the moisture meter. The complete saturation of the wall material was recorded ½ to 1 m above the floor level. This is a serious case of excessive moisture and water intrusion and has created an ideal environment for mould proliferation to occur.
>
> The visual inspection on the exterior of the building revealed insufficient drainage to cope with ground water flowing down the slope and up against the rear of the building. Ecolibria were also informed that there is a cracked storm water pipe in this area at the rear of the property. The guttering system on a neighbouring property (florist) was also insufficient and blocked which could potentially cause moisture issues in the Versus (Aus) business premises.
>
> In the store room area extensive moisture damage and mould growth was visibly evident. The skirting boards in many areas of the premises had visible mould growth too.[17]

48. Further, it is common ground that remedial work was undertaken by the Landlord in 2011, well after the commencement of the lease. This included replacing the roof cladding, tanking the rear wall and constructing an elevated veranda at the rear of the Premises, so as to create additional freeboard at the rear door. The toilet was also replaced. That work was undertaken during the period May to September 2011 at the Landlord's expense and after Mr Siket's 20 May 2011 report referred to above.

49. In addition, Mr Considine, of *IKW Consulting Group*, was engaged by the Landlord to undertake the further remedial work to the concrete floor. He

[17] *Ecolibria* report dated 20 May 2011.

prepared a report dated 3 April 2013, which he adopted as his evidence in the 2014 Hearing. He stated:

> In order to resolve any future problems we were asked to remediate the substrate based on the concrete slab having a high moisture content even though this was never quantitatively proven by Ecolibria.
>
> The scope for the remediation of the slab was as follows:
>
> - Grind off all of the existing epoxy coating until nothing is left but a porous concrete surface with no contaminants
> - Apply ProtectCrete Densi-proof moisture barrier which penetrates into the slab up to 20 cm
> - Patch the concrete slab as required
> - Apply the first of 3 coats of Hychem SF20 surface epoxy
> - Give a light sand in between the first and second of Hychem SF20 surface epoxy
>
> The Densi-proof is used to cure and seal the concrete slab and to stop potential water ingress and protect against possible acid chemical attack. The Densi-proof makes the slab virtually impermeable and restricts vapour transmission.
>
> Densi-proof penetrates up to and beyond 200 mm [sic] into the slab where it forms an internal permanent, chemically complete, non-destructive gel like barrier which allows concrete to breathe and maintain its optimum humidity to allow hydration to continue. It also prevents water and other harmful agents from entering or moving through the concrete.
>
> The Hychem SF20 is a surface epoxy coating and not a moisture barrier which is why the SF20 was not used alone. There are epoxy coatings which can be used as a moisture barrier however they are not recommended as surface coatings which is why the 2 products had to be used in conjunction with each other.
>
> We have used Densi-proof successfully over the years on numerous projects including a flooded Centrelink office in Queensland and have never had any moisture related issues with the slabs where this product has been used.[18]

50. Having regard to all of the matters raised above, I am not persuaded that the condition of the Premises as at 27 March 2013 was any worse compared to the condition of the Premises at the commencement of the lease in June 2006. Indeed, I find that, on the balance of probabilities, problems relating to moisture ingress and the presence of surface and airborne mould affecting the Premises had, in all likelihood, substantially improved as at 27 March 2013, when compared to the state of the Premises in June 2006.

51. In forming that view, I am mindful of Mr Siket's evidence set out in his report dated 16 May 2013, and his oral evidence given during the 2014 Hearing on 21 May 2013, where he said that he found elevated moisture readings in

[18] Report of IKW Consulting Group dated 3 April 2013 at page 5.

various parts of the Premises. Indeed, Mr Siket was of the opinion that there was still a risk that the Premises could be hazardous if re-occupied if those moisture levels did not dissipate. He formed that view because he believed that elevated moisture levels could create an environment for mould growth beyond the normal mould ecology range. However, he qualified his opinion by stating that he did not know what remedial work was undertaken to arrest the problems associated with excessive moisture and therefore, was unsure whether the moisture levels would dissipate in time after the Premises had an opportunity to dry out.

52. During cross-examination, Mr Siket was criticised on the methodology used by him to measure moisture levels in the concrete slab floor. He conceded that the methodology employed by him was not in accordance with the relevant Australian Standard. He further conceded that the testing undertaken by him was indicative only.

53. Mr Siket confirmed that his moisture readings were taken in May, at a time after the remedial work had been completed to the concrete floor. His evidence was that the moisture readings taken by him were similar to the readings taken prior to the remedial work being undertaken. When asked about the scope of work undertaken by Mr Considine, he confessed that he was unfamiliar with the waterproofing work and conceded that he was not an expert in the field. It was put to Mr Siket, that in order to properly read moisture in a concrete floor, it was necessary to drill holes into the concrete and to insert probes into those holes. Mr Siket agreed. He said that he did not adopt that process but merely rested the probes against the concrete floor.

54. In the 2014 Hearing, I expressed the view that I had misgivings as to the methodology adopted by Mr Siket to measure moisture levels in the concrete floor. I maintain that view. I do not consider that his evidence can be taken as an accurate reflection of the moisture level in the concrete floor. In that respect, it seems unlikely, in light of the evidence of Mr Considine, that the concrete floor would record the same moisture levels prior to and after the remedial work was undertaken. In my view, that conclusion undermines the accuracy of the moisture readings recorded by Mr Siket. I do not, therefore, accept that the moisture readings of the concrete slab were necessarily elevated post the remedial work.

55. Nevertheless, it is common ground that Mr Siket discovered some surface mould from the samples taken in the false ceiling. During cross-examination, Mr Siket was asked whether that area appeared to be dusty. He conceded that it was and it appeared not to have been cleaned as part of the remedial work undertaken to eradicate surface mould from the Premises. That evidence is not controversial, given that the Landlord conceded that there were some discrete areas which *Premier Restorations* missed when cleaning the Premises of all surface mould. Indeed, evidence was given by Ms Taylor-Blake, environmental consultant employed by the Landlord, that she instructed Premier Restorations to return to the Premises and re-clean those specific areas.

56. I am also mindful of Mr Barber's submission that *the evidence strongly suggests that the condition of the Premises, including the mould infestation, deteriorated after the Tenant took over the lease and continued to do so in 2013*. In that regard, Mr Barber points to the following factors:

(a) The smell of the premises began in May 2009. Mr Barber submitted that these effects would have been suffered earlier if the infestation had been as bad in 2006 and 2007 as it became later.

(b) The flooding incidents which occurred in March 2010 until the roof was restored and the rear patio was re-built during the period May to September 2011.

(c) The findings of another *MouldLab* report dated 3 July 2013, which recorded the results of sampling undertaken on 28 June 2013. In that report, Mr Lark concluded that there were high levels of airborne mould and some very high levels of surface mould detected in surface sampling.

57. In my view, it is difficult to draw any firm conclusion based on the fact that musty odours became apparent in May 2009. There is no expert evidence indicating that this circumstance marks the presence or point in time where moisture and mould first manifested or is indicative that the problem escalated over time. Without expert evidence to guide me, it is difficult to know why odours did not become apparent until May 2009. Moreover, there be may be a variety of reasons for this phenomena. For example, it may be that the Tenant's fit-out works, which included covering the damp western wall with plasterboard, delayed the onset of the offensive odours or may have exacerbated the situation by providing a humid environment conducive to mould growth.[19] This seems to be a view expressed by representatives of *Premier Restorations* during a conversation recorded by Mr Spaleta of a meeting on 13 January 2012. However, without the guidance of expert opinion on this specific issue, one can only speculate.

58. It is beyond doubt that the flooding events which occurred from March 2010 until remedial work was undertaken were matters which attracted the operation of s 52 of the RLA. However, significant remedial work was undertaken by the Landlord during the period May to September 2011. From all accounts, that work rectified the cause of those flooding events. It is not suggested, nor is there any expert evidence, linking those flooding events to the presence of mould and ongoing issues of moisture ingress which affected the Premises after September 2011. Indeed, the evidence demonstrates that the presence of mould and moisture ingress, especially emanating from the western wall, were clearly present before those flooding events occurred. In particular, the uncontested evidence of Mr and Mrs Spaleta is that musty odours became noticeable in 2009, being a date before the flooding events occurred. This is consistent with Mr Spaleta's evidence, that Mrs Spaleta had

[19] Transcript of a conversation between representatives from *Premier Restorations* an representatives of the Tenant and the Landlord on 13 January 2012 (Exhibit BS-1 to the affidavit of Bob Spaleta at page 305).

been feeling unwell since May 2009, which, seemingly, he attributed to the ecological conditions within the Premises. That being the case, the fact that the Premises were flooded in 2010 does not indicate that the condition of the Premises in June 2006 was better or worse than the condition of the Premises in March 2013.

59. Reference is also made to the *Mouldlab* report dated 3 July 2013. It shows that of the six surface samples tested, three were recorded as being **High** and two were recorded as being **Very High**. In my view, it is difficult to make a comparative assessment based on that data because those readings relate to *Biotape Surface Liftoffs* strip tests which target specific surface locations. It is not known whether those specific areas had previously been tested. Indeed, it appears from the other *Mouldlab* reports tendered in evidence, that the areas tested in the 3 July 2013 report do not appear to have been previously tested. Therefore, I am unable to find on the evidence or even draw an inference that those specific areas were mould free when the lease was first entered into.

60. In my view, testing the airborne mould is a more accurate assessment of the presence of abnormal mould ecology because it does not target a discrete surface area but rather, tests the general atmosphere within the Premises. In that respect, the *MouldLab* report dated 3 July 2013 records airborne mould as being **High**. The reading was recorded as 5013m^3. However, a comparative second reading was taken from outside the Premises in Church Street and it was recorded as 5707m^3. In those circumstances, is difficult to draw any conclusion that the presence of airborne mould, at that particular time, was due to the condition of the Premises or because of environmental conditions experienced on the day of testing.

61. As I have indicated above, there is insufficient evidence for me to be satisfied, on the balance of probabilities, that the condition of the Premises in March 2013 was worse than its condition in June 2006. Indeed, I find that in all likelihood, the condition of the Premises had improved by that later date.

Covenant of quiet enjoyment

62. Mr Barber submitted that the covenant of quiet enjoyment protects a tenant from substantial interference by a landlord or persons claiming through the landlord. He submitted that it may be breached not only by positive interference by a landlord with a tenant's enjoyment of leased premises but also by a landlord's negligent acts or omissions. Mr Barber drew my attention to the decision of Yeldham J in *Martin's Camera Corner Pty Ltd v Hotel Mayfair Pty Ltd*,[20] where the NSW Supreme Court held that the negligent conduct on the part of a landlord, in failing to ensure regular inspections or cleaning of the roof area of a building in which the demised premises were located, also constituted a breach of the covenant of quiet enjoyment.

63. Mr Barber conceded that the orders of Judge Lacava in the Earlier Proceeding, requiring the Landlord to remediate the premises of mould, did

[20] [1976] 2 NSWLR 15.

not add a term to the lease. Nevertheless, Mr Barber argued that remediation was, nevertheless, a matter within the Landlord's control and responsibility. Therefore, he submitted that the situation was analogous to what was before the Court in *Martin's Camera Corner Pty Ltd*.

64. In *Martin's Camera Corner Pty Ltd*, the tenant's occupancy of the leased premises was disrupted as a result of water ingress caused by a lack of maintenance of the roof of the building in which the leased premises were located. That roof was not part of the leasehold but rather, formed part of the landlord's property. Yeldham J found that the landlord, as owner of the roof area, was negligent in failing to maintain that area and that such negligence led to the loss and damage suffered by the tenant.

65. In my view, that situation is somewhat different to what is before the Tribunal in this case. In particular, the cause of action in negligence was the catalyst giving rise to a breach of the covenant of quiet enjoyment, as his Honour observed:

> Although it is not clear that, for there to be a breach of this covenant [of quiet enjoyment] in circumstances such as exist in the present case, there must be present all the ingredients of a cause of action in tort for negligence (i.e. duty of care and breach) – and, indeed, if this is required, such a covenant would in most cases be redundant – nonetheless, I am prepared to assume, for the present purposes, that these must be shown to exist.[21]

66. Later in his judgment, his Honour stated:

> In holding, as I do, in circumstances such as those in the present case, and subject to any special provisions in the lease, that the defendant owed a duty of care to the plaintiff which involved the taking of reasonable steps to prevent water from escaping from the roof into the shop below, I think it is important to repeat the observations which Bankes L.J. in *Cockburn v Smith*, felt impelled to make, namely: "I want to make it plain at the outset that this is not a letting of the whole house where, without an express covenant or statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises whether the required repairs were structural or internal and whether they had all had not notice of the want of repair."
>
> In my opinion, the defendant was in breach of such a duty of care, and that breach, was the cause of the plaintiff's damage.[22]

67. What then is the cause of action giving rise to the obligation to remediate the Premises of mould and moisture ingress? If I understand the Tenant's position, that cause of action is premised on a finding made in the Earlier Proceeding that the Landlord had breached s 52 of the RLA.[23] However, as I have already found, nowhere in the Reasons or the orders of Judge Lacava is there any finding (or discussion) that the Landlord breached s 52 of the RLA

[21] Ibid 24.
[22] Ibid 26.
[23] The *Applicant's Closing Submission* at paragraph 197.

(insofar as the presence of mould and continuing water or moisture ingress are concerned).

68. Mr Hay referred me to an extract of *Bradbrook, MacCallum and Moore's Australian Real Property Law*,[24] where the learned authors stated:

> The covenant is prospective in nature and amounts to an obligation on the landlord not to do anything after the date of the grant which substantially interferes with the tenant's occupation, the covenant does not provide a remedy where the state of affairs existed at the date of the grant of the lease.[25]

69. Mr Hay further referred to a number of authorities in support of that proposition, which he set out in his written submissions as follows:

> 54. In *Southwark London Borough Council v Mills; Baxter v Camden London Borough Council (No 2),*[26] Lord Hoffman of the House of Lords stated:
>
> > The covenant [of quiet enjoyment] does not apply to things done before the grant of the tenancy, even though they may have continuing consequences for the tenant. Thus in *Anderson v Oppenheimer* (1880) 5 QBD 602 a pipe in an office building in the City of London burst and water from a cistern installed by the landlord in the roof flooded the premises of the tenant on the ground floor. The Court of Appeal held that although the escape of water was a consequence of the maintenance of the cistern and water supplied by the landlord, it was not a breach of the covenant for quiet enjoyment. It did not constitute an act or omission by the landlord or anyone lawfully claiming through him after the lease had been granted. The water system was there when the tenant took his lease and he had to take the building as he found it.[27]
>
> 55. His Lordship went on to say:
>
> > In the grant of a tenancy it is fundamental to the common understanding of the parties, objectively determined, that the landlord gives no implied warranty as to the condition or fitness of the premises. Caveat lessee. It would be entirely inconsistent with this common understanding if the covenant for quiet enjoyment were interpreted to create liability for disturbance or inconvenience or any other damage attributable to the condition of the premises.[28]

[24] Moore, Gratten and Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 2016, 6th ed).
[25] Ibid 700 [14.225].
[26] [1999] 4 All ER 449.
[27] Ibid 455.
[28] Ibid 456.

56. In *Byrnes v Jokana Pty Ltd*,[29] Allsop J (as his Honour then was) referred with approval to *Mills* and stated:

> In assessing whether there has been a material reduction in the fitness of the premises for the business, the excepted state of the premises at the time of grant is relevant. The covenant [of quiet enjoyment] does not apply to things done before, or the state of affairs at, the grant. The tenant takes the property not only in the physical condition in which he, she or it finds it, but also subject to the uses which the parties must have contemplated would be made of the parts retained by the landlord: *Southwark LBC v Tanner*, supra at 11-12. One should be careful about finding a breach of the covenant when the matters complained of worsen the position little from the state of affairs at the date of the grant.[30] [Underlining added]

70. In my view, absent any contravention of s 52 of the RLA or covenant in the lease, the failure to eradicate the Premises of mould or excessive moisture, in circumstances where that condition was likely to have been present at the time when the lease was entered into, does not amount to a breach of the covenant of quiet enjoyment. As the authorities referred to above make clear, *the covenant does not provide a remedy where the state of affairs existed at the date of grant of the lease*. [31]

Section 54

71. Although not forcefully pressed, it appears that the Tenant also contends that s 54 of the RLA may provide a further ground upon which it can be said that the Landlord repudiated its obligations under the lease. Section 54 of the RLA states, in part:

> **54. Tenant to be compensated for interference**
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damage) suffered by the tenant because a landlord or a person acting on the landlord's behalf –
>
> (a) substantially inhibits the tenant's access to the retail premises; or
>
> (b) unreasonably takes action that substantially alters the flow of customers to the retail premises; or

[29] [2002] FCA 41.
[30] Ibis [66] [emphasis added].
[31] Bradbrook Croft Hay *Commercial Tenancy Law* (Lexis Nexis Butterworths, 2009, 3rd ed.) 233 [8.4].

(c) unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or

(d) failed to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or

(e) fails to rectify soon as practicable –

(i) any breakdown of plant or equipment that is not under the tenants care or maintenance; or

(ii) any defect in the retail premises or in the building or retail shopping centre in which the retail premises are located, other than a defect due to a condition that would have been reasonably apparent to the tenant when entering into or renewing the lease or when the tenant accepted assignment of the lease; or

…

72. Mr Hay submitted that s 54(2) of the RLA does not entitle a party to terminate a lease. He contended that the remedy for a breach of the terms implied by s 54(2) is specified within the subsection; namely, that the tenant is entitled to 'reasonable compensation'. He submitted that there is no right to damages nor is there any right to determine the lease. Mr Hay referred me to an extract in *Commercial Tenancy Law*,[32] where the learned authors addressed this issue as follows:

> Whether a breach of the provisions of subs 54(2) would entitle the tenant to determine the lease on the basis of repudiation by the landlord is not clear. If these provisions are to be treated as lease terms, and assuming their breach by the landlord's conduct sufficiently serious to constitute repudiation (as to the nature of such conduct, see [16.26]), then it is arguable that the lease may be determined by the tenant's acceptance of the repudiation. However, even assuming that subs 54(2) provisions are to be treated as lease terms, it cannot be said that the landlord is repudiating the bargain in the same sense as is the position with terms actually agreed between the parties. Having regard to this, and the fact that subs 54(2) and the other provisions of s 54 expressly provide for the remedy for breach of their 'implied terms' – reasonable compensation for any loss or damage suffered by the tenant – which does not include a right to determine the lease on any basis, the better view appears to be that no right to determine

[32] Bradbrook, Croft and Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009)

> the lease by acceptance of repudiation can arise on the basis of these provisions.[33]

73. The express purpose of s 54(2) is clearly directed towards compensating a tenant for interference with its use of the demised premises. The 'improper' acts or omissions on the part of the landlord, set out under subsections (a) to (f) are not standalone provisions to be implied into the lease agreement but constitute the factors which would enliven the Tribunal's jurisdiction to order compensation to a tenant under s 54(2) of the RLA. Those subsections must be read in conjunction with s 54(2) of the RLA, and not independently of it.

74. There is support for this proposition in the judgment of Croft J in the Appeal Proceeding:

> 62. Turning now to s 54 of the Act, the Plaintiff submits that its right to compensation under s 54 stands independent of the question of the extent of the Defendant's obligation under s 52. The Plaintiff's right to compensation arises, it claims, when the landlord substantially inhibits the tenant's access to the premises (s 54(2)(a)), or fails to take reasonable steps to stop significant disruption within the landlord's control to the tenant's trading at the retail premises (s 54(2)(d)). Thus, the Plaintiff says, the right to compensation arises regardless of whether the landlord is in breach of the obligation imposed by s 52. While I accept these submissions as to the distinct operation of ss 52 and 54, that is not to say that the sections are not related in their operation and application …[34]

75. Therefore, I do not accept that s 54(2) is to be construed to mean that a landlord will have repudiated its obligations under the lease if it refuses to rectify (under s 54(2)(e)(ii)), a latent defect as soon as practicable. If that were the case, the provision would be expressed differently, so that it imposed a positive obligation on a landlord to rectify any latent defect in the retail premises. It does not, and in my view, giving the provision that meaning would be importing words into the section which do not exist.

76. Moreover, if s 54(2) was construed such that the matters set out under subsections (a) to (f) were contractual obligations, then s 52 of the RLA would either have no work to do or the very least, be undermined, as the limitation contained in that provision, which only requires a landlord to maintain the premises in a condition commensurate with its condition at commencement of the lease, would be meaningless. In my view, that could not have been the intention of the legislature.

77. Consequently, I construe s 54(2) as a mechanism by which a tenant receives compensation in the circumstances discussed. The right to seek compensation through this mechanism stands independently of a tenant's right to take proceedings for damages for breach of a covenant and in some instances, may provide the mechanism by which a tenant is able to receive compensation that

[33] Ibid 796 [23.55].
[34] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515 [62].

would not otherwise be available. However, the matters set out under s 54(2) do not stand as independent obligations imposed upon a landlord, although in most cases, the matters will relate to express or implied covenants in the lease. For example, the ability to obtain compensation where a landlord *fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises*, may fall within the general covenant of giving quiet enjoyment.

78. Further, although the Tenant's claim is said to be couched in terms of 'breaching' s 54(2) of the RLA, no submissions were advanced to the effect that repudiation can be founded on a 'breach' of that provision.

79. Consequently, I find that s 54(2) of the RLA, of itself, does not entitle a party to terminate a lease, even in circumstances where a landlord's conduct amounts to a gross failure to act or not act within the matters referred to in subsections (a) to (f) of s 54(2).

Conclusion on repudiation

80. I find that, in the absence of any contravention of the repair covenants imported into the lease under s 52 of the RLA, the Landlord did not breach any express term of the lease or the implied covenant of quiet enjoyment. Similarly, I do not consider that s 54 of the RLA provides an avenue in which to determine the lease. That being the case, I am now left in a similar position as I was at the conclusion of the 2014 Hearing.

81. Although the parties have addressed me on the Landlord's conduct concerning its effort or lack of effort in undertaking remedial work, I do not consider it necessary for me to further consider that evidence, in light of my finding that there was no contractual obligation to remediate the Premises of moisture and mould. As I have already indicated, the only grounds raised by the Tenant as to whether the Landlord had any contractual or statutory obligation to undertake remedial work are those set out above. It is not suggested that there is any other express or implied term, statutory requirement or other obligation which would otherwise require the Landlord to remediate the Premises.

82. Further, other than determining whether or not the Landlord had repudiated its obligations under the lease, it is unnecessary for me to determine how the lease came to an end, as that question is beyond the scope of this remitted hearing. Further, neither party has addressed me on that question.

83. Nevertheless, as I indicated in the 2014 Hearing, the evidence clearly points to the parties having each considered the lease to be at an end as at either 27 March 2013, in the case of the Tenant, or 9 April 2013, in the case of the Landlord. Given my finding that the Landlord did not repudiate its obligations under the lease, I find that the lease came to an end on 9 April 2013, being the date of correspondence from the Landlord to the Tenant, wherein it acknowledged that the lease was at an end.

DAMAGES OR COMPENSATION

84. Mr Barber submitted that, in the alternative, if the Tribunal concluded that the Landlord did not repudiate the lease, then the Tribunal should nonetheless find that the Tenant is entitled to compensation either under s 54 of the RLA or alternatively, arising from an estoppel, and as follows:

    (a) loss of profits to the date of termination of the lease;

    (b) compensation for damage to the goodwill value assessed to the termination of the lease;

    (c) damages for the loss of the opportunity to open a Sydney outlet.

Section 54 claim for compensation

85. It is not entirely clear whether s 54(2) operates to impose liability on a landlord to pay compensation to a tenant irrespective of any covenant which would require the landlord to do or not to do the matters set out under subs (a) to (f) of that section. For example, s 54(2)(e) makes a landlord liable to pay reasonable compensation to a tenant if the landlord fails to rectify, as soon as possible, *any defect in the retail premises which was not reasonably apparent to the tenant when entering into or renewing the lease*. That right to reasonable compensation is less restrictive than would otherwise be the case if a tenant was claiming general damages based on a landlord having breached the 'covenant to maintain' imported into the lease by s 52; because s 52 does not require a landlord to repair latent defects, unless they manifested during the currency of the tenancy.

86. Ultimately, I do not consider that it is necessary for me to decide this question in the context of this remitted hearing. This is because it is uncontroversial that the ingress of moisture, particularly along the western wall, and the presence of mould was a condition that was reasonably apparent to the Tenant when *renewing the lease* on 18 May 2011, being more than four years after the Tenant first discovered moisture and mould. Unlike s 52 of the RLA, s 54 expressly limits the right to compensation where a landlord fails to rectify any defect in the premises to exclude *a defect due to a condition that would have been reasonably apparent to the tenant when entering into or renewing the lease* [emphasis added].

87. Further, I do not consider that the remaining subsections in s 54(2) are applicable in this case. In particular, s 54(2)(a) refers to the landlord substantially inhibiting *the tenant's access to the retail premises*. Similarly, s 54(2)(d) refers to the landlord failing to *take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises*. Although, on one view, the matters set out in those subsections might extend to the facts alleged in this proceeding. For example, it might be said that the Landlord's failure to repair the Premises has:

    (a) ultimately led to a situation where the Tenant's access has been denied – because it is unsafe to re-occupy the Premises; or

(b) ultimately led to a situation where the failure to repair has caused significant disruption to the tenant's trading at the Premises – again, because the Tenant is unable to safely re-occupy the Premises.

88. However, I am of the view that those subsections must be read in context with the whole of s 54 and in particular, by reference to subsection s 54(2)(e), which specifically addresses the question of compensation arising from a landlord's failure to repair defects in the retail premises. On the other hand, s 54(2)(a) seems to be directed at addressing issues of access, rather than focusing on an inability to occupy the demised premises because of a latent defect, which the landlord refuses or neglects to rectify. Similarly, subsection s 54(2)(d) is directed towards the imposition of a significant disrupting event, rather than a disruption caused by a landlord failing to rectify a latent defect in the premises. For example, in the Earlier Proceeding, the Tribunal found that the Landlord had breached this subsection by failing to object to a planning proposal to carry out renovations to an adjoining property and by ultimately consenting to scaffolding being erected at the rear of the Premises in order to facilitate that renovation work. It was found that this had the effect of "disrupting" the tenant's trading activities and compensation was awarded in favour of the Tenant under this provision.

89. In my view, where compensation is sought under s 54(2) of the RLA as a consequence of a landlord's failure to rectify, as soon as practicable, any defect in the demised premises, s 54(2)(e) covers that field. It is not open to seek compensation, in respect of the same factual circumstance, under the remaining subsections of s 54(2) as a means to circumvent the statutory limitation as to when such compensation is available for that particular factual scenario. To construe s 54(2) in that wider way would leave s 54(2)(e) with very little work to do and undermine the intention of the legislature to limit compensation for that particular fact scenario to only those situations where the tenant was not reasonably aware of the defect when entering into or renewing the lease.

90. Therefore, compensation under s 54(2) is not available if it is found that the defect related to a condition of the premises that would have been reasonably apparent to the tenant when entering into or renewing the lease. As I have already indicated, the defect and the condition of the Premises giving rise to moisture and mould, was patently obvious and known to the Tenant as at the date when the lease was renewed on 18 May 2011.

Compensation arising from estoppel

91. Mr Barber submitted that if the Tribunal were to reject all claims for breach of the lease, the Tribunal should still find that the Tenant is entitled to compensation on the ground that an equity has arisen in its favour. In that respect, Mr Barber adopted the reasoning in the 2014 Hearing, set out at paragraphs [50]-[71] of my Reasons, in support of his submission.

92. Mr Hay submitted that it is only if the Tribunal finds that the Landlord had breached the lease that questions of pre-April 2013 damages, loss of profit,

lost opportunity and diminished value of goodwill become issues. He argued that if there has been no breach found, then no loss can be brought home to the Landlord. Mr Hay further submitted that the Tenant has not pleaded an estoppel, nor was it raised in its opening submissions.

93. I do not accept that submission. As I concluded in my Reasons given in the 2014 Hearing, the Tenant alleged in its *Third Further Amended Points of Claim*, and its closing submissions of the 2014 Hearing, that it was entitled to damages by reason of false representations being made by the Landlord as to completing remedial work, which the Tenant contends ultimately caused the destruction of its business. Although the Tenant had previously categorised this head of damage as unconscionable conduct on the part of the Landlord, I formed the view that the claim was really couched in terms of damages arising as a result of a false representation. That is precisely what the Tenant claims in this remitted hearing, by making reference to my *Reasons* in the 2014 Hearing. Moreover, the Landlord was afforded an opportunity to address me in oral reply submissions and in those circumstances, I do not accept that the failure to spell out this head of damage with fine legalese deprives the Tenant from prosecuting that alternative claim.

94. As I indicated in my *Reasons* in the 2014 Hearing, it is beyond doubt that the evidence adduced in this proceeding and in the Earlier Proceeding indicates that the parties had some mutual understanding that further remedial work was to be undertaken by the Landlord after the Tribunal handed down its decision in December 2011. That work concerned arresting excessive levels of moisture and eradicating excessive mould found to exist in the Premises. It may be that such an arrangement was reached in order to mitigate the possibility of further relief being sought by the Tenant under s 54 or s 57 of the RLA or simply to maintain a commercial relationship with the Tenant.

95. Whatever the reason, it is self-evident that the Tenant persisted in maintaining the tenancy based on a belief that the Premises (and the shop fittings and other chattels removed from the Premises) would be remediated in a timely manner. Although it has never been suggested that this 'understanding' had any contractual basis, presumably because there was no fresh consideration, it is reasonable to infer that it nevertheless altered the Tenant's position. For example, had the Landlord indicated that it was going to rely upon its strict contractual rights and not undertake any work to remediate the Premises, then it is likely that one of two things would have occurred:

    (a) the Tenant would have sought to end the tenancy under s 57 of the RLA, given that it says it was unable to carry out its business without remedial work being done; or

    (b) the Tenant would have carried out the remedial work itself.

96. Neither of these circumstances eventuated. Indeed, the Tenant abandoned its claim in the Earlier Proceeding for loss of the value of any goodwill in the business, presumably because it assumed that remedial work would be carried out in the early part of 2012. That assumption was not baseless. There were

numerous emails emanating from the Landlord indicating that it was poised to undertake remedial work and indeed, it is common ground that that is exactly what occurred, albeit late.

97. In my view, it was reasonable for the Tenant to believe that the Landlord would undertake the remedial work, given that the Landlord had indicated that it was poised to carry out that work. In my view, the circumstances of this case give rise to an equitable estoppel. The following passage from the judgment of Brennan J in *Walton's Stores (Interstate) Ltd v Maher* [35] is apposite:

> In my opinion, to establish equitable estoppel, it is necessary for the plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in that case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance upon the assumption or expectation; (4) the defendant knew or intended him to do so; (5) plaintiff action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.[36]

98. In my view, the assumption that remedial work was going to be done was reasonably induced by the assurances and conduct of the Landlord. The chain of email correspondence relied upon by the Tenant makes that point clear. For example, in email correspondence dated 4 January 2012 addressed to the Tenant, Mr Lepp, for the Landlord, stated:

> Dear Bob
>
> Time did not permit us to seek other quotes for mould remediation prior to the Court Hearing in November 2011. We have since found another accredited company and have asked them to provide a quote for the same remediation works that Pure Protect have quoted for previously.
>
> We are planning to meet them at the shop on Thursday 5th of January 2011 or Friday 6th but will confirm time and date when they indicate their availability…

99. Further email correspondence dated 10 January 2012 from Mr Lepp to the Tenant stated:

> Dear Bob
>
> …
>
> There is to be a further inspection on Friday, 13 January 2012 by the mould remediator to enable detailed remediation works to be specified.

100. Further email correspondence dated 20 February 2012 from Mr Lepp to the Tenant stated:

> Dear Bob

[35] (1988) 76 ALR 513.
[36] Ibid at 542.

> Sorry for the delay in starting works at the shop but we are still waiting for permission from the Freemasons to go ahead with works on their side of the wall.

101. Further correspondence dated 19 October 2012 from the Landlord's solicitors to the Tenant stated:

> In accordance with the Orders of Judge Lacava made 1 December 2011, the damaged wall to the premises will be repaired and all mould from both the surfaces and in the air at the premises will be eradicated. A report will also be obtained from a qualified mould remedial specialist certifying all mould has been eradicated from the surfaces and in the air within the premises.
>
> The works will take a minimum of eight (8) weeks. During this period, you will not be permitted to enter the premises due to occupational health and safety reasons. You will be liable for any consequences resulting from attempts to enter by yourself or your agents…

102. In my view, it is open for the Tenant to claim compensation on the ground that an equity has arisen in its favour based on the promises made by the Landlord and the fact that it has altered its position to its detriment, in reliance upon those promises. The comments of Mason CJ and Wilson J in *Waltons* reinforce this point:

> Nonetheless the proposition, by making the enforcement of the promise conditional on (a) a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee and (b) the impossibility of avoiding injustice by other means, makes it clear that the promise is to be enforced in circumstances where departure from it is unconscionable.[37]

103. Accordingly, 1 will assess the Tenant's claim for compensation on that footing. That claim is couched under three heads of loss:

(a) loss of profit for the period 1 January 2012 to 9 April 2013, being the date that the lease came to an end;

(b) loss of the goodwill value of the business; and

(c) loss of the opportunity to open a second store in Sydney.

QUANTUM OF COMPENSATION

Loss of profit for the period 1 January 2012 to 9 April 2013

Gross profit

104. The Tenant claims compensation for loss of profits based on the same formula adopted by Judge Lacava in the Earlier Proceeding. As I have already indicated, the Tribunal ordered that the Landlord pay the Tenant $136,686 (plus interest) as compensation for loss of profits over the period 2008 to

[37] *Waltons v Maher* (1988) 76 ALR 513 at 522. See also full commentary at pp 521-526 and judgment of Brennan, especially at page 540.

2011, which was calculated as set out in the following table, extracted from paragraph 312 of his Honour's Reasons:

Year	Projected Sales at 6%	Cost of Sales + 6%	Gross Profit	Actual Expenses	Net Profit/Loss	Difference to Actual
2007	120 945					
2008	128,201	92,512	35,689	95,175	-59,489	1,320
2009	135,893	40,112	95,781	91,312	+ 4,469	37,586
2010	144,046	14,469	129,577	89,811	+39,766	79,982
2011	152,688	15,337	137,351	89,811	47,540	47,540
						$166,428

105. His Honour found that the sum of $166,428 was to be reduced by $19,826, representing four months (January to April) of the 2008 monthly average net loss. That gave a total loss of profit of $136,686.

106. As can be seen in the above table, his Honour adopted a flat 6% growth rate in sales in order to calculate projected sales over the relevant period. It is common ground that the Tribunal must also adopt a 6% growth rate in sales, when calculating any further assessment of loss of profit, having regard to the judgment of Croft J in the Appeal Proceeding. In particular, his Honour found that the adoption of a flat 6% increase in projected sales was a finding made in the Earlier Proceeding which bound the Tribunal to adopt the same calculation when assessing projected sales for the period after 2011.

107. However, Mr Barber submitted that the Tribunal is equally bound to adopt the flat increase of 6% in respect of the *Cost of Sales*, which then equates to a fixed *Gross Profit Margin* of 89.96%. Mr Barber contended that, although there was no express finding in the Earlier Proceeding of *Gross Profit Margin*, it nevertheless represented the bedrock of the Tribunal's calculation of damages for the years 2010 and 2011 and as such, the parties cannot go behind that calculation.

108. By contrast, Mr Hay submitted that there was no calculation or adoption of any *Gross Profit Margin* in the Earlier Proceeding. Indeed, Mr Hay submitted that the calculations and findings made by Judge Lacava in the Earlier Proceeding demonstrate that no fixed *Gross Profit Margin* was adopted by his Honour. Mr Hay extracted a part of the table set out under paragraph 312 of Judge Lacava's Reasons and then added a column showing the calculated *Gross Profit Margin* based on the figures Judge Lacava used to calculate lost profit. That table shows that the calculated gross profit margin fluctuated over the period of assessment:

Year	Projected Sales at 6%	Cost of sales + 6%	Gross profit	Gross profit margin
2007	120,945			
2008	128,201	92,512	35,689	27.84%
2009	135,893	40,112	95,781	70.48%
2010	144,046	14,469	129,577	89.95%
2011	152,688	15,337	137,351	89.95%

109. The contest concerning whether or not to adopt a *Gross Profit Margin* of 89.95%, on the ground that that figure constituted a finding in the Earlier Proceeding, impacts significantly on the Tenant's claim for compensation under this head of loss. In particular, if that *Gross Profit Margin* was adopted, then the calculation of loss of profits would be as follows:

Year	Projected Sales at 6%	Cost of Sales + 6%	Gross Profit	Actual Expenses	Net Profit/Loss	TOTAL
2011	152,688	15,337	137,351	89,811		
2012	161,849	16,257	145,592	85,949	59,643	
2013	171,560	17,232	154,328	75,699	78,629	
						$138,272

110. The sum of $78,629 for the 2013 calendar year must be reduced pro-rata by $57,302, representing 266 days (10 April to 31 December) of the 2013 year, to take into account that the lease came to an end on 9 April 2014. This means that the net profit claimed for the calendar year 2013 is $21,327, making the total loss of profits claimed $80,970.

111. In my view, the rationale advanced by Croft J in the Appeal Proceeding, in determining that the Tribunal is bound to adopt the projected sales increase of 6% per annum going forward, applies equally to the adoption of a fixed increase for the *Cost of Sales*. I fail to understand how the two elements of Judge Lacava's calculation in the Earlier Proceeding can be distinguished. The fixed increase of 6% on *Projected Sales* and 6% increase on the *Cost of Sales* were two elements of the same formula adopted by Judge Lacava. Indeed, when one examines the judgment of Croft J in the Appeal Proceeding, it appears that his Honour said as much:

> 105 I accept that Judge Lacava's finding as to the appropriate growth rate was a finding of fact based solely on the facts of the Plaintiff's business and not the broader market conditions cited by the Defendant's expert witnesses. That finding was an indispensable element of his Honour's calculation of the Plaintiff's projected gross sales and costs for the years up to and including the 2011 year that the Senior Member used as the basis for the 2012 and 2013 projections, and bound the Tribunal in the same way. If, in a different world, Judge Lacava had concluded that the market-wide sales data was a component of the calculation, it may well have been opened for the Tribunal to update that data with fresh evidence in subsequent years. That the relevant factual evidence

> relied upon by Judge Lacava in characterising the Plaintiff's growth prospects remained on foot, in large part due to what is said to be the Defendant's conduct. Accordingly, I do not accept the Defendant's submission that the Tribunal was entitled to recalculate the projected growth rate of the Plaintiff's business for the years 2012 and 2013 on the basis that this calculation was performed under a new lease and in respect of different years. [Underlining added]

112. Accordingly, I find that I am bound to accept that both *Projected Sales* and the corresponding *Cost of Sales*, increase at 6% per annum, irrespective of fluctuations in the market or other factors that might have otherwise been considered, had a market based approach been adopted in the Earlier Proceeding for calculating loss of profits.

113. Therefore, notwithstanding the evidence of Mr Ellis, the forensic accountant engaged by the Landlord, gross profit is to be calculated in accordance with the formula previously enunciated by Judge Lacava in the Earlier Proceeding. That being the case, I find that the gross profit for the period 1 January 2012 until 9 April 2013 is $187,450,[38] calculated as follows:

Year	**Projected Sales + 6%**	**Cost of sales + 6%**	**Gross profit**
2012	161,849	16,257	145, 592
2013 (part)	46,532 [39]	4,674 [40]	41,858
TOTAL			**187,450**

Expenses

114. In my view, the rationale applied in calculating gross profit does not apply in respect of determining projected operating expenses. This is because Judge Lacava, in arriving at a net profit for the years 2008, 2009 and 2010 used actual expenses incurred, rather than adopting a formula to calculate projected expenses.[41] Therefore, there is no finding made in the Earlier Proceeding as to projected expenses or how they are to be calculated. In my view, it is open for the Tribunal to assess projected expenses based on the evidence before it, unencumbered by any pre-determined figure, formula or methodology.

115. Mr Ellis, the forensic accountant engaged by the Landlord, gave evidence that the expenses for the years 2012 and following would not have been static and would have increased as a result of a number of factors, including increases in rent, being the most significant operating expense.

116. Mr Mark Ruttner, certified practising valuer, was engaged by the Landlord to express an opinion as to what the likely market rent would have been following renewal of the lease on 18 May 2011. In his expert report, he states, in part:

[38] Rounded to the nearest dollar.
[39] This amount is calculated by multiplying the full year amount of 171,560 x 99/365.
[40] This amount is calculated by multiplying the full year amount of 17,232 x 99/365.
[41] Earlier Proceeding Reasons [305].

5.3 Primary Valuation Principles

The primary basis of this rental valuation has been on a Direct Comparison Basis with other properties within the immediate locality. More particularly, consideration has been given to rental evidence having occurred within the immediate locality being of a similar end use. To this end, due regard has been given, but is not limited to the following factors:

- Rental
- Location
- Date and method of last rent review
- Size of the premises
- Use of the premises

5.4 Previous Rental

Further to my instructions and Clause 18 of the Lease, the following net rental sums were applicable:

18 May 2008	$63,654.00 p.a. plus GST
18 May 2009	$65,563.62 p.a. plus GST
18 May 2010	$67,530.54 p.a. plus GST

…

5.6.3 Market Rental Value

In conclusion, I am of the opinion that the current market rental for the demised premises is as follows:

Rental	
92 square metres @ $1,033 per square metre	$95,000 p.a.
Add GST @ 10%	$9,500 p.a.
Rental inclusive of GST	**$104,500 p.a.**

117. The original lease dated 26 June 2006, transferred to the Tenant on 10 November 2006, specified commencement rental of $60,000 per annum plus GST. It further specified fixed rental increases of 3% on the anniversary of each year in the first term (and subsequent terms), which are set out in paragraph 5.4 of Mr Ruttner's report cited above. The lease further specified that the market review date was 18 May 2011. Clause 3(g) of the lease stated:

> (i) The rental specified in Item 7 of the Schedule and the rental agreed upon or described for any further term must be reviewed on each review date specified in Item 17 of the Schedule (the Review Date) in the manner referred to in this Clause 3(g).
>
> (ii) If the parties failed to agree on the new current market rent of the Premises 14 days prior to the Review Date, then it must be determined by a qualified valuer who must also be a practising estate agent and if the Act applies, must be a 'Specialist Retail Valuer'…
>
> (iii) If by the Review Date the reviewed rental has not been determined then the Lessee must continue to pay the previous rental and any necessary adjustment between the parties must be made no later than seven days after the determination has been delivered.

118. On 13 April 2011, the Landlord's leasing agent wrote to the Tenant advising that a market review of the rent was due upon renewal. The correspondence stated, in part:

> As you are aware your lease will expire on 17 May 2011.
>
> You have exercised your options for a further term of Five (5) years from this date.
>
> In accordance with the terms and conditions of your lease, a market review of the rent is due.
>
> Our assessment of market rentals for premises similarly located along Church Street Brighton, 3186, suggested a comparable rent for a further 12 months would be $87,500.00
>
> We propose the following terms –
>
> **Rental:** $87,500 per annum plus GST and Outgoings
>
> **Annual Increases:** 3% on anniversary
>
> Attached is an Acceptance Form for your signature and return to our office by 27 April 2011.

119. There is no evidence that the parties either agreed or disagreed on the market rent proposed by the Landlord. Similarly, there is no evidence that the provisions in the lease, which fall into play when the parties cannot agree on the market rent, were exercised following renewal of the lease. Nevertheless, if I am to assess projected expenses on the basis that the tenancy continued unimpeded until 9 April 2013, then I consider it reasonable to assume, for the purpose of that calculation, that the parties would have followed the relevant provisions under the lease. In other words, they would have either agreed on a figure for market rent upon renewal of the lease, or allowed market rent to be determined in accordance with Clause 3(g) of the lease. Having regard to the evidence of Mr Ruttner, I find it probable that if the parties had not agreed on the figure for market rent upon renewal, market rent would have been, at the very least, the amount that the Landlord was seeking at the time; namely, $87,500 per annum plus GST, being a figure less than what Mr Ruttner has 'retrospectively' valued to be the market rent.

120. That being the case, I find that the commencement rental in the second term of the lease would have been $87,500 per annum plus GST. Rent would have been further increased in that second term by 3% per annum, such that the rental moving forward would have been:

(a) 19 May 2011 to 18 May 2012: $87,500 per annum plus GST;

(b) 19 May 2012 to 18 May 2013: $90,125 per annum plus GST;

(c) 19 May 2013 to 18 May 2014: $92,829 per annum plus GST.

121. In his report dated 22 July 2016, Mr Ellis states that he has reviewed the Tenant's accounts for the calendar years 2008 through to 2010 which show that expenses, excluding interest and rent, average $10,825 per year. Mr Ellis produced the spreadsheet setting out each of those expenses for each month in

each calendar year, which he attached to his report. In Mr Ellis' supplementary report dated 6 February 2017, he opines:

> 4.12 In addition to this I estimated in the July Report paragraphs 8.21 to 8.28 that other expenses would be $10,000 per year in 2012 (plus interest) and would increase 3.00% per year…
>
> 4.13 I note that in the table at paragraph 8.24 of the July Report Land Tax Expenses were included in the outgoings of the Applicant in error.[42] This was not a comprehensive list of other expenses of the Applicant however and was only intended to be illustrative. The estimated other expenses of $10,000 per year were based on historic trading data of the Applicant. Accordingly, it is not necessary to amend this figure.

122. Mr Feutrill, the forensic accountant engaged in by the Tenant, also gave evidence on this issue. Although he did not dispute that fixed expenses (excluding rent and interest) approximate $10,000 per annum, and that there should be some uplift of that sum in following years, he opined that the uplift should be commensurate with CPI increases, as follows:

(a) 2012: 1.7%

(b) 2013 : 2.5%

(c) 2014: 2.5%

123. Having regard to the evidence of both forensic accountants, I find that the projected expenses, (excluding rent and interest) are to be assessed at $10,000 for the calendar year 2012 and $10,250 for the calendar year 2013 (had the Tenant traded for that full year).

124. Mr Spaleta gave evidence in the 2014 Hearing that the Tenant's expenses also included payment of interest on an overdraft facility. He said that that overdraft facility was discharged on 14 June 2012.

125. According to the expense spreadsheets prepared and annexed to Mr Ellis' report, the amount of interest paid by the Tenant at the end of the 2010 calendar year was $21,865. This is consistent with documents produced during the 2014 Hearing, which included a forensic accountant's report prepared by *Munday Wilkinson* dated 6 August 2012. Although the author of that report was not called to give evidence, the report states that it received instructions from the Tenant. The expenditure spreadsheets attached to the *Monday Wilkinson* report records bank interest of $21,864 in 2010, and $22,737 in 2011, with no interest being recorded as projected expenditure for the calendar year 2012 (presumably reflecting the Tenant's intention to discharge that overdraft facility during that year).

126. Therefore, interest on the overdraft facility only accrued for the first half of the 2012 calendar year. Assuming that the same interest rate applied, $12,487

[42] [This was s 50 of the *Retail Leases Act 2003* prohibited recovery of land tax].

in interest was no longer payable after 14 June 2012 for the 2012 calendar year. Moreover, no interest was payable in respect of the 2013 calendar year.

127. Therefore, and having regard to the matters referred to above, I find that the total projected expenses amount to $137,288,[43] calculated as follows:

Year	Rent	Other yearly expenses	Interest	Total
2012	89,112 [44]	10,000	10,250	109,362
2013	25,146 [45]	2,780 [46]	0	27,926
TOTAL				**137,288**

Net profit

128. Having regard to my findings set out above, I calculate the Tenant's projected net profits over the period 1 January 2012 until 9 April 2013 to be $50,162, calculated as follows:

Year	Gross Profit	Expenses	Net Profit
2012	145, 592	109,362	36,230
2013 (part)	41,858	27,926	13,932
TOTAL	187,450	137,288	**50,162**

DAMAGES TO GOODWILL

129. The Tenant claims further compensation on the ground that the value of goodwill in the business operated by it has been completely destroyed as a result of the Landlord failing to remediate the Premises in a timely manner. Mr and Mrs Spaleta both gave evidence that the Tenant's business had previously held distributorships for a number of exclusive lines of lingerie, all or most of which were lost as a result of it not being able to trade during the period that the Premises were unable to be occupied.

130. In the 2014 Hearing, Mr Spaleta was asked why he did not re-establish the business in other premises, following the favourable judgment made on 1 December 2011 by Judge Lacava, which awarded the Tenant damages in the amount of $218,599.63. Mr Spaleta said that by that time, it was too late to re-establish the business in other premises because the supply contracts had been rescinded. He said that the Tenant would have been in a fantastic position in January 2012 to expand but for the fact that it had lost its suppliers. That begs the question why this head of damage was not prosecuted as part of the Earlier Proceeding, notwithstanding the fact that it was originally claimed in that proceeding but later, inexplicably, withdrawn.

[43] Rounded to the nearest dollar.

[44] This amount has been calculated by reference to 132 days applicable to the 2011-2012 rental and 234 days applicable to the 2012-2013 rental, noting that 2012 was a Leap Year and rounding the daily amounts to the nearest dollar.

[45] Given that the lease came to an end prior to the rental adjustment date of 18 May 2013, rent of $90,125 per annum is calculated pro rata to the period from 1 January to 9 April 2013 (99 days at $254 per day).

[46] Given that the lease came to an end prior to 31 December 2013, expenses of $10,250 per annum is calculated pro rata to the period from 1 January to 9 April 2013 (99 days at $28 per day).

131. The evidence given by Mr Spaleta in the 2014 Hearing differs somewhat to what he now says concerning the loss of the supply contracts. In particular, in this remitted hearing, Mr Spaleta said the supply contracts were lost during the period February to April 2012, rather than at some point prior to January 2012.[47] Hence, the loss had not yet accrued by the time the Earlier Proceeding was heard.

132. In my Reasons given in the 2014 Hearing, I concluded that there was insufficient evidence for me to find, on the balance of probabilities, that the rescission of the supply contracts or exclusive distributorships was such that it completely destroyed the Tenant's business, albeit that I acknowledged that the loss of supply contracts may have adversely impacted on the profitability of the business, either in the short term or possibly long-term. I stated:

> 107. No doubt the loss of supply contracts may have adversely impacted on the profitability of the business, however, that is a far cry from concluding that the business has been completely destroyed. In my view, further evidence would need to have been adduced that any attempt to re-establish supply contracts was unsuccessful and that this led to a situation where the Tenant was unable to trade profitably. There is no direct evidence establishing that.
>
> 108. In my view, the evidence going to the issue that the Tenants business having been completely destroyed, such that it is no longer viable to re-establish that business, is speculative. I am not persuaded, based on the general comments made by Mr and Mrs Spaleta, that the business conducted by the Tenant was unable to be re-established during the currency of the Lease, had its run its full term. No doubt, that Tenant may have suffered ongoing losses but that is a very different head of damage to a claim for damages based on the business having been completely destroyed.

133. In the Appeal Proceeding, Croft J concluded that, even though the Tenant had claimed for the loss of goodwill value, it was open for the Tribunal to assess that claim on the basis that goodwill may have been reduced in value, rather than completely destroyed.[48] In other words, Croft J found that the claim for loss of goodwill value should not have been dismissed simply on the basis that there was insufficient evidence to substantiate that the business had been completely destroyed or could not be re-established. His Honour concluded that the Tribunal should have considered whether there was any compensable diminished value of goodwill.

134. The additional evidence adduced in this remitted hearing does not take the matter much further. There still remains a lacuna in the Tenant's evidence as to whether the supply contracts could not be resurrected or whether alternative distributorships could be obtained. Despite what is set out in the above paragraphs of my Reasons given in the 2014 Hearing, the additional evidence

[47] Cross-examination of Mr Spaleta on 28 February 2017.
[48] [139].

adduced in this remitted hearing provides no detail as to how the business was "completely destroyed" or whether any effort was made to re-establish supply contracts, either with the original suppliers or with alternative brands. In those circumstances, the Tenant still relies on the uncorroborated and to some extent, inconsistent statements of Mr Spaleta to make good this aspect of its claim.

135. In *Gurnett v Macquarie Stevedoring Co Pty Ltd*, Street CJ stated:[49]

> A guess is a mere opinion or judgment formed at random and based on slight or uncertain grounds. In contradistinction to such a conjectural opinion, an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. It must be something which flows from the given premises and is certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect.

136. In the present case, the conclusion which the Tenant says should be accepted by the Tribunal does not, in my opinion, follow from the evidence presented *as certainly or probably true and the mere possibility of* the Tenant's business being completely destroyed *is not sufficient to justify an inference to that effect*.

137. Consequently, I do not accept, based on the evidence presented in the 2014 Hearing and this remitted hearing that the business was completely destroyed, as of April 2012, being the date that it now says that the supply contracts were lost. Nevertheless, I find that the loss of the supply contracts clearly had a significant adverse impact on the value of the business goodwill, given that those supply contracts largely underpinned the exclusivity of the range of lingerie sold by the Tenant.

138. Therefore, in accordance with the judgment of Croft J in the Appeal Proceeding, I will assess the Tenant's claim for loss of goodwill value based upon the premise that the goodwill value was diminished, albeit not completely destroyed.

139. On that basis, and doing the best that I can without any direct evidence to assist me, I find that the value of the goodwill should be reduced by 25 per cent to take this factor into account. In forming that view, I am guided by the comments of Croft J in *Casa Di Iorio Investments Pty Ltd v Mini Guirguis*,[50] where his Honour cited *Commonwealth v Amann Pty Ltd*,[51] and stated:

> 22 It is trite that the assessment of loss and damage is often difficult and that in the assessment process something in the nature of a broad estimation may be required, as is made clear by Mason CJ and Dawson J in *Commonwealth v Amann Aviation Pty Ltd*:
>
> > The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility

[49] (1955) 72 WN (NSW) 261 at 264 cited by Muirhead J in *Nominal Defendant v Owens* (1978) 22 ALR 128 at 133.
[50] [2017] VSC 266.
[51] (1991) 174 CLR 64 at 83.

> of estimating them as best it can. Indeed, in *Jones v Schiffman* [(1971) 124 CLR 303 at 308], Menzies J went so far as to say that the 'assessment of damages … does sometimes, of necessity involve what is guess work rather than estimation'. Where precise evidence is not available the court must do the best it can. And certainty as to the profits to be derived from a business by reason of contingencies is not a reason for a court refusing to assess damages.

Valuing goodwill

140. Mr Ellis and Mr Feutrill, the two forensic accountants engaged by the parties, both gave evidence as to how business goodwill is to be valued. Both agree that the value of the goodwill is the difference between the value of the entity as a whole less the value of the net tangible assets.[52]

141. Both experts relied upon the *Capitalisation of Future Maintainable Earnings Valuation* methodology to value goodwill. This methodology establishes a market value by multiplying expected future maintainable earnings before interest and tax by an index multiple reflective of the number of variables including industry, profitability, cash flow and the nature of the business being valued. According to Mr Feutrill, small to medium enterprises, such as the Tenant's business, regularly sell and are valued with an index multiple in the range of 1 to 6 times the average *earnings before interest and tax* (**'EBIT'**). Mr Feutrill looked at the calendar years 2011, 2012 and 2013 (which he annualised) in order to calculate the average EBIT over that period of $68,679.[53] To that amount, he applied a range of index multiples from 4 to 6 which he considered appropriate for the type of business operated by the Tenant. That resulted in a value range of $274,714 to $412,071. He considered that the midway point of $343,393 represented a fair value of the business goodwill.[54]

142. Mr Ellis opined that the calculation of goodwill was overstated for a number of reasons. First, he said that the calculation was not based upon the EBIT of the business, but rather the value of the business based on the EBIT. According to Mr Ellis, in order to value the business based on the EBIT, the value of assets and liabilities of the business would need to be removed. Based upon findings made in the Earlier Proceeding, where compensation was awarded to the Tenant for damaged stock and fixtures, Mr Ellis assessed the value of the business assets at $82,841.[55] He opined that this amount was to be deducted from the gross value of goodwill.

143. During concurrent evidence, Mr Feurtrill agreed that business assets needed to be removed from the business value to calculate goodwill. Mr Feutrill did not offer an opinion as to whether the amount of $82,841, adopted by Mr Ellis, was correct or not. Moreover, Mr Fuetrill made no comment in his reply expert report as to whether the amount of $82,841 was overstated or not.

[52] Transcript of the Remitted Hearing at T:162-3.
[53] Appendix E to the report of Greg Feutrill dated 13 February 2017.
[54] This equates to a multiplier of 5.0.
[55] Paragraph 4.20 of the report of Mark Ellis dated 6 February 2017.

144. In those circumstances, Mr Ellis' evidence that $82,841 is to be deducted from the *business* value in order to calculate goodwill is uncontested and I accept that evidence.

145. Mr Ellis further opined that when calculating maintainable earnings, it is necessary to make an adjustment for wages. He stated:

> … a fair salary needs to be included when valuing a business because a current owner may not be paying themselves a fair market salary. Without this adjustment it is not possible to determine the actual profit (after salary) that the business is making and it is not possible to make comparisons between different businesses.

146. Mr Ellis stated that he considered that a conservative wage for Mrs Spaleta, being the person managing the Tenant's business, would be $60,000 per annum. He estimated this figure, having regard to the 2016 *Hays Salary Guide*. If that were taken into account the EBIT of $68,679 calculated by Mr Feutrill would be reduced to $8,679.

147. During the course of the hearing, Mr Fuetrill conceded that in many instances, wages are taken into account in assessing EBIT. However, he explained that this was not always the case. He said in some instances, businesses were purchased in order to replicate a wage and in that situation, there would be no adjustment made for wages.

148. In my view, the evidence of Mr and Mrs Spaleta indicates that the business was being conducted in a way similar to a family run business, albeit through a corporate vehicle. In that context, Mrs Spaleta's expertise in the lingerie industry and her physical presence were critical components of that business. None of the profit and loss or expenditure spreadsheets which had been produced during the course of this proceeding or the Earlier Proceeding indicate that a wage was ever paid to Mrs Spaleta. This is consistent with Mr Feutrill's opinion that what the business earned effectively became the wage of the persons controlling the enterprise, notwithstanding that it was being operated through a corporate vehicle. In those circumstances, I do not consider it appropriate for the average earnings of the Tenant to be reduced further by taking into account a wage (that has never been paid).

149. Mr Ellis also disagreed that a multiplying factor of 5.0, adopted by Mr Fuetrill, was appropriate. He opined that the appropriate multiplier was 1.95. He adopted this multiplier by reference to the *BizEchange Index* for businesses with a turnover less than $500,000.[56] Item G (retail trade) lists the *common* multiplier for micro businesses with a turnover of less than $500,000 at 1.95 for the June Quarter 2016.

150. Mr Fuetrill opined that the Tenant's business was unique and could not be categorised under a general heading of *retail trade* because it offered a distinctive shopping experience. He said that his opinion was based upon his experience in selling distinctive businesses, rather adopting an earnings

[56] For the June Quarter 2016.

multiplier from the *BizExchange Index*. Regrettably, Mr Fuetrill did not provide any comparative data in order to reinforce his opinion that a higher earnings multiplier should be adopted in the present case.

151. The *BizExchange Index* is a general guide from which the value of a business can be assessed. The document notes that other factors may also need to be considered:

> The BizEchange Index provides a guide to business values based on the earnings multiple for industries and business size. However, other factors need to be considered when assessing an individual business. Some of the important factors are:
>
> - Type of income
> - Profit margins
> - Stability
> - Competitive advantage
> - Industry life-cycle
> - Reliance on owner operator
> - Market fluctuations [57]

152. In the present case, the Tenant's business held exclusive distributorships of luxury lingerie brands, which may be said to have given it a competitive advantage. That factor may attract a higher earnings multiplier. On the other hand, even though the business operated with a high profit margin, its annual earnings were relatively modest and certainly at the lower end of the scale for a *Micro Business*.[58]

153. Nevertheless, and having regard to Mr Fuetrill's evidence, I consider that some uplift should be added to the *common* multiplying index set out in the *BizEchange Index*, applicable to the time when the contract came to an end.[59] Doing the best I can based upon the evidence before me, I consider it appropriate to adopt an index multiplier of 2.0.

154. The final area of disagreement between the two experts concerns the measure of EBIT. In particular, the experts' opinions differ on what is the applicable *Gross Profit Margin* and the projected expenses. Mr Fuetrill has calculated an average EBIT for the calendar years 2011, 2012 and 2013 (annualised) of $68,679.[60] According to Mr Ellis, that figure is too high. However, Mr Ellis' opinion is based upon a *Gross Profit Margin* which is premised on a market based calculation, rather than based upon findings made by Judge Lacava in the Earlier Proceeding. As I have already indicated, the findings made by Judge Lacava in relation to both revenue and the *Cost of Sales* fix those amounts by annual increases of 6%. It is no longer possible to revisit those figures according to market.

[57] *The BizExchange Index, Australian Private Business Values*, June Quarter 2013, p3.
[58] A *Micro Business* is categorised in the *BizEchange Index* as having a turnover of less than $500,000.
[59] The *common* earnings multiplier for *The BizExchange Index* June Quarter 2013 is 1.92.
[60] Appendix E to the expert report of Mr Feutrill dated 13 February 2017.

155. However, Mr Fuetrill's calculation of EBIT is also problematic. In particular, it appears that he has adopted values partly from the Earlier Proceeding and partly from findings made in the 2014 Hearing. For example, for the calendar year 2011, he has adopted gross revenue and *Cost of Sales* figures from findings made in the Earlier Proceeding but has then taken the 2011 operating expenses figure from a finding made in the 2014 Hearing in order to calculate the EBIT. In my view, that skews the calculation. Similarly, he has adopted operating expenses for the calendar years 2012 and 2013 (annualised) again based on findings made in the 2014 Hearing. However, as those findings have been set aside and fresh evidence now adduced, those expense figures are no longer relevant.

156. In my view, the calculation of goodwill must take into account projected expenses as found by me and set out above. Further, the calculation of goodwill should adopt an index multiplier of 2.0, having regard to my finding above. With those corrections made to Mr Feutrill's calculations (as set out in the table Appendix E of his report), I find that the EBIT for the calendar years 2012 and 2013 (annualised) are as follows:

	2012	**2013 (annualised)**
Revenue	161,849	171,560
Less: Cost of Sales	(16,257)	(17,233)
Gross Profit	145,592	154,328
Less operating expenses	(109,362)	(102,043)
Add interest	10,250	0
EBIT	**46,480**	**52,285**

157. Accordingly, I find that the average EBIT over those two calendar years (with 2013 annualised) is $49,383.

158. If an index multiplier of 2.0 is adopted, the business value equates to $98,766. If the value of stock and fixed assets is $82,841, then the goodwill value is $15,925.

159. As indicated above, I consider this amount should be discounted by 25% to reflect my finding that the business was not totally destroyed as at April 2013. Accordingly, I find that the diminished value of the business goodwill is $11,944.[61]

LOSS OF OPPORTUNITY

160. The Tenant claims that it is entitled to compensation in respect of losing the opportunity to open additional retail outlets, and more particularly, a second retail outlet in Sydney. Mr Barber submits that the Tenant certainly would have had that opportunity had the Respondent's actions not crippled its business.

161. In the Appeal Proceeding, Croft J found that the claim in respect of loss of opportunity had not been considered in the 2014 Hearing and therefore

[61] Rounded to nearest dollar.

remitted that question for further consideration by the Tribunal in this remitted hearing. His Honour stated:

> 142. … Senior Member Riegler did note the existence of the Plaintiff's claim for loss of opportunity at one point in his reasons, but nowhere else in the reasons is the loss of opportunity claim separately considered. The Plaintiff contends that, had its loss of opportunity claim being considered by the Tribunal, it would have been awarded further compensation for loss of opportunity to open a further retail outlet in Sydney. While the Plaintiff originally sought to claim for loss of opportunity in relation to other proposed retail outlets, that claim was not and is not pressed.
>
> 143 I am of the opinion that the seventh ground set out in the Amended Notice of Appeal is established – with the caveat that, as noted earlier in these reasons, I am not satisfied that any issue estoppel arose in respect of Judge Lacava's finding at paragraph 11 of his Honour's reasons.[62]

162. In my Reasons of the 2014 Hearing, I stated:

> 109. Moreover, the quantum claimed in respect of the destruction of the business or business goodwill is premised on an assumption that the business would have expanded to 10 retail outlets. Again, the evidence going to that issue is speculative and I am not persuaded that this goal could have been achieved. In particular, there are so many variables which may affect the growth of a retail business from year to year and its ability to expand its operations to more than one retail outlet. These variables include factors such as the state of the retail market from one year to another, the availability of other retail premises and the likely profit that might be derived by those other retail outlets, especially when located in other locations it might have a very different demographic to the retail market in Brighton. The only evidence given in relation to these factors are general comments, reflecting the ambition of the Tenant to expand its business. No expert opinion evidence was adduced in support of this aspect of the Tenant's claim.

163. Mr Barber submitted that the judgment of Croft J directs the Tribunal to award damages for this lost opportunity. I do not accept that submission. As I read the judgment of Croft J in the Appeal Proceeding, it remains open for me to find whether the opportunity said to have been lost was real or speculative. His Honour stated:

> 87 There is nothing to suggest any error of law with respect to the Plaintiff's claim for damages for loss of opportunity in this respect or that on the evidence, or lack of it, which was before the Tribunal, any finding or award of damages would have been other than mere speculation.

[62] *Versus (Aus) Pty Ltd VSC 515 v A.N.H. Nominees Pty Ltd* [2015] [142-143].

164. With that in mind and given that all findings made by me in the 2014 Hearing are said to have been set aside, I now turn to reconsider that issue in the context of the Sydney store only.

165. Mr Hay drew my attention to an extract of *Cheshire & Fifoot Law of Contract*, which succinctly encapsulates this area of law:

> By recognising that a chance of less than 50% is compensable the law departs, in relation to loss of chance, from the normal principle that the existence of a loss must be proved on the balance of probabilities. However, this does not mean that the normal standard of proof has no role to play in assessing damages for loss of a chance. The law imposes on the plaintiff a threshold requirement of establishing that performance of the contract would have created a chance opportunity that had some value, and was not merely speculative or negligible. The plaintiff must prove on the balance of probabilities that the breach relied on caused the loss of such a chance, in accordance with the normal rules of causation. This means that where the realisation of a chance depends on the plaintiff's own decision to take it up, it must be proved on the balance of probabilities that it would have been taken up.[63]

166. In *Sellar v Adelaide Petroleum NL*,[64] Brennan J stated:

> Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly "loss" or "damage"…
>
> To prove the substantiality of a prospect of acquiring a benefit or of avoiding a detriment that would have been the plaintiff's actions if the opportunity had been offered, it will usually be necessary to tend evidence to establish the plaintiff's objectives and the contingencies in the way of their achievement. Evidence of that kind will bear upon the existence and the value of the lost opportunity.[65]

167. Mr Barber referred me to *Nicholson v Hilldo Pty Ltd*:[66]

> 69. Where loss of an opportunity is claimed, as is the case here, the court must assess "the prospects of success of that opportunity had it been pursued." This will normally require evidence of the "plaintiff's objectives and contingencies in the way of their achievement." The plaintiff is required only to prove that there is some degree of probability or possibility that the opportunity would have been taken up and the court will adjust the award of damages to reflect that degree of probability accordingly. Consequently, a lost commercial advantage or opportunity will be compensable even with a chance of achieving the opportunity is

[63] Seddon Bigwood and Ellinghaus, *Chesire & Fifoot Law of Contract* (Lexis Nexis Butterworth, 2012, 10th ed) [23.16]
[64] (1994) 179 CLR 332.
[65] Ibid 364-5.
[66] [2014] VSCA 158 (omitting footnotes).

> less than 50 per cent. No damages will be awarded for a loss of an opportunity with a chance of achieving the opportunity so dependent on the unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach. Neither will damages be awarded where a chance is so speculative that it is impossible to put a value on the loss.
>
> 70. Difficulty in assessing the damages will not cause a claim for damages to be defeated.

168. Apart from what Mr and Mrs Spaleta now say, the only contemporaneous evidence relied upon is an introduction letter to the Landlord's leasing agent dated 26 September 2006 and a business plan dated August 2007. That correspondence stated:

> The decision to expand our business into Australia is based on over 2 years of research into the Australian women's apparel market. As such, we shall open the first 10 stores in Australia. The boutique at 17 Church Street, Brighton is to be our flagship store.

169. Reliance is also placed upon the Tenant's business plan, which was submitted to the National Australia Bank in August 2007.[67] In the Earlier Proceeding, Judge Lacava stated that he accepted Mr Spaleta's evidence that the Tenant had intended to establish another retail outlet in Sydney once the Brighton store had been established. However, in the Appeal Proceeding, Croft J did not find this statement as binding on the Tribunal.

170. In my view, a distinction is to be drawn between an intention to open another store in Sydney and an actual opportunity to do so. As I indicated in the 2014 Hearing, there are so many variables which would impact on any decision to open a store in Sydney. For example, finding a retail outlet within the appropriate demographic area, weighing the rental against projected earnings, evaluating competition in that particular area, measuring profitability against competition from on-line sales are only to mention a few factors which could ultimately impact on any decision to open another outlet in Sydney. None of these factors were addressed in the evidence before me. In those circumstances, I remain of the view that there are is insufficient evidence for me to be satisfied, on the balance of probabilities, that any real opportunity was lost. I find that the claim rests solely on an ambition rather than any real opportunity that arose.

171. My view is fortified by the fact that the Tenant was on notice that deficiencies in its evidence, in order to establish that a real opportunity was lost, underpinned my finding in the 2014 Hearing that this claim was unsustainable. Even with that deficiency highlighted, little further evidence was proffered in this remitted hearing. In particular, the Tenant has not produced any business plan for the proposed Sydney store, any expert accounting projections (other than simply extrapolating forecasts from the

[67] Reference was also made to a spreadsheet prepared by the Tenant, although that spreadsheet was prepared for the purpose of litigation in the 2014 Hearing (Exhibit A-33).

Brighton store),[68] any lending application or documentation, details of fit-out works or other associated costs, or details about leasing options available to it.

172. Accordingly, I find that the claim is *so speculative that it is impossible to put a value on the loss*. This aspect of the Tenant's claim is dismissed.

THE GOODS CLAIM

173. The Tenant claims compensation in relation to its fixtures and chattels that were left in the Premises when the Tenant vacated in May 2011. Although the fixtures remained in the Premises, the chattels were subsequently removed in order to either remove mould from those chattels or if that exercise was not possible or economical, to dispose of those chattels.

174. The Tenant claims $3,980 in respect of personal goods and $46,022 in respect of the Tenant's fixtures and *shop chattels*, making a total of $50,002 claimed under this head of loss.

175. Mr Hay submitted that shop chattels and personal goods which were removed from the Premises, and which were capable of being cleaned, have already been cleaned twice and have been made available for collection by the Tenant. Therefore, he submitted that no compensation should be awarded in respect of those items.

176. Mr Hay further submitted that those goods which were not able to be cleaned or where it was uneconomical for them to be cleaned, are to be discarded and the Landlord has offered to pay the Tenant the reasonable value of those goods in the amount of $1,188.29. In relation to the Tenant's fixtures, which remained in the Premises after the lease came to an end, Mr Hay submitted that their value, if depreciated over 10 years, is $1,340.29.

177. The Landlord contends that those goods which have been successfully cleaned of mould should have been collected by the Tenant. The Landlord claims that the Tenant has refused to either collect or receive delivery of those cleaned goods, and as a consequence, it has incurred the costs of storing those goods. It counterclaims against the Tenant for the cost of storing those goods from October 2013 to January 2017 in the amount of $9,314.80.

178. Pursuant to orders made by the Tribunal following the conclusion of the 2014 Hearing, the issues which comprise the claim for goods were isolated into series of questions for determination. What follows are my findings in relation to each of those questions.

Question 1: What are the goods, fixtures and fittings removed from the Premises or remain in the Premises that are or were the property of the Tenant ('the Goods')?

179. The Tenant contends that the Goods are listed in a list delivered by the Tenant to the Respondent in January 2013, and which are annexed to the expert report of Stephen Peasley dated 12 April 2015, being the valuer engaged by the

[68] Evidence of Mr Feutrill in his report dated 13 February 2017 and oral evidence.

Tenant. Although there is some disagreement as to when that list was delivered to the Landlord, there seems to be common ground that the list annexed to Mr Peasley's report comprises all of the Goods.

180. That list separates the Tenant's fixtures from the shop chattels and the personal chattels. The shop chattels and the personal goods were removed from the Premises in January 2013.

181. The Tenant's fixtures remained in the Premises, and the Tenant contends that they are now being utilised by the new tenant currently occupying the Premises.

Question 2: Have the Goods been remediated, such that they are safe to be returned to the Tenant?

182. According to Mrs Lepp, those Goods which were able to be cleaned of excessive mould have been returned to a safe or normal level of mould ecology.[69] In her affidavit dated 12 August 2014, she deposes to the following:

> 3. On or about 24 January 2013, the goods were removed by the respondent's contractor Premier Restorations from the premises to be cleaned by them.
>
> 4. On 8 April 2013, Rick Bryant of Premier Restorations informed the respondent that they have cleaned the Goods (the recoverable items) in accordance with IICRC s520/500 guidelines. Now produced … is a true copy of the email from Rick Bryant of Premier Restorations to Harold Lepp of ANH Nominees Pty Ltd dated 8 April 2013.
>
> 5. In or about July 2013, the respondent instructed Premier Restorations to clean the Goods again. Now produced … is a true copy of the invoice from Premier Restorations to ANH Nominees Pty Ltd dated 25 July 2013 for cleaning and storage of the Goods.
>
> 6. In July 2013, the respondent instructed Mr Ivan Cupic of LRM Global Pty Ltd to undertake a verification assessment of the goods stored at Premier Restorations, 21 Silicon Place Tullamarine in the said State to verify whether the contents had been successfully remediated and returned to normal fungal ecology. On 23 July 2013, 14 representative surface samples were collected from the content stored within the "cleaned" area. There was no visible mould growth or odours of the goods and 12 samples had below detectable limits, one sample was low and one sample obtained from cardboard box 2 (toys/game) exhibited high surface mould count. A sample from within that cardboard box was not obtained.
>
> Now produced … is a true copy of the report from LRM Global Pty Ltd to ANH Nominees Pty Ltd dated 30 July 2013.
>
> …

[69] Affidavit of Barbara Lepp dated 12 August 2014.

9. On 21 August 2013, Rick Bryant of Premier Restorations provided the respondent with a final catalogue list of items removed from the premises from Premier Restorations and whether each item had been cleaned.

   Now produced … is a true copy of the email from Rick Bryant of Premier Restorations to Harold Lepp of ANH Nominees Pty Ltd dated 21 August 2013.

10. In relation to the goods which have not been cleaned, I have made investigations of their value on the internet and on internet selling sites such as eBay and Gumtree and believe that they are worth a total of approximately $1,188.29. Some of the items have been used and are to be treated as consumables and accordingly, have no value. Below is a table of the goods which have not been cleaned and my estimate of their value…

183. In the email dated 8 April 2014 from Rick Bryant (*Premier Resorations*) to Harold Lepp, which is referred to in Mrs Lepp's affidavit, Mr Bryant states:

> Hi Harold just a summary of works up to date; We have finished the clean and have an air purifier in the shop. Demi is away on holidays and therefore we cannot have samples taken until she gets back next week. Attached is an invoice for the cost up to date.
>
> - Remove all loose contents from the shop and returned to our factory-$1,315.00 plus GST
>
> …
>
> - Clean recoverable items utilising the IICRC s520/500 guidelines. Box & store-Original quote $1,476.00 plus GST was for the content we picked up-We now have to add a further $1,580.00 plus GST -The total charge for these works is now $3,056.00 plus GST
>
> …

184. The report from LRM Global Pty Ltd dated 30 July 2013, also referred to in Mrs Lepp's affidavit states, in part:

> **Assessment Protocol:**
>
> The information results collected during this assessment have been divided into the following: Visual Inspection and Microbiological Investigation.
>
> *Visual Inspection*: A visual inspection was conducted of the "Cleaned" content stored within the encapsulated bubble area. Information collected during the assessment included noting whether specific odours and mould growth were evident.
>
> *Mould Testing*: Microbiological sampling to measure the surface mould levels of the "Cleaned" contents, stored within the encapsulated bubble area. The type of testing performed is listed below:
>
> …

Visual Inspection

On arriving to site, LRM Global was shown the two locations where the contents were stored.

Location 1: Metal open container:

The content stored in this container was said to be the "Rejected" items (not able to be cleaned/cleaning was more costly than item was worth). See Appendix A Photo 1.

Location 2: Plastic enclosed double area:

The content stored within this area are deemed to have been "Cleaned" items (able to be cleaned/cleaning was cost-effective up against replacement). See Appendix A Photo 2 to 6.

According to Premier Restorations, the cleaning method they employed included the use of HEPA (High Efficiency Particulate Air) filtered vacuuming, microfibre cloth and cleaning agent.

The contents included:

- Semi-porous surfaces: unfinished wood, displays
- Non-porous surfaces: These included glass (from Euro lights), plastic (toys), metal-hanging equipment, finished wood (Thomas the Tank Structure), electronic equipment and mannequins.

Bio-Tape Surface Sampling for Viable/Non-viable Fungi

There were 14 representative surface samples collected from the content stored within the "Cleaned" area. One sample (10132-11 -Cardboard Box 2 (toys/games) exhibited a high surface mould count with predominant mould genera being Aspergillus / Penicllium. Fungal hyphae were also detected, indicating active mould growth is occurring. Please refer to Appendix B for the MouldLab report.

Assessment Summary:

After all aspects of the assessment are taken into consideration the following can be surmised:

1. Visual Inspection:
    - No visible mould growth or odours were evident in the content stored within Location 2.
2. Mould sampling:
    - Representative surface samples taken of the contents, stored within Location 2, have reported a high mould level at one of the 14 tested locations. (Refer to Appendix B for Analytical Report).

Recommendations:

LRM Global recommends the following:

- We suggest the content stored within Cardboard box 2 (toys/games), be further remediated, to ensure the contents are returned to a condition 1 (normal fungal ecology).

185. Mr Barber submitted that the Goods need to be certified as being free of contamination by mould. He referred me to an extract of the transcript in the 2014 Hearing in support of that proposition. The transcript records the Tenant's cross-examination of Mr Bryant from *Premier Restorations*. It is unclear to me, having regard to the relevant passages of the transcript to which Mr Barber refers, that the Goods are required to be "certified", whatever that word means in the context of this proceeding. In particular, the relevant passage of the transcript states:

> Why have they been passed? --- Well, they have been cleaned, haven't they?
>
> I don't know? --- They haven't been passed. Did I say "passed" or "cleaned". Yey, cleaned. So they've been cleaned and then they have to be tested. So if they fail, they may fail testing which means then they get rejected.
>
> So that the list that you've provided to us, which is quite large or long, all the items that sit there, let's say that they're passed --- ? --- Did I say "passed" sorry, or "cleaned"?
>
> Cleaned, sorry? --- Yeah.
>
> Doesn't that mean it's been passed? --- No.[70]

186. As seen in the above extract of the transcript, there is no mention of any certification process. Mr Bryant's evidence concerns the process adopted by *Premier Restorations* to remove mould from the Goods and then to test the Goods after that work has been done to assess whether mould ecology is still present.

187. In any event, Mr Bryant's evidence, set out in the above extract of transcript, relates to what occurred prior to 20 May 2013, being the date that he gave that evidence. However, Mrs Lepp deposes to further cleaning being undertaken by *Premier Restorations* well after that date. This ultimately led to testing being undertaken by *LRM Global* and *MouldLab* in July 2013.

188. Mr Barber further submits that the LRM Global report disclosed that one of the surface sample readings recorded high levels of mould. Mr Barber referred to the expert report of Mr Siket dated 31 March 2015, the building biologist engaged by the Tenant, who expressed the opinion that:

> If there is active mould growth in one of the items in the "cleaned" Bubble Storage Area then there is an elevated risk that other items may have got cross contaminated. Therefore there is a risk that if further mould surface samples were taken on items, that they may have contamination levels above "Normal Mould Ecology". It would have been very important that

[70] Transcript of the 2014 Hearing at T293-4.

> the contaminated Cardboard Box 2 was removed from the "cleaned" area straight away and remediated.
>
> …
>
> It seems as though this is exactly what was attempted but the fact that an item had active mould growth in a contaminated open "cleaned" area, for an unknown amount of time means that the risk of cross contamination was very real and therefore in my opinion other items could not be guaranteed as being uncontaminated.

189. Regrettably, no independent testing of the Goods was ever carried out by the Tenant. It relies upon the expert opinion of Mr Siket and the educated assumptions he made in respect of the possibility of cross-contamination. However, those assumptions are not fact. In my view, the Tenant bears the evidentiary burden of proving that the Goods are contaminated with mould, such that it was reasonable for it not to retrieve those Goods.

190. Based on the evidence before me, I am not satisfied that the Goods, other than those Goods which have been deemed not economically feasible to clean and the Goods within the *Cardboard Box 2*, are contaminated with mould.

Question 3: What Goods have not been remediated or are unable to be remediated?

191. Having regard to my finding set out above, I find that the only Goods which have not been remediated are those Goods listed under paragraph 10 of Mrs Lepp's affidavit dated 12 August 2014 and the box of toys/games marked *Cardboard Box 2*.

Question 4: Was the Landlord required to remediate the Goods?

192. Mr Barber submitted that this question has already been determined by virtue of Order 2 of the orders of Judge Lacava made on 1 December 2011. As I have already indicated above, those orders do not compel the Landlord to remediate the Premises but rather, ordered that rent be abated until such time as the Premises return to reasonable levels of mould ecology. Moreover, the orders say nothing about remediating the Goods.

193. Nevertheless, the Landlord agreed to remediate the Goods and to a large extent, this has occurred.

Question 5: What is the value of the un-remediated Goods?

194. The Landlord concedes that it will compensate the Tenant $1,188.29 in respect of those Goods which were deemed uneconomical to clean. That amount does not include any of the Tenant's fixtures which remained in the Premises after the lease came to an end or those Goods which the Landlord says have been cleaned of mould and are available to be collected by the Tenant.

195. In terms of valuing the Goods, it is appropriate to distinguish between:

(a) those Goods which have been cleaned and are available to be collected by the Tenant;

(b) those Goods which have been deemed uneconomical to clean and are to be discarded; and

(c) those Goods which comprise the Tenant's fixtures and which remained in the Premises after the lease came to an end.

196. What follows are my findings in relation to those categories of Goods.

Goods which have been cleaned

197. As indicated above, I find that those Goods which have been cleaned of excessive levels of mould ecology remain to be collected by the Tenant. In those circumstances, I do not consider that the Tenant is entitled to any compensation in respect of those Goods.

Goods which have not been cleaned

198. As indicated above, Mrs Lepp has estimated that the value of the uncleaned Goods total approximately $1,188.29. Her estimate is, in part, based upon comparing like products on selling sites such as *eBay* and *Gumtree*.

199. Mrs Lepp set out her calculations under paragraph 10 in her affidavit by ascribing a value to each and every particular item. It appears that the price attributed to many of the smaller items, such as stationery, toys and miscellaneous personal items mirror the amount set out in the *Catalogue of Items* prepared by the Tenant.

200. The difficulty, however, in valuing the items is that there is no expert evidence or other documentary evidence which would provide some guidance as to what the true value of those items are, either as of the date that the Tenant vacated (May 2011) or the date when the lease came to an end (April 2013). Similarly, there is no evidence as to the condition of the items – whether they were new or used and if they were used, whether their depreciated value has already been claimed as a taxable expense.

201. The only 'expert' evidence going to this issue is the evidence of Mr Peisley, as set out in his two reports filed in this remitted hearing. However those reports do not value the goods but rather adopt the value of the goods as ascribed by the Tenant. Mr Peisley's expert opinion evidence focuses on calculating depreciation values of the Goods (including the Tenant's fixtures) based upon the values attributed to those goods by the Tenant. In that sense, Mr Peisley's evidence is unhelpful. Moreover, Mr Peisley's calculations are based upon all of the shop chattels and Tenant's fixtures. In other words, he has assumed that none of the Goods have been remediated.

202. The major disparity between what the Tenant says is the value of un-remediated chattels compared to the evidence of Mrs Lepp relates to electronic equipment, such as a *LOEWE* television, *iMac* computer, *Sony* monitor and *Samsung* security monitor. According to Mrs Lepp, she has

attributed value to those items based upon comparable items being available on *eBay* and *Gumtree*. It is not clear how the Tenant has attributed a value to those items or how the value has been calculated or derived. I assume that the values correlate to the initial purchase cost.

203. In my view, values attributed to the uncleaned Goods by reference to comparable goods listed on *eBay* or *Gumtree* more accurately reflects the loss suffered by the Tenant, if those Goods had to be replaced.

204. Accordingly, I accept the evidence of Mrs Lepp that the reasonable value of the uncleaned Goods listed under paragraph 10 of her affidavit dated 12 August 2014, is $1,188.29.

205. To that amount, an amount should be added in respect of the items in *Cardboard Box 2*, which was found to have abnormally high levels of mould ecology on the outside of the box. Regrettably, no evidence is before me as to what the value of the items in that cardbox box are. Nevertheless, I note that the cardboard box has been referred to in the *LRM Global* report as *toys/games*. Although, is impossible to know whether those *toys/games* have not already been counted in the Landlord's list of uncleaned Goods, it seems, given the limited number of toys listed in the Landlord's list of uncleaned Goods, that those items are separate to that list – and I find that to be the case.

206. Doing the best that I can with the evidence before me, and having regard to the value attributed to other toys in the list of uncleaned Goods set out under paragraph 10 of Mrs Lepp's affidavit, I will allow a further $500 in respect of those items.

207. Therefore, I find that the total amount to be allocated in respect of uncleaned Goods that have been removed from the Premises is $1,688.[71]

Tenant's fixtures

208. Mr Barber submitted that the value of the Tenant's fixtures should be assessed as at the end of the period for the calculation of lost profits, since those Goods would have been used for that period and depreciated commensurately. Having regard to my findings set out above, that date is April 2013.

209. There is little or no evidence that the Tenant's fixtures have not been cleaned of mould. Nevertheless, it appears that most, if not all, of the Tenant's fixtures were left in the Premises or discarded by the Landlord after the lease came to an end and prior to the Premises being re-let. Therefore, the Tenant contends that the Tenant's fixtures have been converted.

210. Mr Hay submitted that the Tribunal does not have jurisdiction to entertain a claim grounded upon the tort of conversion. I do not accept that proposition. The Tribunal's jurisdiction in relation to the subject matter of this remitted hearing, is found under s 89 of the RLA. The orders which the Tribunal may make in resolving a retail tenancy dispute, such as the present dispute, are set out under s 91 of the RLA and are expressed widely to include:

[71] Rounded to nearest dollar.

…

(b) requiring a party to pay money, by way of restitution or compensation or otherwise, to a specified person; or

…

(e) requiring anything else to be done that it –

…

(ii) considers necessary desirable to resolve the matter concerned.

211. It is trite that the Tribunal's powers under ss 89 and 91 of the RLA are to be exercised in accordance with law. In determining whether a party is to pay money or what orders are to be made to resolve a retail tenancy dispute, the Tribunal must have regard to principles of contract, tort or some other legal ground upon which the claim is based. Accordingly, it is not the cause of action which determines the Tribunal's jurisdiction but rather, the enabling enactment under which the cause of action is prosecuted. Consequently, I do not accept that, once the Tribunal is vested with jurisdiction under s 89 of the RLA, it is incompetent to consider a claim based on the tort of conversion.

212. It is common ground that the Tenant's fixtures remained in the Premises after the lease came to an end and I accept that, in all likelihood, were passed to the incoming new tenant. In *Consolidated Company v Curtis & Son*, Collins J stated:

> … a sale and delivery with intent to pass the property and chattels by a person who is not the true owner and who has not got his authority is a conversion.[72]

213. Similarly, in *Penfolds Wines Pty Ltd v Elliott*, Dixon J said that:

> … the essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel.[73]

214. Consequently, I find that the Landlord has converted the Tenant's fixtures and is therefore liable to compensate the Tenant for its loss occasioned thereby.

215. In Mr Peasley's report, the Tenant's fixtures (the fit-out) is stated to have cost $110,642.26. Of that amount, $82,000 is allocated towards the labour cost of Mr and Mrs Spaleta to install or construct the fit-out. However, the amount of $110,642.26 is not a figure that was derived through any valuation process undertaken by Mr Peasley. It is a figure that was given to Mr Peasley in order for him to calculate depreciated values. In his report dated 14 April 2015, Mr Peasley makes that clear:

> Note the monetary figures contained in this inventory are NOT our opinion of value.

216. Nevertheless, Mr Spaleta gave evidence that shortly after the Tenant took possession of the Premises, in or around November 2006, it obtained a

[72] [1892] 1 QB 495, 498.
[73] (1946) 74 CLR 204, 229.

quotation from Eddy Scheruga, a registered builder, to supply and install the shop fit-out for a cost of $190,000. Mr Scheruga also gave evidence in the remitted hearing confirming that he had quoted $190,000 to undertake the fit-out works. He said that he did not ultimately undertake the fit-out works because it was discovered that moisture was penetrating through the western wall, which had the effect of delaying commencement of the fit-out works, to a point where he no longer had capacity to undertake that work. He stated:

> And did you have any involvement with that fit out? --- I had involvement in the sense that I provided some tools and I gave a price but I never did the work.
>
> How did you come to give a price? --- I went out and had a look, and thought about what it is that they wanted to do, and came together with a figure for that.
>
> Right, what was that figure? --- $190,000.
>
> And what was that for? --- That was to do the fit out internally, there was some joinery shelving and stuff like so.
>
> Can you be any more specific about what is included? --- Well, it was a (indistinct) at the time so it was about doing the cleaning of the walls, and - you know, there was some work to do on the ceilings, and there was - I don't remember completely but there was a fit out to do which we included, an empty space that was going to be fitted out to be a shop of some sort.
>
> Was your quoted price accepted? --- It was.
>
> Did you start work? --- No.
>
> Tell me what happened? --- Well, there were some issues with waterproofing, some water issues, and the job was delayed, and then I could not continue to do work after that, we had other commitments.
>
> How were the water issues discovered? --- Well, there were walls that I saw that were - they had caused damaged, there was - you could see water penetrating through, not in the sense that it was pouring through, but there was bubbles on the walls, it looked there was some damp (indistinct) issues.

217. Mr Scheruga also confirmed that he inspected the fit-out works after they had been completed by Mr and Mrs Spaleta. He said words to the effect that what had been completed was the same as what he had quoted on.

218. During cross-examination, Mr Scheruga said that his quotation comprised both materials and labour and that the labour component:

> … could have been about two-thirds maybe, half to two-thirds, I'd assume.

219. Regrettably, the Tenant lost Mr Scheruga's written quotation after the Premises were flooded in 2010. Further, Mr Scheruga did not produce a copy of that quotation during the course of the remitted hearing. Nevertheless, the upshot of his oral evidence was that the labour component of his quotation was priced between $62,700 and $95,000, which, if taken at a midpoint ($78,850), is generally consistent with what the Tenant says is the value of Mr and Mrs Spaleta's labour to construct the fit-out ($82,000).

220. However, the evidence given and accepted by Judge Lacava in the Earlier Proceeding was that the actual out-of-pocket cost to construct the fit-out (the cost of materials) was $25,000. That figure is inconsistent with what Mr Scheruga said was the approximate cost of materials comprised in his quotation. In particular, if the labour component of Mr Scheruga's quotation was $78,850 (see above), then the materials cost would be $111,150. Even allowing for a reasonable *builder's margin* to be added to the cost of materials, the disparity between the actual cost of $25,000 and the quoted cost of $111,150 is significant and, in my view, suggests that what was quoted is different to what was ultimately built.

221. Having regard to that anomaly and also to my perception of Mr Scheruga's recollection of matters being somewhat vague, which was understandable given that more than 10 years have passed since he inspected the completed fit-out works, I do not accept that the as-constructed fit-out works completed by Mr and Mrs Spaleta were the same as the scope of works set out in Mr Scheruga's quotation.

222. That being the case, I do not accept that the reasonable cost of labour is $82,000. My finding is reinforced by the fact that no timesheets, work diaries or other documentation or information was provided as to the amount of hours worked by Mr and Mrs Spaleta, nor is there any expert valuation of the shop fit-out (apart from Mr Peisley's depreciation values).

223. Doing the best that I can with the evidence before me, I assess the value of the fit-out by reference to the actual cost, as found in the Earlier Proceeding ($25,000), to which I add half to one third of that amount for labour, which, if taken at a midway point, is a multiplying factor of 0.415 or $10,375. Therefore, I find that the value of the fit-out is $35,375, when first installed.

224. Mr Peisley depreciated the assumed capital cost of the fit-out ($110,642.26) by 50 per cent in order to arrive at a value as at April 2013 ($55,000). Adopting that same formula, I find that the depreciated value of the fit-out as at the date when the lease came to an end is $17,688. However, one further factor needs to be considered. In particular, orders were made in the Earlier Proceeding that the Landlord pay the Tenant $20,000 in respect of damage caused to the shop fit-out, by reason of the flooding events in 2010. It is common ground that this amount needs to be taken into account in assessing what compensation is to be awarded to the Tenant in respect of the shop fit-out being converted.

225. Mr Barber submitted that this amount needed to be deducted from the loss claimed as at December 2011. He submitted that the value of the shop fit-out as at January 2012 is to be reduced by $20,000 and then that figure is to be pro-rated as at April 2013 to arrive at an adjusted value of the fit-out as at that date. In applying that formula, Mr Barber submitted that Mr Peasley depreciated the original cost of the fit-out to $82,500 as of January 2012. That equates to 75 per cent of the assumed original cost of the fit-out.

226. Adopting that same formula and using the same depreciation percentage (75 per cent) but transposing my findings as to the value of the original shop fit-out, in lieu of those adopted by Mr Peasley, I arrive at a value of $4,288 calculated as follows:

> 35,375 (cost of fit-out 2016/17) x 75% = 26,531 (depreciated value January 2012)
>
> 17,688 – (20,000 x 17,688/26,531) = 4,288.

227. Accordingly, I find that the value of the shop fit-out and shop chattels, which were not removed from the Premises, but rather remediated in situ and which have been converted by the Landlord as at April 2013 is $4,288.[74]

Question 6: Is the Landlord liable to compensate the Tenant for the uncleaned Goods?

228. Mr Hay submitted that the Landlord has offered to pay the Tenant the reasonable value of the uncleaned Goods. In those circumstances, I will allow this aspect of the Tenant's claim for compensation.

Question 7: Is the Landlord entitled to be compensated by the Tenant for the reasonable costs of storing the Goods and if so, by what amount?

229. Mr Hay submitted that the Tenant is liable to compensate the Landlord for the cost of storing the Goods after March 2013. He argued that the Tenant has refused to accept the return of the remediated Goods and has therefore forced the Landlord to incur the cost of storing those Goods since that date. Consequently, the Landlord counterclaims against the Tenant in the sum of $9,314.80, being the cost of storage from 31 October 2013 until 31 January 2017.

230. Mr Hay referred to the affidavit of Barbara Lepp dated 22 February 2017 as evidence of the cost of storage. In that affidavit, Mrs Lepp sets out details of the storage costs charged by *Supercheap Storage*. She states that the total amount charged is $11,491.40, of which $2,176.60 has been paid by the Tenant.

231. Mr Barber submitted that the Landlord is not entitled to any compensation because no actionable wrong on the part of the Tenant has been pleaded or is otherwise identified. Mr Barber contended that at no stage has the Landlord had the necessary testing carried out on the Goods to establish that they have been remediated. Therefore, he argued that the purpose for which the Landlord removed the Goods has not yet been fulfilled and that the Tenant was entitled to refuse to accept return of the Goods.

232. Mr Barber further submitted that the Tenant, without abandoning its claim for conversion, but as a means of minimising further unnecessary storage costs, openly gave its permission for the Landlord to dispose of all of the Goods, apart from the *Thomas the Tank Engine* train table, the mannequins and the *Bessemer* and *Fissler* pots. Mr Barber submitted that the Landlord refused this proposal and has therefore failed to mitigate its loss.

[74] Rounded to nearest dollar.

233. I do not accept that the Landlord failed to mitigate its loss, especially where it still remained to be determined whether the Goods had been successfully cleaned of mould. Further, I do not consider that it was incumbent upon the Landlord to incur further costs in having to discard those Goods, especially in circumstances where the Goods were made available for collection by the Tenant. The situation would be different if the Landlord had refused to allow the Tenant to collect the Goods. However, this was not the case.

234. As I have already found, apart from the *Cardboard Box 2* containing games/toys, there is no evidence that the other remediated Goods held in storage are contaminated with mould. In fact, the evidence points in the other direction. In particular, Mrs Lepp has given evidence that the Goods have been cleaned twice by *Premier Restorations*. The report from *LRM Global* also supports that conclusion.

235. In my view, the Tenant has failed to establish any reasonable basis for refusing to retrieve or accept delivery of the remediated Goods. The preponderance of evidence indicates that, apart from *Cardboard Box 2*, the remaining Goods (which are not to be discarded) have been successfully remediated of excessive levels of mould ecology and were safe to be returned to the Tenant.

236. As indicated above, the Landlord claims storage costs from 31 October 2013 onwards. I find that, apart from the *Cardboard Box 2*, the remediated Goods were available to be collected prior to that date. The Tenant chose not to collect the Goods, even though no testing was conducted by it to confirm that the remediated Goods were unsafe. In those circumstances, I find that the cost of storing the remediated Goods is a cost that should not have been borne by the Landlord. I find that those costs are to be counter-balanced against the compensation that is otherwise payable to the Tenant.

237. Accordingly, I find that the Tenant is liable to pay the Landlord $9,315 in respect of the Landlord's counterclaim.[75]

CONCLUSION

Compensation

238. Having regard to my findings set out above, I determine that the Landlord must pay the Tenant $68,082,[76] on the Tenant's claim and that the Tenant must pay the Landlord $9,315, on the Landlord's counterclaim. These amounts are calculated as follows:

Claims	Landlord to pay	Tenant to pay
Loss of profits	$50,162	
Loss of opportunity	0	
Diminished good value	$11,944	
Discarded Goods	$1,688	

[75] Rounded to nearest dollar.
[76] Rounded to nearest dollar.

Converted fixtures	$4,288	
Storage costs	0	$9,315
TOTALS	**$68,082**	**$9,315**

Interest

239. The Tenant also claims interest on the amount of compensation found in its favour. There were no submissions made by the Landlord answering or responding to that aspect of the Tenant's claim, despite it being raised by the Tenant in its closing submissions.

240. In the Earlier Proceeding, Judge Lacava found:

> 337. As to damages, the applicant is entitled to orders for compensation in accordance with the reasons stated above, together with interest, calculated under s 2 of the *Penalty and Interest Rates Act 1983*. From February 2010 to the date that interest rate has been fixed at 10.5% per annum. The calculation will be made from the date the application was commenced in the tribunal.

241. It is arguable that the finding made in the Earlier Proceeding; that the Tenant is entitled to interest, is binding on the Tribunal in this remitted hearing. However, without hearing argument on this point, I form no concluded view as to whether I am bound to order interest or not. Nevertheless, even if that were not the case, I consider that it is appropriate to order interest in this remitted proceeding under s 91(2) of the RLA, given the nature of the claim and the fact that the Tenant has been deprived of income for some period of time.

242. However, there are difficulties in calculating interest in the same way as in the Earlier Proceeding – i.e., from the date the proceeding commenced. This is because part of the Tenant's claim relates to a period prior to the commencement of the 2014 Hearing on 30 April 2012 (loss of profit from 1 January 2012 to 30 April 2012), while the remaining aspects of the claim relate to losses incurred after the proceeding had commenced and for the most part, up to the date that the lease came to an end on 9 April 2013. Regrettably, neither party has addressed me as to how interest is to be calculated, or over what period.

243. In my view, it would be fair that interest be calculated on the judgment sum from 9 April 2013, being the date that the lease came to an end. Although, that calculation departs from the methodology adopted by Judge Lacava in the Earlier Proceeding, it represents a balance that I consider fair in the circumstances.

244. Accordingly, I find that the Tenant is entitled to orders for compensation in accordance with the Reasons stated above, together with interest amounting to

$28,904,[77] calculated under s 2 of the *Penalty and Interest Rates Act 1983* from 9 April 2013 to date, calculated as follows:

Start Date	End Date	Days	Rate	Amount Per Day	Total
09/Apr/2013	06/Oct/2013	181	10.5%	$19.5852	$3,544.93
07/Oct/2013	02/Feb/2014	119	10%	$18.6526	$2,219.66
03/Feb/2014	10/Aug/2014	189	11.5%	$21.4505	$4,054.14
11/Aug/2014	31/May/2015	294	10.5%	$19.5852	$5,758.06
01/Jun/2015	31/Jan/2017	611	9.5%	$17.6910	$10,809.18
01/Feb/2017	15/Jun/2017	135	10%	$18.6526	$25,18.45
Total		**1529**			**$28,904.07**

245. Finally, I will order that the parties have liberty to apply on the question of costs. In relation to any application for costs, I remind the parties of s 92 of the RLA.

SENIOR MEMBER E. RIEGLER

[77] Rounded to nearest dollar.