VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R243/2013

BUILDING AND PROPERTY LIST

CATCHWORDS

Applicant purchased student accommodation business, and obtained lease of premises, from Respondent. Finding that agreement was for transfer of business, not merely a licence to operate. Applicability of. Finding that the lease was a *Retail Premises Lease* governed by the *Retail Leases* Act. Subsequent sale of the business by the Applicant to a third party purchaser. Finding that Respondent's conduct in demanding and receiving payment from the Applicant as the condition to the Respondent granting a lease of premises to a third party purchaser of the business was unconscionable. Consideration of s23 Retail Leases Act.

APPLICANT	Ms Jing Jing Wang
RESPONDENT	Orion Holdings Australia Pty Ltd (ACN: 102 618 780)
WHERE HELD	Melbourne
BEFORE	Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	23, 24 and 28 April 2014. Final written submissions received 9 May 2014.
DATE OF ORDER	4 July 2014
CITATION	Wang v Orion Holdings Australia Pty Ltd (Building and Property) [2014] VCAT 812

ORDERS

1. The Respondent must pay the Applicant $124,202.75.
2. The Respondent's Counterclaim is dismissed.
3. Costs reserved. I direct the Principal Registrar to list any application for costs before Member M Farrelly.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Ms L. Kinda of Counsel
For the Respondent	Mr J. McKay of Counsel

REASONS

INTRODUCTION

1 In around 2005 the Respondent, Orion Holdings Australia Pty Ltd ("Orion") began operating a student accommodation business at premises it owned in Mont Albert, Victoria ("the premises"). In November 2007, Orion and the Applicant, Ms Wang, entered an agreement under which the Applicant purchased, or purchased an interest in, Orion's student accommodation business and was granted a lease of the premises. The Applicant says that, under the agreement, the student accommodation business was wholly transferred to her. Orion says that the business was not transferred and the Applicant was merely granted permission [a licence] to operate the business and to receive the profits of the business, and be responsible for the liabilities of the business, for the period she operated the business, however long that might be.

2 In 2010, the Applicant decided to sell the business and she found a willing purchaser in Ms Sun. Under the terms of the sale contract, the Applicant was required to ensure that Ms Sun could operate the business at the premises.

3 The Applicant says that Orion demanded, as a condition to granting a lease of the premises to Ms Sun, payment from the Applicant of a sum equal to 40% of the sale price of the business to Ms Sun. The Applicant says that, in order to effect the sale of her business to Ms Sun, she had no choice but to meet Orion's demand, and in August 2010 the Applicant paid Orion $96,000 which the Applicant represented to Orion as being 40% of the sale price of the business to Ms Sun. On receipt of the payment, Orion executed a lease document granting a lease of the premises to Ms Sun. The Applicant says that Orion's conduct in demanding and receiving the payment was unconscionable and a breach of the *Retail Leases Act* 2003 ("the Act").

4 Orion says that, under the terms of the 2007 agreement with the Applicant, the transfer of the business to a third party was subject to Orion's approval. For this reason, and because Orion says that the business was never transferred to the Applicant, Orion says it was entitled to negotiate a price for its approval of the transfer of the business to Ms Sun. Orion says also that the lease of the premises to the Applicant was not a *retail premises* lease and, accordingly, the Act does not apply.

5 The parties are also in dispute as to whether Orion is entitled to retain, as it has, the security deposit bond paid by the Applicant at the commencement of her lease of the premises.

6 In this proceeding, the Applicant seeks a refund of the $96,000 payment and the security bond, together with interest. The Applicant also seeks $20,000 damages in respect of alleged miscellaneous breaches of the 2007 agreement by Orion.

7 By way of Counterclaim, Orion claims payment in the sum of $66,000 which it says is the shortfall in the payment Orion ought to have received from the Applicant pursuant to the agreement that Orion receive 40% of the sale price of the business. Orion also claims $31,834 in respect of rent allegedly unpaid and owing by the Applicant.

8 For the reasons set out below, I find that:

(a) Under the 2007 agreement, Orion sold its student accommodation business to the Applicant and granted a lease of the premises to the Applicant;

(b) The lease was a *retail premises* lease governed by the Act;

(c) In demanding and receiving the $96,000 payment from the Applicant, Orion acted unconscionably, and the Applicant is entitled to damages;

(d) Orion has no legal ground for withholding the security bond;

(e) Orion's claim for unpaid rent fails;

(f) The Applicant's claim in respect of other alleged miscellaneous breaches by Orion fails.

HEARING

9 The matter was heard over three days on 23, 24 and 28 April 2014. Ms Kinda of Counsel represented the Applicant and Mr McKay of Counsel represented the Respondent.

10 For the Applicant, Ms Wang gave evidence.

11 For the Respondent, Mr Li, the secretary of the Respondent, gave evidence with the assistance of an interpreter. His wife Mrs Liu, a director of the Respondent, also gave evidence. Mr Shen, who had been a residential tenant at the premises from around June 2005 to December 2007, also gave evidence.

CHRONOLOGY AND EVIDENCE

12 In around 2003, Orion purchased the premises comprising two adjacent buildings located in Whitehorse Road, Mont Albert. In around December 2003, Whitehorse City Council provided certification, as required under Part XII of the *Health Act* 1958, allowing Orion to operate the business of residential accommodation at the premises ("the accommodation business permit"). Some time within the next year or so, Orion began operating its student accommodation business at the premises under the unregistered trading name "*Ruian Student Accommodation*".

13 In his witness statement filed in this proceeding, Mr Li describes the premises and the salient features of the business and the premises as follows:

(a) 42 rooms were available for rent;

(b) The west wing of the premises consisted of 18 rooms with showers;

(c) The east wing of the premises consisted of 24 rooms with no showers;

(d) The rooms were not self contained in that each room did not have its own separate kitchen or bathroom;

(e) The premises contained 3 common cooking areas;

(f) The premises contained communal laundry facilities;

(g) The rooms were mainly let to university students and occasionally to visiting academics;

(h) Approximately 85-90% of [room] leases were for 6 months, with the remainder of the leases being either for over 12 months or for less than 6 months;

(i) Only basic furnishings were provided for each room, such as a bed, desk, chair and wardrobe;

(j) Most other items and furnishings necessary for everyday living were brought by tenants including but not limited to blankets, sheets and bathroom accessories;

(k) Orion targeted advertising at university students through Chinese newspapers;

(l) No packaged food was sold on the premises;

(m) No alcohol was sold on the premises;

(n) No prepared food was to be served on the premises;

(o) There was no separate charge for the use of facilities such as the classroom, pool table and table tennis table;

(p) No cleaning services or housekeeping services were provided except that Orion was responsible for cleaning the common areas;

(q) The tenants were responsible for their own telephone line;

(r) The tenants were initially responsible for their own internet access but Orion later facilitated internet access via a wireless router for a nominal fee;

(s) A pay phone was available to tenants for use at their own cost.

14 In mid 2007 the Applicant, who was intending to commence a student accommodation business, began looking for suitable properties. The Applicant’s uncle had recently commenced operating a college for overseas Chinese students and the Applicant was confident that she could source students for her intended business through her uncle’s business. The Applicant, who had recently completed her commerce degree at Deakin University, intended to run the business with the assistance of her parents.

15 The Applicant and her parents made enquiries with Mr Li as to the availability of Orion's premises and the taking over of Orion's student accommodation business. The Applicant inspected Orion's premises on a number of occasions. In her witness statement filed in this proceeding, the Applicant describes the condition of the premises:

> I found that the building was poorly maintained and in need of many necessary repairs such as painting, replacement of much of the furniture which looked like it had been retrieved from a hard rubbish collection. In particular, I noticed the following works were required to be attended to:
>
> (a) Paint was peeling off in the main areas, corridors, bathrooms and accommodation requiring repainting;
>
> (b) Some walls were mouldy requiring treatment before repainting;
>
> (c) Tiles in the bathrooms were damaged and/or falling off requiring retiling;
>
> (d) Toilets were damaged and unfit for use and required replacement;
>
> (e) Carpet was badly worn and damaged and in many areas posed a safety risk requiring re-carpeting;
>
> (f) Bed mattresses and bed frames and other furniture were either damaged or unclean and requiring replacement;
>
> (g) Garbage proliferated around the property, requiring substantial cleaning;
>
> (h) Garden was overgrown and required branches to be cut back and disposed of;
>
> (i) The air conditioning system did not work, some of the heating and the hot water units as well as the heating system was not working properly and required repair.

16 Orion disputes that the premises were unclean and/or in need of repairs and refurbishment. In any event, the Applicant considered the premises as suitable for her intended student accommodation business. With the assistance of her mother, the Applicant entered into negotiations with Mr Li for a lease of the premises and the acquisition of the student accommodation business which Orion had been operating at the premises. Mr Li says that the negotiations were conducted primarily between himself and the Applicant's mother, and that the Applicant was not always present during those negotiations. The Applicant agrees that her mother took part in the negotiations. I accept the Applicant's evidence that her mother is unavailable to give evidence as her parents are currently in China. There is no dispute that an agreement was reached and that the terms of that agreement were confirmed in a document typed up, in Chinese, by the Applicant. Mr Li, on behalf of Orion, and the Applicant each signed the document on 2 November 2007 ("the 2007 agreement").

17 The Applicant and Orion have each produced an English translation of the 2007 agreement prepared by a translator accredited under the National Accreditation Authority for Translators and Interpreters. Although the translations vary in the language employed, in the main the variations are minor. The translation produced by the Respondent is as follows:

"PROPERTY LEASE AGREEMENT

Between

Party A: *Orion Holdings Australia Pty Ltd*

And

Party B: *Jess Wang* (Jinjin WANG)

Article 1. Party B takes a lease of the property at 692 – 694 Whitehorse Road, Mont Albert VIC Australia (Ruian Student Accommodation) for the purpose of operating a student accommodation business.

Article 2. The rent is one hundred and eighty-five thousand Australian dollars *plus GST* (A185,000.00), and this shall be paid monthly at $15,416.00 (the 10th of each month is the pay day). The rent shall increase annually in line with CPI.

Article 3. The lease is three years, starting from 10 November 2007 to 9 November 2010. If Party A remains the owner of the property when the lease has concluded, the lease shall be renewed for 3+3 years.

Article 4. Party B shall be responsible for *Outgoing* (costs associated with the operation of the student accommodation), including gas, electricity, water, telephone and *Council Rate*. Party A is responsible for fees and charges that should be borne by the property owner such as land tax.

Article 5. Party B shall pay Party A a bond that is equal to the monthly rent: $15,416.00. The bond is non-refundable if Party B breaches the agreement. If the property sustains man-made damage, the amount for repairs shall be deducted from the bond. If none of the above occurs after the lease has concluded, the bond shall be refunded in full. Party A shall refund 20,000 Australian dollars if Party A breaches the agreement.

Article 6. Property insurance including building insurance shall be borne by Party A; Public liability shall be borne by Party B.

Article 7. If the smoke and fire alarm system of the property needs to be linked to relevant authorities and if a sprinkler system needs to be installed, Party A and Party B shall bear 50% each for costs less than 100,000 dollars, and Party A shall be responsible for any costs that are above the 100,000 dollar mark.

Article 8. Party A must guarantee that except air-conditioning and heating, all current facilities including *student accommodation permit*

(including kitchen) must be in working order when Party B takes over the business.

Article 9. Party A shall be responsible for all structural issues of the property (e.g. wall cracking; water leaking); however, if damage is man-made during Party B's operation, e.g. failure of doors or windows, etc, Party B shall be responsible for repairs. Repairs of operational facilities shall be Party B's responsibility.

Article 10. Party A agrees to assign the business, Ruian Student Accommodation, including the right of use of all current operational facilities, to Party B. Party B may assign such business to a third party subject to Party A's approval.

Article 11. Party A is entitled to credit claims and shall bear liabilities associated with the property and the business thereof prior to the execution of the lease agreement and assignment of the business. Party B is entitled to credit claims and shall be responsible for liabilities and legal disputes that arise during the course of operation by Party B.

Article 12. Party A retains the right of use at no cost whatsoever of the room under the unit in the East Wing, next to the garage.

Article 13. This agreement takes effect upon execution by both parties.

Article 14. Matters not mentioned herein shall be resolved through amicable negotiation between Party A and Party B.

Party A: Shujun Li (Orion Holdings Australia): *Shujun Li [signature]*

Date: 2 November 2007

Party B: Jess Wang (Jinjin WANG): *Jinjin WANG [signature]*

Date: 2 November 2007

18 The clauses in the 2007 agreement most relevant to the disputes in this proceeding are the above "articles" 5, 10 and 11. Those clauses, as translated in the translation document obtained by the Applicant, are as follows:

(V) Party B shall pay one month's rent of $15,416 as the security bond. This bond will not be refundable should Party B is in breach of contract. The costs used for repairing damages caused by personal act to the (landlord's) property shall be deducted from the bond. At the end of the lease, the bond shall be refunded in full if there is no aforesaid event. If Party A is in breach of contract, it shall make a refund to Party B in the amount of $20,000 Australian dollars;

(X) Party A agrees to *transfer* the Ruian Student Accommodation Business to Party B, including the right to use all the operating facilities. Party B may *transfer* the business to a third party, but it must be checked and approved by Party A.

(XI) Party A shall be liable for all the debts and liabilities of the premises and the business incurred before the commencement of the lease and before the *transfer* of the business. Party B shall be liable for all claims, debts and legal disputes arising out of her operating the business at the premises".

[emphasis added]

19 For the purpose of the hearing, the Tribunal provided a Mandarin interpreter. At the commencement of the hearing, I asked the interpreter to translate the 2007 agreement. His translation of Clauses 10 and 11 are:

10. Party A agrees to *transfer* the Ruian student business to Party B including the right to use the current business facilities and Party B can *transfer* the business to a third party but has to have the agreement and approval from Party A.

11 All the credit and debt before the business *transfer* and the rental contract is valid shall be the responsibility of Party A and legal disputes while Party B is running the business shall be the responsibility of Party B.

[emphasis added]

20 Although it is not expressly addressed in the 2007 agreement document, there is no dispute that as part of the agreement reached, the Applicant paid to Orion, in addition to a security bond equal to one month's rent including GST, a sum of $20,000 ("the $20,000 payment"). The Applicant says that the $20,000 payment was the negotiated purchase price for the transfer of the Orion student accommodation business from Orion to the Applicant. The Applicant says that, at the time of the transfer, there were approximately 20 students renting rooms in the premises.

21 Mr Li says that Orion did not intend to sell or transfer the accommodation business to the Applicant, but rather that, in consideration for the $20,000 payment, the Applicant obtained an entitlement to operate the Orion accommodation business and to collect all the profits, and be responsible for all the liabilities, of the business for the period the Applicant operated the business, however long that might be. Although he does not use the word "licence", Mr Li's evidence is to the effect that, for a $20,000 fee, Orion granted the Applicant a license to operate the existing student accommodation business owned by Orion.

22 Mr Li says that there is no simple English translation for the Chinese word or characters in clause 10 of the 2007 agreement which have been translated as the word "*transfer*" in the translation document obtained by the Applicant, and which have been translated as the word "*assign*" in the translation document obtained by Orion. Mr Li says that the relevant characters in the Chinese language have a dual meaning of "*change*" and "*permit or allow*". I do not accept his evidence in this regard. I prefer the translation provided by the interpreter at the hearing, namely that the relevant chinese characters mean *"transfer"*. The interpreter's translation is

confirmed in the 2006 edition of the Collins Chinese Dictionary which was produced at the hearing by the Applicant.

23 On all the evidence, I am satisfied that the word "*transfer*" where it appears in the clauses X and XI (10 AND 11) in the translation document obtained by the Applicant, is an accurate translation of the relevant terms in the 2007 agreement.

24 The Applicant says that, prior to signing the 2007 agreement, she told Mr Li and Mrs Liu of her intention to prepare and sell meals to student tenants at the premises. One of the kitchens at the premises is of commercial size and suitable for this purpose. In her witness statement, the Applicant says that Mr Li promised that, as part of the transfer of the business from Orion to the Applicant, Orion would also transfer a commercial kitchen permit held by Orion. However, when giving evidence, the Applicant changed her evidence to say that she "*thought*" that Orion held a commercial kitchen permit that would be transferred as part of the transfer of the business.

25 Mr Li and Mrs Liu agree that, prior to entering the 2007 agreement, the Applicant spoke to them of her intention to prepare and sell meals to student residents. In her witness statement Mrs Liu says that she told the Applicant that *"the kitchen is a commercial kitchen but it cannot be used to sell food to the tenants. In order to sell food to tenants, you have to obtain a special permit"*.

26 I accept Mrs Liu's evidence that Orion did not possess the requisite permit or registration to allow it to sell food at the premises and that Orion never sold food at the premises.

27 On 30 October 2007, just prior to signing the 2007 agreement, the Applicant registered the business name *"NGC Student Services Australia*" as the business name under which the Applicant intended to operate the student accommodation business at the premises.

28 The Applicant says that, immediately after taking possession of the premises in November 2007, she and her parents cleaned the premises and carried out considerable refurbishment works including repainting and the purchase and installation of new furniture, bedding, carpets, tiles, tables, chairs, rugs, sofas, a table tennis table, a pool table and security cameras. The Applicant says the total cost of the refurbishment works was approximately $160,000. While I accept that the Applicant carried out some refurbishment works, I am not satisfied that the cost of such works was around $160,000. The Applicant produced no financial records, or sufficient documentation, to verify the nature and cost of the alleged refurbishment works.

29 On 30 January 2008 the Whitehorse City Council served on Orion a notice pursuant to s44 of the *Health Act* 1958 requiring improvement of the sanitary and hygienic conditions of kitchens and toilets at the premises. The Applicant says that she attended to works, at her cost, to satisfy the Council.

30 On 14 May 2008, the Whitehorse City Council served on Orion an emergency order made under s102 of the *Building Act* 1993 requiring the installation of a residential fire sprinkler and alarm system. The required works were carried out, and it is not disputed that, pursuant to clause 7 of the 2007 agreement, the Applicant and Orion each bore 50% of the cost, approximately $25,000 each.

31 In November 2008, the monthly rental for the premises was, pursuant to clause 2 in the 2007 agreement, increased in accordance with the annual Consumer Price Index to a sum of $16,110 (plus GST) per month.

32 In around November 2009, at which time the rent was again due to be increased in accordance with the Consumer Price Index, the Applicant and Orion agreed to reduce the rent to the sum paid during the first year of the lease, namely $15,416 (plus GST) per month ("the 2009 rent reduction agreement"). Mr Li, Mrs Liu and the Applicant each gave evidence confirming the agreement. The Applicant also produced rent invoices from Orion to the Applicant which confirm the rent reduction. The Applicant says that Orion agreed to the rent reduction in consideration for the considerable expenditure incurred by the Applicant on repairs to the premises. Mr Li and Mrs Liu say that the rent was reduced in order to assist the Applicant who was experiencing financial pressure. Whatever the reason for the 2009 rent reduction agreement, I am satisfied that the agreement was reached in around November 2009 and, pursuant to that agreement, the rent payable was reduced to $15,416 (plus GST) per month.

33 In December 2009, the Applicant applied to the Whitehorse City Council, and was granted, registration of the premises under the *Food Act* 1984 which allowed the Applicant to prepare food for sale to the residential tenants at the premises. I accept the Applicant's evidence that food was subsequently prepared and sold to students at the premises.

34 In around February 2010, the Applicant commenced advertising, in a local Chinese newspaper, the availability of academic tutoring services at the premises. The Applicant confirms that the tutoring services were provided, not by the Applicant or any employee of the Applicant, but by an independent tutor who invoiced students directly for the services provided.

35 In March 2010, the Applicant decided to sell the business. I accept the Applicant's evidence that her decision was, in part, motivated by the fact that her elderly parents, who had been very much involved in the day to day running of the business, wished to return to China to visit relatives, and the Applicant would have found it difficult to continue running the business without her parents assistance. The Applicant engaged a broker to assist in locating potential purchasers. The broker found an interested purchaser, Ms Sun.

36 In April 2010, the Applicant's broker provided to Ms Sun a "vendor statement" pursuant to s52 of the *Estate Agents Act* 1980. The Applicant is the named "vendor" in the statement and the business proposed to be sold is

identified as the *“student accommodation services”* operating under the name *“NGC Student Services Australia*”.

37 In around July 2010, the Applicant and Ms Sun reached agreement on a purchase price for the business, $405,000.

38 The Applicant says she approached Mr Li to discuss a transfer of the lease to Ms Sun. She says that Mr Li told her that Orion would not transfer the lease, or grant a new lease, to Ms Sun unless the Applicant agreed to pay Orion a portion of the sale price of the business. The Applicant says that she told Mr Li that the business was not his or Orion’s to sell and that he had no right to demand a share of the sale price. The Applicant says that Mr Li made it very clear to her that Orion would not agree to transfer the lease, or grant a new lease, of the premises to Ms Sun unless the Applicant paid Orion an agreed percentage of the sale price of the business. The Applicant says that she had no option, if she wished to proceed with the sale, but to meet Mr Li’s demand. She says that Mr Li initially sought 50% of the business sale price, but after further negotiation he agreed to accept 40% of the sale price.

39 Mr Li says that the Applicant’s parents approached him to seek his consent to the sale of the business to Ms Sun and that he told them that he would be willing to allow the sale on the condition that the revenue from the sale would be divided equally between Orion and the Applicant. He says that, as the business was owned by Orion, but having regard to the fact that the Applicant had contributed to the growth of the business, he considered a 50/50 split of the sale proceeds to be fair. He says that, after the Applicant’s parents subsequently pleaded for a more favourable division of the proceeds of the sale, he offered a 60/40 split, with Orion taking 40% of the business sale price. Mr Li says that the Applicant and her parents agreed to this proposal.

40 On 20 July 2010, the Applicant, as vendor, and Ms Sun, as purchaser, signed a contract for the sale of the business identified in the contract as *Student Accommodation Renting Service* operating under the business name *NGC Student Services Australia*. The contract identifies a sale price of $300,000. The Applicant confirms that the “real” sale price agreed to, and paid by Ms Sun, was $405,000. The Applicant says that, in negotiating the real sale price, Ms Sun also agreed to insert the lower price in the sale contract documentation. Ms Sun did not give evidence at the hearing, however Orion produced at the hearing, without objection from the Applicant, a statutory declaration of Ms Sun dated 25 June 2013 which confirms that, although the sale contract identifies a sale price for the business of $300,000, the “*real*” sale price was $405,000.

41 The Applicant concedes that her purpose in understating the “real” sale price in the sale contract documentation was to reduce the payment (40% of the sale price) to be paid to Orion.

42 On 5 August 2010, the Applicant made payments totalling $96,000 to Orion and "Grandland Australia Pty Ltd" ("the $96,000 payment"). Grandland Australia Pty Ltd is an entity associated with Orion and there is no dispute that Orion directed the Applicant to make the $96,000 payment by way of a $50,000 payment to Grandland Australia Pty Ltd and a $46,000 payment to Orion.

43 $96,000 does not equate to 40% of a sale price of $300,000 or $405,000. In her witness statement, the Applicant says that *"after numerous hard and painful negotiations with Mr Li, I persuaded Mr Li to accept payment to $96,000…"*. At the hearing, however, the Applicant gave evidence that $96,000 represents 40% of the *net* proceeds of the sale price nominated in the contract ($300,000) after allowing $60,000 for expenses associated with the sale including her broker's fee.

44 The Applicant produced no documentation to confirm the broker's fee and other expenses associated with the sale, and I doubt that such expenses totalled $60,000.

45 At the time of making the $96,000 payment, the Applicant sought and obtained from Mr Li and Mrs Liu written acknowledgement of receipt of the payment. The receipt acknowledgement, which was prepared by the Applicant, is signed by Mr Li and Mrs Liu and dated 5 August 2010. An English translation of the document, produced at the hearing by the Applicant without objection from Orion, reads as follows:

> This is to acknowledge the receipt of $96,000 from Jin Jin Wang as a condition for giving consent to Jin Jin Wang for selling the student accommodation business at 692-694 Whitehorse Road, Melbourne and for signing a new lease agreement with the buyer
>
> Landlord: Aiyun Liu, Shujun Li
>
> 05/08/2010

46 The Applicant says that, at the time of the $96,000 payment, it was her intention to take future action to recover the payment which she believed Orion, through Mr Li, had wrongly extracted from her. She says she sought and obtained the receipt acknowledgment as evidence that the payment was made.

47 On the same day that the $96,000 payment was made, 5 August 2010, Orion executed a new lease document granting a lease of the premises to Ms Sun for a period of 3 years at an annual rental of $185,000 plus GST, with two further optional terms, each of three years.

48 Mr Li says that, approximately 1 month after the $96,000 payment was made, he discovered, through an unnamed source, that the "real" sale contract price was $405,000. He says he then spoke to Ms Sun who confirmed the real sale price. Orion now claims an entitlement to be paid a further $66,000 being the difference between the $96,000 payment and the

sum which Orion says it ought to have been paid, $162,000, being 40% of the "real" sale contract price.

49 If, as Mr Li claims, the student accommodation business sold to Ms Sun was a business owned by Orion and not the Applicant, why is it that the sale contract documentation identifies the Applicant, and not Orion, as the "vendor"? I asked Mr Li for his explanation but he was unable to provide a satisfactory explanation. He simply repeated his evidence that Orion's student accommodation business was not sold or transferred to the Applicant and that, if the business was to be sold, Orion was entitled to receive a proportion of the sale proceeds.

50 The Applicant says that Orion has wrongfully refused to return the security deposit bond, $16,958.00 (a sum equal to one month's rent including GST), paid by the Applicant at the commencement of her lease of the premises. Mr Li agrees that Orion has not returned the security bond to the Applicant. He says there are a number of reasons why Orion is entitled to retain the payment.

51 First, Mr Li says that shortly after the completion of the sale of the business to Ms Sun, Orion received a Whitehorse City Council invoice for rubbish bin rates in the sum of $1,600. He says that the Applicant was obliged to pay these rates pursuant to her obligation under clause 4 in the 2007 agreement which provides that the Applicant is to pay all outgoings, including Council rates. As Mr Li did not produce the Council rates notice or any other documentation to support Orion's claim, I am not satisfied that the Applicant has failed to meet its obligation in respect of Council rates.

52 Next, Mr Li says that at the time the Applicant vacated the premises, he believed that further "outgoings" expenses for which the Applicant was responsible under the 2007 agreement *might* yet come to light. He now confirms, however, that no such further unpaid "outgoings" arose.

53 Next, Mr Li says that following the Applicant's departure from the premises, the Respondent incurred $6,000 as the cost to repair a hot water service and the alarm system, and that Orion is entitled, under the 2007 agreement, to meet such repair expense from the deposit bond. I do not accept Mr Li's evidence. The 2007 agreement provides:

– *The costs used for repairing damages caused by personal act to the (landlord's) property shall be deducted from the bond,* [clause 5 in the translation document produced by the Applicant], or

– *If the property sustains man-made damage, the amount for repairs shall be deducted from the bond* [article 5 in the translation produced by the Orion]

54 As Orion has produced no documentation to verify the nature of the alleged damage or repairs or the cost of the alleged repairs, I am not satisfied that the Applicant bears any responsibility for the alleged repair costs.

55 Finally, Mr Li says that the security bond was withheld after he discovered that the Applicant had not paid to Orion 40% of the "real" sale price of the

business to Ms Sun. Although he does not say so, and although it is not pleaded as such, Orion presumably retains the security deposit on account as part of the money it now says it is owed by the Applicant. For reasons discussed later, I do not accept that the Applicant owes any money to Orion.

56 Following the failure of the parties to resolve their disputes in mediation before the Small Business Commissioner in around July 2013, the Applicant commenced this proceeding by Application filed on 12 September 2013.

57 In summary, the Applicant is claiming:

(a) Repayment of the $96,000 payment;

(b) Repayment of the security deposit bond, $16,958;

(c) Interest on the above sums;

(d) $20,000 as damages payable pursuant to the provision in clause 5 of the 2007 agreement which provides that Orion agrees to refund to the Applicant $20,000 if Orion breaches the 2007 agreement. The Applicant alleges that Orion committed a number of breaches.

58 By Counterclaim, Orion claims from the Applicant:

(a) $66,000 being the shortfall in the payment Orion says it ought to have received pursuant to the agreement that the Applicant pay Orion 40% of the proceeds of the sale of the business to Ms Sun;

(b) Unpaid rent in the sum of $31,834 made up of $18,525 allegedly not paid for the month of January 2010, with the balance of unpaid rent being the difference between the rent paid by the Applicant after the the 2009 rent reduction agreement, and the rent that would have been payable for the same period but for the 2009 rent reduction agreement. Orion says that because the Applicant deceived Orion as to the "real" sale price of the business to Ms Sun, the Applicant is, retrospectively, not entitled to the reduced rent benefit she obtained pursuant to the 2009 rent reduction agreement.

(c) Interest on the above sums.

TRANSFER AND SUBSEQUENT SALE OF THE BUSINESS

59 Orion submits that it did not transfer ownership of its student accommodation business to the Applicant under the 2007 agreement and that this is borne out by the requirement in clause 10 of the 2007 agreement that any subsequent transfer of the business to a third party would require Orion's "approval". For a number of reasons, I do not accept that submission.

60 First, as noted above in these Reasons, I am satisfied that the terminology in the 2007 agreement provides for the "*transfer*" of the business to the Applicant, not the mere granting of permission to operate the business.

61 Next, I am satisfied that the $20,000 payment constitutes good consideration for the sale of the business to the Applicant.

62 Next, as noted earlier in these reasons, Orion has no satisfactory explanation as to why the Applicant, and not Orion, is the named vendor in the contract of sale of the business to Ms Sun.

63 The language in clause 10 of the 2007 agreement raises an inconsistency. It confirms the *transfer* of the student accommodation business from Orion to the Applicant. It then provides that any subsequent transfer of the business *by the Applicant* to a third party is subject to Orion's approval.

64 In *Sea Road Logistics v Patrick's Stevedores* [2014] VSC 170, Almond J commented on the principles of construction of commercial agreements:

> The relevant principles of construction are well established. The meaning of commercial documents is determined objectively. The Court must decide what a reasonable person in the position of the parties would have understood the terms to mean. This normally requires consideration of the surrounding circumstances and the commercial purpose of the contract. The contract is to be construed so as to give it a commercially sensible construction …
>
> In discerning the parties' intention, the court must have regard to the contract as a whole and, if possible, construe the words of every clause "so as to render them all harmonious" and give the various components of an agreement a consistent or congruent operation. The court may supply, omit or correct words where it is clearly necessary to avoid absurdity or inconsistency.
>
> Where the language in a contract is reasonably open to two constructions, courts will prefer a construction which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious or the most grammatically accurate"[1]

65 I was also referred to the comments of Mason J *in Codefla Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, at page 352:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning.

66 In my view, the overall purpose of the 2007 agreement is to provide for the transfer of Orion's student accommodation business to the Applicant together with the grant of a lease of the premises to the Applicant, and clause 10 should be construed in that light. For this reason, I accept the Applicant's submission that clause 10 ought be construed as confirming the transfer of Orion's business to the Applicant, with reservation of Orion's right, as *landlord* of the premises, to approve any future transfer of the lease of the premises to a new tenant.

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1 At paragraphs 11-15

RETAIL PREMISES LEASE ?

67 The application of the Act depends on whether the lease granted to the Applicant under the 2007 agreement was a *retail premises* lease. The relevant part of section 4 of the Act provides:

> (1) In this Act, **"retail premises"** means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—
>
> (a) the sale or hire of goods by retail or the retail provision of services;

68 Orion submits that because the *use* of the premises was individual residential accommodation rooms for students, typically for periods of six months, the premises as a whole should be regarded as being *intended for use as a residence* and therefore falling outside the definition of *retail premises*.

69 Orion further submits that accommodation for students cannot be characterised as a use *wholly or predominantly for the sale or hire of goods by retail or the retail provision of services*.

70 Orion says the *use* of the premises is demonstrated by the evidence of Mr Shen, who resided at the premises from around June 2005 to June 2007. Mr Shen says that, as a resident at the premises, he had use of common facilities including lounge/leisure areas, bathroom and kitchen. He says the kitchen was supplied with all the necessary facilities and that he and other students cooked their own meals. He says also that the student residents themselves cleaned the common leisure areas, television and table tennis room.

71 In determining whether premises are *retail* premises within the meaning of section 4 of the Act, it is the use or intended use of the premises *under the terms of the lease* that is relevant. I accept Orion's submission that a lease, not attracting the operation of the Act at the time the lease was entered, cannot subsequently attract the operation of the Act by reason of the tenant changing its use of the premises to a use not contemplated under the terms of the lease.

72 The permitted or intended use of the premises is set out in clause 1 of the 2007 agreement which provides that the Applicant leases the premises:

(a) *for the purpose of operating a student accommodation business*; (as translated in the translation document obtained by Orion); or

(b) *for carrying on a student accommodation business* (as translated in the translation document obtained by the Applicant).

73 In *Stringer and Ors v Gilandes Pty Ltd* [2012] VSC 361, the Supreme Court found that a serviced apartment complex was governed by the Act because the hiring of rooms in the complex for a fee constituted the *retail provision*

of services. In his decision in that case, Croft J comments (at paragraphs 65 and 68):

> It is clear … that the Plaintiffs' Units were available for occupation by members of the public, ultimate consumers for fee or reward (being fees paid for accommodation). The Plaintiffs' Units were, in my view, used wholly or predominantly for the carrying on of a business involving the sale or hire of goods by retail or the retail provision of services. There was no evidence as to the precise nature of the goods and services provided by the Defendant apart from accommodation. I only note that the parties agreed that the Defendant operates the TBC business which provides for the Facilities. Motels, hotels or resort complexes, generally speaking, provide retail services for fee or reward, including the hiring out of the rooms. They may also sell food, liquor and other beverages, by retail, at any restaurant faculty provided. In any event, the hiring out of rooms or units for fee or reward to members of the public clearly constitutes the provision of retail services …
>
> I should, however, sound a note of caution in relation to this finding by emphasising that whether or not premises described as "serviced apartments" is to be characterised as "retail premises" depends upon the particular circumstances, including the nature of the premises, the manner of in which occupancy is provided and the nature of that occupancy. As I have said, the term or description, "serviced apartments", is not a term of art. Rather, it is a term or description of premises which connotes a range of possibilities. At one end of the range one would find premises managed and occupied in a manner indistinguishable from a motel or hotel and at the other end premises indistinguishable from long term residential accommodation, separately let but with the attribute of being serviced. In the former case it would be expected that the Acts would apply on the basis that the premises are "retail premises" and in the latter case they would not, any more than they would to any block of residential units. In between there are a range of possibilities each of which may have different consequences in terms of the application of the Acts.

74 In my view, there are a number of features of the business operated by the Applicant at the premises, falling within the contemplated use of *operating a student accommodation business*, which place the business, not at the "block of residential units" end of the spectrum, but at the retail premises end of the spectrum as described by Croft J above.

75 I accept the Applicant's evidence that she and her parents regularly provided advice and assistance on a range of daily issues to young Chinese students, often year 11 and 12 school students, who had little life experience outside of China. I accept the Applicant's evidence that the availability of such personal assistance was something the Applicant used in marketing her business to potential new clients and their parents.

76 As noted earlier, from around December 2009 onwards, the Applicant prepared and sold meals to students at the premises.

77 I accept the Applicant's evidence that from around February 2010 onwards, the Applicant advertised the availability of tutoring services (provided by an independent tutor who invoiced students directly) at the premises.

78 Mr Li says, in his witness statement, that eighty five to ninety percent of rooms were let for six months. He says also that the rooms were occasionally let to visiting academics. I accept the Applicant's evidence that, in the period she operated the business, rooms were sometimes let to people, such as visiting academics, for short periods of a week or two. In my view, the evidence of both is enough to distinguish the premises as something other than long term residential accommodation.

79 On all the evidence, I am satisfied that the Applicant's lease of the premises was a *retail premises* lease attracting the operation of the Act.

SECTION 23 OF THE ACT

80 The Applicant submits that each of the $20,000 payment and the $96,000 payment constitutes a *key-money* or a *goodwill* payment in contravention of section 23 of the Act. I do not accept the submission.

81 Section 23 of the Act provides:

> **23 Key-money and goodwill payments prohibited**
>
> (1) A landlord must not seek or accept the payment of—
>
> (a) key-money; or
>
> (b) any consideration for the goodwill of any business carried on at the retail premises.
>
> Penalty: 50 penalty units.
>
> (2) A provision of a retail premises lease is void to the extent that it requires the payment of key-money or consideration for goodwill or has that effect.
>
> (3) However, subsections (1) and (2) do not prevent a landlord from—
>
> (a) recovering from the tenant costs which the landlord reasonably incurred in investigating a proposed assignee of the lease or sub-tenant of the premises; or
>
> (b) recovering from the tenant costs which the landlord reasonably incurred in connection with—
>
> (i) an assignment of the lease or a sub-lease; and
>
> (ii) obtaining any necessary consents to the assignment or sub-lease; or
>
> (c) claiming goodwill from the tenant in relation to the sale of a business that the landlord operated from the retail premises immediately before its sale, if the lease was granted to the tenant in the course of the sale of the business; or
>
> (d) receiving payment of rent in advance; or
>
> (e) securing the performance of the tenant's obligations under the lease by requiring a bond, security deposit or

guarantee to be provided from the tenant or any other person (such as a requirement that the directors of a corporation guarantee performance of the corporation's lease obligations); or

(f) seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the landlord to the tenant in connection with the lease being granted; or

(g) seeking and accepting payment for the grant of a franchise in connection with the lease being granted.

(4) Any payment made, or the value of any benefit conferred, by the tenant and received by the landlord contrary to this section may be—

(a) recovered by the tenant from the landlord in a court of competent jurisdiction as a debt due; or

(b) otherwise recovered by the tenant from the landlord as determined under Part 10 (Dispute Resolution).

(5) In this section, ***landlord*** means—

(a) a landlord; or

(b) a person acting on behalf of a landlord or prospective landlord; or

(c) a prospective landlord.

82 *Key-money* is defined in section 3 of the Act:

> **"key-money"** means money that a tenant is to pay, or a benefit that a tenant is to give, that is—
>
> (a) by way of a premium, or something similar in nature to a premium, in that there is no real consideration or no true consideration given for the payment or benefit (for example, it is so disproportionate to the benefit that it cannot be true consideration); and
>
> (b) in consideration of—
>
> (i) a lease being granted or an agreement being made to grant a lease; or
>
> (ii) the variation of a lease; or (iii) the renewal of a lease or the granting of an option for the renewal of a lease; or
>
> (iv) consent being given to the assignment of a lease or to the sub-leasing of the premises to which a lease relates;

83 As set out above in these reasons, I find that the $20,000 payment constitutes valuable consideration for the transfer of Orion's student accommodation business to the Applicant. Although the payment falls within the meaning of s23(1)(b) of the Act, namely a payment in consideration for the goodwill of a business carried on at the premises, the payment also falls squarely within the exception allowed pursuant to s23(3)(c) of the Act. That is, there is no prohibition against a landlord claiming goodwill from a tenant in relation to the sale of a business that the landlord operated from the retail premises if the lease was granted to the

tenant in the course of the sale of the business. As set out above, I find that the 2007 agreement provided for the sale of Orion's student accommodation business together with a lease of the premises to the Applicant.

84 In my view the $96,000 payment cannot be characterised as *key-money* because the payment was not made by the incoming tenant, Ms Sun. Section 3 of the Act defines *tenant*:

> "Tenant" under a retail premises lease –
>
> (a) means the person who under the lease is entitled to occupy the premises; and
>
> (b) in Part 10, includes a former tenant (because of section 83).

85 Part 10 of the Act deals with "Dispute Resolution". Section 83, which falls within Part 10 of the Act, provides that *"in this Part … "tenant" includes a former tenant*".

86 In my view, the broader definition of *"tenant*" in section 83 is limited to the operation of Part 10 of the Act. For the purpose of section 23 of the Act, and the definition of *key-money* within section 3 of the Act, I consider the definition of *"tenant"* is limited to the first limb of the definition provided in section 3, namely *"the person who under the lease is entitled to occupy the premises"*.

87 Although the $96,000 payment might have been made in consideration for the landlord (Orion) granting a new lease, the payment was not made by the *tenant* (Ms Sun) entitled to occupy the premises under the lease to be granted and, as such, in my view the payment cannot constitute *"key-money"* as defined in the Act.

88 Nor do I consider the $96,000 payment to be a *"goodwill"* payment prohibited under section 23 of the Act.

89 Orion submits that, similar to the *key-money* prohibition, section 23(1)(b) ought be construed as applying only to a *goodwill* payment made by the incoming tenant, in this case Ms Sun. Orion submits that such a construction is implicit having regard to section 23(4) of the Act which sets out the relief available to *"the tenant*" in the event a landlord has contravened section 23. While I consider the submission has merit, I need not determine the issue as I am satisfied, in any event, that the $96,000 payment was not a payment attracting the operation of section 23(1)(b) because it was not a payment made in consideration for the goodwill of the business carried on at the premises. There was payment made in respect of the goodwill of the business carried on at the premises, but that payment was made by Ms Sun to the Applicant. In my view, the $96,000 payment made by the Applicant to Orion was a payment made for the singular purpose of obtaining, from Orion, a grant of a lease of the premises to Ms Sun.

UNCONSCIONABLE CONDUCT

90 The Applicant says that the conduct of Orion, making the grant of a lease to Ms Sun conditional on Orion receiving payment form the Applicant, constitutes unconscionable conduct. Orion says that, having regard to clause 10 in the 2007 agreement, there was nothing wrong or illegal in Orion negotiating a price for its approval of the transfer of the student accommodation business, a business which Orion claimed ownership of, to Ms Sun.

91 Section 77(1) of the Act provides:

> **77 Unconscionable conduct of a landlord**
>
> (1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

92 Section 77(2) lists a number of matters the Tribunal may have regard to for the purpose of determining whether a landlord has contravened section 77(1). Some of the matters listed are

> (a) the relative strengths of the bargaining positions of the landlord and tenant;
>
> (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant…
>
> (k) the extent to which the landlord acted in good faith;

93 Section 80(1) of the Act provides:

> A landlord or tenant, or former landlord or tenant, who suffers loss or damage because of unconscionable conduct of another person that contravenes section 77 or 78 may recover the amount of the loss or damage by lodging a claim with the Tribunal against the other person.

94 The following judicial comments illustrate the level of culpability or moral obloquy required to reach a finding of unconscionable conduct:

> Unconscionability is a well-established but narrow principle in equitable doctrine. It has been applied over the centuries with considerable restraint and in a manner which is consistent with the maintenance of the basic principles of freedom of contract. It is not a principle of what “fairness” or “justice” or “good conscience” requires in the particular circumstances of the case … Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was “fair” or “just”, it could transform commercial relationships in a manner which the Minister

> expressly stated was not the intention of the legislation. The principle of "unconscionability" would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute about a retail lease arises.[2]
>
> The term "unconscionable" is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience.[3]
>
> …there is no statutory definition of "unconscionability". But it appears that, to qualify, serious misconduct, something clearly unfair or unreasonable, must be demonstrated.[4]
>
> The word "unconscionable" is not a term of art. Its ordinary meaning given in the shorter Oxford dictionary is "showing no regard for conscience; inrreconcilable with what is right or reasonable".[5]
>
> "Unconscionable" is a strong word. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgement.[6]

95 As set out earlier in these Reasons, I find that clause10 in the 2007 agreement is to be construed as confirming the transfer of Orion's *business* to the Applicant, with reservation of Orion's right, as landlord of the premises, to approve any future transfer of the *lease* of the premises to a new tenant. The business sold to Ms Sun was not Orion's to sell. Orion was, however, entitled to consider the suitability of Ms Sun as a prospective new tenant of the premises. It could, on reasonable grounds, refuse to approve Ms Sun as a suitable tenant.

96 There is no evidence to suggest that Orion had any concerns as to the suitability of Ms Sun as a tenant of the premises.

97 There is no evidence to suggest that Orion would suffer loss or damage by granting a lease of the premises to Ms Sun.

98 I accept the Applicant's evidence that Mr Li made it clear to the Applicant that there would be no lease to Ms Sun unless the Applicant paid Orion a portion of the sale price of the business. I accept that, to sell her business to Ms Sun, the Applicant had no real choice but to meet Orion's demand. That the Applicant was able to negotiate Orion's price down from 50% to 40% of the sale price of the business to Ms Sun does not alter the essential nature of the transaction. In my view, it is no coincidence that Orion executed a lease of the premises to Ms Sun on the day the $96,000 payment was made.

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2 Spigelman CJ, Attorney General (NSW) v World Best Holdings Ltd (2005) 63 NSW LR 557 at 583

3 Gummow and Hayne JJ, Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18 at paragraph 42

4 Beaumont J Cameron v Qantas Airways Limited (1995) FCA 1304 at paragraph 211

5 Gray, French and Stone JJ Australian Competition and Consumer Commission v Samton Holdings Pty Ltd (2002) FCA 62 at 44

6 Vassie SM Transaero Pty Ltd v Goulthorpe (2009) VCAT 2146 at paragraph 95

99 In my view, Orion exploited its considerable power – the power to grant or refuse a lease of the premises to Ms Sun or any other prospective purchaser of the Applicant's business- to extract the $96,000 payment from the Applicant. Such conduct, in my view, meets the "*high level of moral obloquy"*, as referred to by Spigelman CJ, required to reach a finding of unconscionability.

100 On all the evidence, I am satisfied that Orion acted unconscionably in extracting the $96,000 payment from the Applicant, and the Applicant is entitled to damages. In addition to awarding damages in a sum equal to the sum of the payment, $96,000, I think it fair that damages in the nature of interest, that is interest on $96,000, also be awarded. Having regard to s91(2) of the Act and s60 of the *Supreme Court Act* 1986, I am satisfied it is fair to award interest from the date the Applicant commenced this proceeding, 12 September 2013, at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983. I calculate such interest to the date of these Reasons as $8,417.75

RETENTION OF SECURITY DEPOSIT BOND

101 Section 24 of the Act provides:

> **24 Security deposits**
>
> (1) A retail premises lease is taken to provide that—
>
> (a) money paid by the tenant to the landlord as a security deposit for the performance of the tenant's obligations under the lease must be held by the landlord on behalf of the tenant in an interest-bearing account; and
>
> (b) the landlord must account to the tenant for interest earned on the deposit but the landlord is entitled to keep the interest and deal with it as money paid by the tenant to the landlord to form part of the security deposit; and
>
> …
>
> (d) if the tenant performs all of the tenant's obligations under the lease the landlord must return the security deposit to the tenant as soon as practicable after the lease ends.

102 There is no dispute that Orion refused to return to the Applicant the security bond, $16,958, paid by the Applicant at the commencement of her lease of the premises. As noted earlier in these reason, Mr Li gives four reasons as to why Orion did not return the bond, and I have dismissed the first three reasons as providing no justification for Orion's retention of the bond. The fourth reason given by Mr Li is that the bond was withheld when he discovered that the Applicant had not paid to Orion 40% of the "real" sale price of the business. Having found that Orion acted unconscionably in

demanding the payment and that the payment should be returned to the Applicant, I do not accept that Orion is, or was ever, entitled to retain the security deposit bond.

103 There is no evidence as to whether the Respondent placed the deposit bond in an interest bearing account pursuant to s24(1)(a) of the Act. In all the circumstances, I think it fair to order that Orion return to the Applicant the bond payment, $16,958, together with interest from the date the payment was made. I accept the Applicant's evidence that the bond payment was made on the date the 2007 agreement was signed by the parties, 2 November 2007.

104 There being no evidence as to the rate of interest which might reasonably have been attained had the bond payment been placed into an interest bearing account, I will, doing the best I can, allow an interest rate of 2.5% as a reasonable rate that may have been obtained had the bond been deposited in a non fixed term deposit account with a bank. Accordingly, I calculate interest on the security bond, from the date it was paid to the date of these Reasons, as $2827.

APPLICANT'S FURTHER CLAIM FOR DAMAGES

105 The Applicant claims a further $20,000 as damages payable pursuant to the provision in clause 5 of the 2007 agreement. In the Applicant's closing written submissions, it appears that the claim may be the same claim, discussed earlier in these Reasons, that the $20,000 payment constituted a breach of section 23 of the Act. For the reasons set out earlier, that claim is rejected.

106 To the extent the Applicant is otherwise maintaining a claim for damages in reliance on clause 5 in the 2007 agreement, I find that such claim fails. The Applicant does not clearly articulate the alleged further breaches of the 2007 agreement by Orion, however the alleged breaches appear to be the following:

(a) Failure of Orion to obtain building insurance pursuant to clause 6 in the 2007 agreement. Orion produced at the hearing an Insurance policy and invoices confirming the existence of the required insurance for the period 23 February 2009 to 23 February 2011, and I accept Mr Li's evidence that Orion had obtained similar insurance for the relevant period prior to 23 February 2009. I find that Orion did not breach the agreement as alleged.

(b) Failure of Orion to transfer to the Applicant the *student accommodation permit* pursuant to clause 8 of the 2007 agreement. The permit is the accommodation business permit issued by Whitehorse City Council in 2003. It is true that the permit was not transferred to the Applicant. However, clause 8 in the 2007 agreement does not require the transfer of the permit. It simply provides that the permit must be *"in working order"* when the

Applicant takes over the business. There is no evidence that the permit was not functional or *in working order* when the Applicant took over the business.

(c) Failure by Orion to refund the security deposit bond in accordance with the provision contained in clause 5 in the 2007 agreement. As discussed above, I have found that Orion wrongfully failed to return the security deposit bond and, as a result, I will order the return of the bond payment with interest. I do not accept that the Applicant is entitled to further damages in respect of the same matter.

107 In her Points of Claim, filed in this proceeding, the Applicant alleges a number of other miscellaneous breaches of the Act on the part of Orion. It is my understanding, based on the opening submissions of the Applicant's Counsel and the closing written submissions of the Applicant, that the Applicant now pursues no other claims other than those dealt with above in these Reasons. In case I may have misunderstood the Applicant's submissions, I deal briefly with the other miscellaneous matters raised in the Applicant's Points of Claim.

108 The Applicant pleads that, in breach of sections 17, 46 and 47 of the Act, Orion failed to provide to the Applicant, before she entered the lease of the premises or at any time, a disclosure statement, an estimate of outgoings and a statement of outgoings. Even if Orion did commit any such breaches, I am not satisfied that the Applicant has suffered any resulting loss raising an entitlement to compensation damages.

109 Under section 17 of the Act, in the event a Landlord fails to comply with its obligations in respect of the provision of a disclosure statement, the tenant may within a certain period terminate the lease. There is no provision for payment of damages. Neither is there any evidence before me that the Applicant incurred any resulting loss or damage.

110 Under section 46 of the Act, a tenant who is not provided with an estimate of outgoings is not liable to contribute to outgoings, for which an estimate is required, until the estimate is provided. There is no evidence as to whether the Applicant was provided with an estimate of outgoings. Nor is there any evidence as to any loss or damage resulting from the alleged breach for which the Applicant should now be compensated.

111 As to Orion's alleged failure to provide a statement of outgoings in accordance with section 47 of the Act, there is no evidence as to any loss resulting from the alleged breach for which the Applicant should now be compensated.

112 The Applicant pleads that Orion, in breach of section 41 of the Act, demanded and was paid capital costs in respect of the premises. It appears that the capital costs referred to is the alleged $160,000 expended by the Applicant on refurbishment and cleaning costs shortly after she took possession of the premises, referred to earlier in these Reasons, and the

Applicant's 50% contribution ($25,000) to the cost of installing a fire sprinkler and alarm system, also referred to earlier in these Reasons.

113 Section 41(1) of the Act provides that a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of capital costs of the building, or any areas used in association with a building, in which the retail premises are located. Section 41(2), however, provides that section 41(1) does not operate to render void a provision in a retail premises lease requiring the tenant to undertake capital works at the tenant's own cost.

114 As noted above in these Reasons, it is not disputed that, pursuant to clause 7 of the 2007 agreement, the Applicant and Orion each bore 50% ($25,000 each) of the cost of installing the fire alarm/sprinkler system. In my view, there is no breach of section 41 of the Act because the 2007 agreement expressly provides that the Applicant will bear such cost.

115 As stated earlier in these Reasons, I accept that the Applicant carried out some refurbishment and cleaning works at the premises shortly after taking possession of the premises, but I do not accept that the cost of such refurbishments was $160,000. There being very little documentation produced by the Applicant, there is insufficient evidence to make a finding as to the exact nature and cost of the refurbishment works. Further, there is no provision in the 2007 agreement to the effect that the Applicant must bear the (alleged) refurbishment costs. For these reasons, I do not accept that Orion has breached section 41 of the Act.

116 Finally, the Applicant pleads that Orion *failed to repay, reimburse or credit the Applicant for monies paid by the Applicant for repairs to the Premises pursuant to section 52 of the Act (as more particularly described at paragraph 9 herein and above)*. Paragraph 9 in the Points of Claim refers to the sum of approximately $163,000 expended by the Applicant in cleaning, refurbishing, repairing and maintaining the premises, the $25,000 expense of the fire alarm/sprinkler system and an alleged *"$6,700 spent by the Applicant on building repairs to comply with Council's emergency orders*".

117 Section 52 of the Act provides that a landlord is responsible for maintaining, in a condition consistent with the condition of the premises when the retail lease is entered into, the structure, fittings, plant and equipment and appliances, fittings and fixtures relating to gas, electricity, water drainage and other services. However, the landlord is not responsible for maintaining those things when the repair arises out of misuse by the tenant or where the tenant is entitled or required to remove a thing at the end of the lease.

118 As noted above, the Applicant's contribution to the cost of installing the alarm/sprinkler system was expressly provided for in the 2007 agreement. I do not accept that such cost constitutes a repair or maintenance cost attracting the operation of section 52 of the Act.

119 As to the alleged expenditure of approximately $163,000 by the Applicant, as discussed above, there is insufficient evidence to make a finding as to the nature and cost of works carried out by the Applicant. Further, on the Applicant's own evidence that the cost was incurred shortly after taking possession of the premises, it is apparent, in my view, that the expenditure relates to improvements to the premises, and not costs incurred in maintaining the premises in the condition they were in when the lease was entered.

120 As to the alleged building repairs in the sum of $6,700 carried out to comply with the Council's emergency orders, there is insufficient evidence to find that Orion should bear the alleged cost pursuant to its obligations under section 52 of the Act. While there is evidence that, early in 2008, the Whitehorse City Council served a notice under the *Health Act* 1958 requiring the kitchenettes and toilets at the premises to be maintained in a clean, sanitary and hygienic condition, there is insufficient evidence to find that it was the action or inaction of Orion, and not the Applicant, that created the unsatisfactory condition of the premises. Nor has the Applicant produced adequate documentary evidence as to the nature and cost of repairs alleged to have been carried out.

121 For the above reasons, I find that the Applicant's claims for damages, other than her claim in respect of the $96,000 payment and her claim in respect of Orion's refusal to return the security deposit bond, fail.

ORION'S COUNTERCLAIM

122 In view of my finding as to the unconscionable conduct of Orion in respect of the $96,000 payment, Orion's claim for the alleged $66,000 shortfall in the payment it says ought to have received necessarily fails.

123 Orion also claims unpaid rent in the sum of $31,834. Orion says that $18,525 of that sum is unpaid rent for the month of January 2010. The Applicant denies any shortfall in the payment of rent. As Orion produced no financial records to verify the claim, I am not satisfied that the Applicant failed to pay rent for January 2010 as alleged.

124 The balance of Orion's claim in respect of unpaid rent is the difference between the actual rent paid by the Applicant after the 2009 rent reduction agreement and the sum of rent payable under the 2007 agreement for the same period, disregarding the rent reduction agreement. Orion says that, because the Applicant deceived it as to the "real" sale price of the business to Ms Sun, the Applicant should, retrospectively, be denied the benefit of the rent reduction agreement. I do not accept Orion's submission. There is no dispute that the 2009 rent reduction agreement was reached and there is no evidence that the Applicant failed to pay rent in accordance with that agreement. There is no sound reason to retrospectively overturn the 2009 rent reduction agreement and, accordingly, Orion's claim fails.

CONCLUSION

125 For the reasons set out above, I will order that Orion must pay the Applicant $124,202.75, made up of sums equal to the $96,000 payment, the security bond payment and interest on both sums as set out above. I will also order that Orion's Counterclaim be dismissed. I will reserve the question of costs with liberty to apply, and I draw the parties attention to s92 of the Act

MEMBER M. FARRELLY