VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

VCAT REFERENCE NO. R106/2012

RETAIL TENANCIES LIST

CATCHWORDS

LANDLORD AND TENANT - Section 251 *Building Act* 1993; whether tenant responsible to implement essential safety measures under terms of the lease; whether landlord liable for costs of implementing essential safety measures. Evidence - whether sufficient evidence adduced; fallibility of human memory. Termination of lease - whether acts or omissions on the part of the landlord prevented the tenant from conducting its business. Pleading - whether fresh issues can be raised in closing submissions which were not raised in points of claim. Misleading and deceptive conduct - representations made by leasing agent; *Australian Consumer Law (Victoria)* - Part 2.2 *Australian Consumer Law and Fair Trading Act* 2012. Damages - mitigation of loss and damage; relevant principles considered.

FIRST APPLICANT	Marie Noelle Sheila McIntyre
SECOND APPLICANT	Anna Marguerite Pty Ltd (ACN 155 882 584)
RESPONDENT	Kucminska Holdings Pty Ltd (ACN 111 936 219)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	13 and 14 September 2012 (Written closing submissions last filed on 1 October 2012)
DATE OF ORDER	21 November 2012
CITATION	McIntyre & Anor v Kucminska Holdings Pty Ltd (Retail Tenancies) [2012] VCAT 1766

ORDER

1. The Applicants' application is dismissed.
2. The First Applicant must pay the Respondent $12,414.37.
3. Either party is at liberty to apply to have this proceeding listed for further hearing on the question of costs and interest, such liberty to be exercised on or before **30 November 2012**, by filing and serving a written notice requesting that the proceeding be re-listed for hearing on the question of costs and interest.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the First Applicant	Ms M McIntyre in person
For the Second Applicant	Ms M McIntyre (director)
For the Respondent	Mr M Whitten of counsel

REASONS

1. The First Applicant (**'the Tenant'**) previously leased retail premises (**'the Premises'**) from the Respondent (**'the Landlord'**), which were to be used as a beauty therapy salon and facility to train beauty therapists. The business was to be operated by or with the Second Applicant. The lease was signed by the Tenant on 3 November 2011 and provided for an initial term of 2 years with options for two further terms of 2 years each.

2. A security deposit of $2,530 was paid to the leasing agent on 3 November 2011, following which the Tenant was given possession of the Premises.

3. According to the Tenant, certain representations were made by the leasing agent employed by the Landlord concerning work that the Landlord had allegedly agreed to undertake prior to the Tenant taking possession and in order to improve the Premises. That work or at least a substantial part of it was not carried out, which the Applicants contend prevented them from commencing their business from the Premises.

4. The Tenant ceased paying rent for and after March 2012. As a consequence, the Landlord served a notice of default and subsequently re-entered the Premises on 20 April 2012.

5. In their *Points of Claim* the Applicants claim loss and damage totalling $234,765.40, as a result of not being able to conduct the beauty therapy and training business from the Premises. The loss and damage is calculated as follows:

   (a) $7,175 being rent paid by the Tenant for which no benefit was ultimately received.

   (b) $186,765.40 being the loss of income incurred by the Second Applicant; and

   (c) $48,000 being the loss of income incurred by the Tenant.

6. The Landlord denies that any representations or promises were made prior to the Tenant entering into the lease, which were not incorporated in the written agreement signed by the Tenant. The Landlord counterclaims against the Tenant in the amount of $28,958.56 plus interest, which is made up as follows:

   (a) Rent arrears in the amount of $6,900.

   (b) Ongoing loss of rental $13,800 calculated to September 2012.

   (c) Outgoings in arrears and other expenses associated with re-entry in the amount of $8,258.56.

The issues

7. As indicated above, the *Points of Claim* filed by the Applicants claim loss and damage relating to wasted expenditure and loss of earnings by reason of not being able to operate the business from the Premises. Although not expressly

set out in the *Points of Claim*, it is clear that they allege that this circumstance was caused by the acts or omissions on the part of the Landlord. As I understand the claims made by the Applicants, those acts or omissions relate to:

(a) various breaches of the lease or promises made by the leasing agent concerning the state of the Premises; and

(b) the re-entry of the Premises by the Landlord.

8. Obviously, if the Landlord's re-entry of the Premises was lawful, then the loss of income claims cannot be maintained past the date of re-entry, as the Tenant and Second Applicant would have no right to remain on the Premises after that date. Therefore, termination of the lease is central to the issues to be determined in this proceeding. Accordingly, based on the *Points of Claim*, two questions arise for consideration:

(a) Did the acts or omissions of the Landlord prevent the Tenant or Second Applicant from conducting the business to be operated from the Premises?

(b) Was the re-entry of the Premises by the Landlord lawful?

9. However, in the Applicants' written closing submissions, the case set out by the Applicants is somewhat different to how it has been couched in their *Points of Claim*. In particular, the written closing submissions ground the claims as follows:

(a) The lease is void because the lease was not properly executed by the Landlord or because of other irregularities associated with the signing of the lease.

(b) The Landlord breached the *Building Act* 1993 and the *Fair Trading Act* 1999, although nothing is said as to what relief is being sought as a consequence. Nevertheless, I assume that these fresh allegations of breach are to be treated as an adjunct to the breaches which are raised in the *Points of Claim* as being the cause that has prevented the Applicants from conducting the business from the Premises.

(c) The re-entry by the Landlord was unlawful. Again, although this allegation was not specifically raised in the *Points of Claim*, it is implicitly raised, given that the loss of income claims relate to monies that would otherwise have been derived had the lease continued in force.

10. Mr Whitten of counsel, who appeared on behalf of the Landlord, submitted that all previously *unpleaded* claims and allegations raised for the first time in the Applicants' closing submissions ought be refused and disregarded. He argued that the Tribunal's obligations in respect of the fair and proper conduct of a matter and the hearing of it are prescribed by provisions such as ss.80, 97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 and s.7 of the *Civil Procedure Act* 2010. He drew my attention to the requirement that

the Tribunal is expressly bound by the rules of natural justice. According to Mr Whitten, to permit the Applicants to conduct and present a case as set out in the Applicants' closing submissions would offend each of the above statutory provisions and deny natural justice and procedural fairness to the Landlord. He referred me to the decision of Vickery J in *Nolan v MBF Investments Pty Ltd (No 3)*, where his Honour stated:

> Permitting the proposed amendment at this point in the trial, on necessary terms that would enable the plaintiff to reopen his case, provide further discovery or submit himself or any further witnesses he was to call to cross-examination would be inconsistent with the principles enunciated by the High Court in *AON Risk Services Australia Ltd v Australian National University*.[1]

11. I do not consider the Applicants' closing submissions place this case to be considered in light of *Nolan* or *AON Risk Services Australia Ltd v Australian National University*. In my view, the 'widening' of the closing submissions are within the ambit of the evidence adduced during the course of the proceeding and to some extent, are also to be inferred by the general allegations made in the *Points of Claim*.

12. Moreover, at the conclusion of the hearing of this proceeding, I specifically ordered that liberty was to be given to the Landlord to make application to file further material or call further evidence in the event that the Applicants' closing submissions touched upon fresh issues not canvassed in their *Points of Claim* or raised during the course of the hearing. I made those orders because some of the matters raised by the Tenant during the course of the hearing indicated that the Applicants were poised to raise fresh issues in closing submissions. That liberty was not exercised by the Landlord and in those circumstances; I do not consider that it is being denied natural justice or procedural fairness if recourse is had the Applicants' closing submissions.

13. Therefore, I summarise the issues for consideration and determination as follows:

    (a) Did the Landlord represent that certain works would be carried out at the Landlord's cost?

    (b) Did the Landlord's failure to carry out certain works prevent the Applicants from operating their business?

    (c) Is the lease void?

    (d) If not, was the lease lawfully terminated by the Landlord?

    (e) If so, is the Landlord entitled to compensation?

Did the Landlord make certain representations concerning work to be carried out?

14. A number of witnesses were called to give evidence during the course of the hearing concerning the issue of whether certain representations were made

[1] [2009] VSC 457 at [36].

prior to and as an inducement to enter into the lease. According to the Tenant, the proposed terms of the lease and certain specific conditions were discussed with the Landlord's leasing agent, David Johnson, prior to the Tenant entering into the lease. In particular, the Tenant said that an offer was made to David Johnson that the Tenant would enter into a lease on condition that she was given a three months rent free period and that the Landlord would attend to certain repairs *reasonably necessary* for the Tenant to have the premises approved by the local council for use as a beauty therapy clinic. She further said that this was necessary in order for her to obtain insurance. Those repairs included repairing the rear window, providing an emergency exit, ensuring that the emergency fire equipment was compliant and up to date, replacing some of the plinth boards, and replacing some of the posts supporting the front veranda and other minor works.

15. Mr Johnson denies making any such representations. In his witness statement, adopted as his evidence in the proceeding, he states:

> 12. At no time, either before or after the commencement of the lease, did I ever represent to Sheila or promise that the landlord would have any additional works done to the property or pay for any items such as those alleged by the Applicants' in their Points of Claim filed herein on 29 May 2012.
>
> 13. During November (after commencement of the lease) and December 2011, I had a number of telephone conversations and email exchanges with Sheila in which she requested various further works to the property and other items to be provided by the landlord. As a result, I asked Sheila to obtain a quote for the works she considered were the landlord's responsibility, which I would then provide to Anna [the director of the Landlord] for her response. At no time did I tell Sheila that the landlord would do the things she wanted, as I was not authorised to do so. Anna did not agree to any further works apart from some painting to the front of the property which she organised was done in about February 2012.

16. In addition, the evidence of Dr Kucminska, the Landlord's director, was that the only issue raised by David Johnson regarding remedial work prior to the signing of the lease was painting and planting. She said that at the time she did not agree but afterwards capitulated by organising for the front of the Premises to be repainted in February 2012.

17. As is often the case where there is conflicting evidence, tribunals of fact will consider relevant documents, including correspondence between parties, in order to ascertain what the more likely scenario is. This case is no different and an examination of the correspondence between the parties is necessary in order to resolve that conflicting evidence.

18. In the present case, it is common ground that the Tenant first made enquiries of the leasing agent from or about the middle of October 2011 regarding leasing the Premises. On 21 October 2011, the Tenant sent an email to David Johnson, wherein she stated, in part:

> Dear David,

> Thank you for the property inspection... this morning.
>
> As you know, I am aware that the property has been vacant for a few months now and needs a good coat of paint on the outside, the front yard needs to be improved with some beautiful plants to be aesthetically pleasing and to better street appeal.
>
> In view of the above, I would like to make the following offer:
>
> 3 months rent free
>
> $2300 per month for the next two years with an option to renew the lease on a yearly basis.
>
> Permission to add the following:
>
> a shower in the toilet/powder room area plumbing for a washing machine in the laundry
>
> If the landlord agrees to the above I would also gratefully request the following:
>
> Free access to the property as from Wednesday 26 October
>
> Rent to start from the 03 November to give us time to take care of the above improvements/additions.
>
> I would appreciate it if you would get back to me at your earliest convenience so that I can plan accordingly.

19. A further email was sent by the Tenant on 25 October 2011 which stated:

> Good morning David,
>
> Many thanks for your response, I am very happy with everything except I would like to request 2 things
>
> If we could start the agreement as from 3rd November and have the rent free period until the end of this year, I would be very grateful i.e. start the lease from 03 January 2012.
>
> If I can plant the front porch in front of the garden with daisies myself, the business name is Anna-Marguerite (after my 2 grandmothers and Marguerite is the French word for Daisy) it would mean a lot to me...
>
> If I can meet with you tomorrow afternoon 1 PM to show you where I would like some plants that would be perfect…

20. By email dated 27 October 2011, David Johnson advised the Tenant that her offer had been accepted. He attached an application form to that email and arranged for the Tenant to sign the lease on the following day. According to the Tenant, it was important that the lease commence on 3 November 2011 as that date coincided with her grandmother's birthday, a date which she considered to be of some significance.

21. On 3 November 2011, the Tenant attended the offices of the leasing agent for the purpose of signing the lease. David Johnson was not in attendance; however, his colleague Nic Sal met with the Tenant for the purpose of signing the lease. According to the Tenant, she told Mr Sal that she would not sign the

lease until the repairs to the Premises had been carried out, to which he replied that the repairs would be done once the lease was signed. She said that she signed the lease and paid the security deposit in reliance upon that representation.

22. According to Mr Sal, the Tenant was given an opportunity to read the lease documents but he had no recollection of her asking him any questions about the lease or expressing any concerns about signing the lease.

23. On 22 November 2011, the Tenant telephoned David Johnson to discuss certain issues concerning the state of the Premises, which included fixing a broken window latch. In response, Mr Johnson sent an email to the Tenant asking her to send him an email confirming what had been discussed so that he could have the matter acted upon immediately.

24. In response, the Tenant sent the following email dated 23 November 2011 to Mr Johnson:

> Following our phone conversation yesterday, I would be grateful if you could organise for work to be done on the exterior of the house as agreed prior to me signing the lease.
>
> A good clean of the interior and a fresh coat of paint.
>
> The grass has been mowed, but whoever is doing this job is not doing it properly.
>
> There is a branch on the house next that needs to be removed.
>
> There is also a broken window pane at the back which needs to be replaced as water get in when it rains.
>
> If you could just drop in tomorrow, I can show you what needs to be done.

25. That e-mail correspondence does not mention the rear window frame, the provision of an emergency exit, ensuring that the emergency fire equipment was compliant and up to date, replacing some of the plinth boards or replacing some of the posts supporting the front veranda.

26. Mr Johnson subsequently passed that email onto the Landlord and advised the Tenant that he was waiting for a response. In particular, by email dated 24 November 2011, he stated:

> Hi Sheila,
>
> I have just passed your email onto the owner and am now awaiting a reply.
>
> I will seek instructions and get back to you ASAP.
>
> I am trying to organise to get RSJ down to the property and assist with the cleanup.

27. On 5 December 2012, the Tenant sent another email to Mr Johnson which stated, in part:

> I did mention to your colleague Nic on the day before I signed the lease (while you were away) that I was not prepared to sign the lease until the building had been cleaned up on the outside. He assured me that it would be done as soon as

> I signed the lease, so I came in good faith and signed the lease on the 3rd Nov as agreed. Now it is over a month, December is one of the busiest times in the beauty industry and I am not able to work due to not having the accreditation, thus no insurance... I would be grateful if you could deal with this as a matter of urgency, as I cannot have insurance until I get industry accreditation and I cannot receive this Industry Accreditation until the assessors are satisfied that the building meets all the standards and requirements and at the moment it is far from accomplishing that.
>
> WHAT NEEDS DOING MOST IMPORTANTLY –
>
> A GOOD CLEAN UP OF THE OUTSIDE OF THE HOUSE & FRESH COAT OF PAINT, AS AGREED PRIOR TO SIGNING THE LEASE.
>
> DEAD BRANCH HANGING ON THE FRONT OF THE BUILDING NEEDS TO BE REMOVED, IT IS VERY CLOSE TO ELECTRICITY LINES ON THE HOUSE, SO THIS POSES A REAL DANGER.
>
> BROKEN WINDOW PANE IN BACK ROOM.
>
> BROKEN WINDOW LATCH ON THE SAME WINDOW.
>
> ALSO, I STILL DO NOT HAVE A KEY TO THE BACK DOOR, WHICH IS AN OHS ISSUE.
>
> IT IS OVER A MONTH SINCE THE BUILDING HAS BEEN LEASED, AND THE FOR LEASE BOARD IS STILL STANDING.
>
> DUE TO THE CLEANUP OF THE BUILDING NOT DONE, I HAVE NOT BEEN ABLE TO FIX THE FRONT YARD AND PUT ANY NEW PLANTS AS I DO NOT WANT THEM DAMAGED WHILE WORK IS BEING DONE ON THE BUILDING.
>
> ... I would request that you reconsider the rent free time to extend to another month since you did not keep your side of the agreement.
>
> Also, please do let me know about the advertising board ASAP.

28. The reference to the advertising board concerns negotiations regarding the Tenant being permitted to utilise the advertising board for her own advertisement. Negotiations were ongoing in that respect, hence, the advertising board was left on the property following the commencement of the lease.

29. I note that nothing is mentioned in that email concerning the rear window frame, ensuring that the emergency fire equipment was compliant and up to date, replacing plinth boards or replacing posts supporting the front veranda.

30. By email dated 5 December 2011, Mr Johnson responded as follows:

> Hi Sheila,
>
> I agree that has taken a long time to get these works done.
>
> We are having serious issues getting people to do quotes because of the time of year.
>
> Are you able to get your trades to quote and give it to me and I can get the owners approval?

Please let me know ASAP.

31. The Tenant responded by advising that she would obtain a quotation to carry out the work and would respond once she had spoken to a tradesperson.

32. Although no quotation was immediately obtained by the Tenant, or at least communicated to the Landlord, the Landlord undertook some minor works which included repainting the front of the building during February 2012. In that regard, Dr Kucminska gave evidence that although at the time she did not agree but afterwards thought *for peace of mind, just get it done*.

33. At that time, rent for February 2012 was unpaid. Moreover, attempts were made by Mr Johnson to contact the Tenant but to no avail. Consequently, Mr Johnson handed the matter over to Nyree Maskal, the leasing agent's property manager, with instructions to issue a notice of default. A notice of default dated 28 February 2012 was subsequently served on the Tenant.

34. On 13 March 2012, Ms Maskal contacted the Tenant who advised that she was not paying rent because the outstanding repairs required to the property had not been undertaken. Subsequently, arrangements were made between the leasing agent and the Tenant to inspect the property and discuss what work was to be undertaken.

35. On that same day, the Tenant sent an email to Ms Maskal which raised a number of issues and also attached a quotation from a builder by the name of Rudy Corantin concerning work which the Tenant considered necessary. The material aspects of that email stated:

> As per our telephone conversation earlier, I would like to put in writing the same points I discussed with you, I am not sure if you were aware of what is really happening or if you are only chasing me for money and disregarding the fact that your side of the agreement has not been respected.
>
> 1) Upon inspection of the property with a witness who happens to be a paralegal I told your agent David that I was prepared to take the property provided the necessary repairs were done. He told me on the day that he would check with the owner and get back to me.
>
> 2) A few days later he said that the owner had agreed to do the necessary repairs provided I took the lease for a period of 2 years + 2 and offered me a rent free period of 2 months. I had asked for 2-3 years and six months rent free as I was aware that the property had been vacant for a LONG time and required quite a bit of work.
>
> 3) On the 2nd of November David's colleague Nick called me to ask if I would come to sign the lease, that he was handling my file because David was on holidays. As I had gone past the property that morning and saw that nothing had been done, I told him I would not sign the lease until the repairs were done. He told me that the owner said that the repairs would be done once the lease was signed. So in good faith, I went and signed the lease and waited for David or Nick to get back to me...

> In good faith I paid my rent in advance and spent almost $40,000 to start this business, paid some minor repairs, but still cannot trade legally as I cannot get a permit from the council...
>
> Are you aware that I do not have a backdoor key, in spite of having asked for it several times. The last time I spoke to David, he said just get a locksmith to do it. I thought that it was very unprofessional on his part. According to my lease contract I am not allowed to do so...
>
> No one from your company has been sent to the property to do a condition report. I have asked David several times to meet me on the premises, he never returned my calls...
>
> Attached is a list of the repairs that need urgent attention, it has been recommended not just to do a paint job to cover the rot in disrepair, but to fix the place to make it legally safe...
>
> I will forward some pictures of your handyman's work which leaves a lot to be desired, and request that the work be carried out by someone we recommend and trust only when the work is completed as it should be and as was agreed, will I pay the rent.

36. The quotation Rudy Corantin attached to the email dated 13 March 2012 included the following scope of work:

Exterior

(a) Replace gutter for a 3 m section, deep clean gutter and downpipes.

(b) Deep clean around facade, repair rotting columns under front veranda.

(c) Painting needs to be done around outside of building.

(d) Gas pipe has been cut off, needs to be repaired for hot water system.

(e) Hot water system not appropriate for commercial building.

Indoors

(f) Fix window in back room as frame completely rotten and breaking off.

(g) Broken window frame of same window.

(h) Fix doorframe in front toilet, currently stuck due to moisture.

(i) Sanding and clear protective varnish of the front deck, replace and repair rotting wooden planks.

37. The quotation for the cost of the above work was $8,190. The leasing agent subsequently sent the email and quotation to the Landlord. On 15 March 2012, Dr Kucminska, the director of the Landlord forwarded the following response to the leasing agent:

> Dear Nyree,
>
> I have not seen the latest email, but I have seen some of the previous ones.
>
> You may be aware that there was some misunderstanding as I actually never agreed to do any extra work prior to lease of the property.

As you are aware the house is owned by a family trust and I'm just managing that. Have to discuss extra expenses with my parents.

The house has been painted and renovated by Mr Ryan, from RSJ Construction. So all the painting inside and some of outside was done. The cleaning of the property inside and outside was done.

The front of the house was fixed, repaired and I extended the work to the windows, doors etc.

If Cameron construction does not have the keys to the back door, RSJ should still have it, as I did not collect them.

My gardener is doing regular maintenance outside. The overgrown branches of the tree were cut off and removed by RSJ construction as per Dandenong City Council guidelines during the course of house renovation last year. City Council was conducting fire danger review in February and I have not got the letter regarding this property, which means that they were happy. This can be further confirmed with Dandenong City Council...

I think that I was very kind so far, reducing rent, giving rent free time etc.

So unless the rent is paid up to date within 7 days hereof, please issue a notice of objection and make application to recover the lost rent.

38. An inspection of the property was carried out on 16 March 2012 in the presence of the Tenant, Ms Anne Thomson, a friend of the Tenant, David Johnson and Nyree Maskal. Ms Maskal completed a condition report on that day. Of relevance, the following matters were noted:

Guttering, Roof and downpipes:	Good	Keeping up with age-looks old and rusty
Walls:	Good	The whole front has been painted minus the side of the house.
Signs:		Sign is still waiting to be put up over the leasing board.
Windows and doors:	Good	Clean and front door working
Light fittings:	Good	All working
Doors:		One door is scraping the floor-needs attention.

Recommendations
The back window latch has come off the hinges needs attention.
Door to be looked at - might need re-fitting or shaving so it doesn't scrape the floor.

39. Photographs were taken of the premises which are largely consistent with the condition report. Further, on 19 March 2012, a quotation was requested by the leasing agent from RSJ Constructions Pty Ltd to carry out the following work:

Can you please go out and quote on the following:-
One door needs re-fitting or shaving down as it keeps scraping the floor
Window latch at the back next to the door is broken needs fixing/replacing.
Doors lock is playing up can you see if it needs a new one and if so quote on that too.

40. In response to that request, RSJ Constructions provided a quotation dated 10 April 2012 to undertake the above work for $220.

41. Although the February 2012 rent was eventually paid on 15 March 2012, March and April rent was in arrears. In addition, there were charges associated with the notice of default and outgoings relating to the use of electricity during the period of the tenancy, which had not been paid. Consequently, on 4 April 2012 another notice of default was served on the Tenant relating to the failure to pay rent for March 2012.

42. That rent has never been paid even though the Tenant sought legal advice after service of the notice of default. In particular, the Tenant caused her solicitor to write to the Landlord's leasing agent by letter dated 18 April 2012. That letter stated, in part:

> 2. Prior to the acceptance and entering of the lease by our client, the following matters were specifically brought to your knowledge.
>
> (a) Inspection of the Property was conducted on 13 October 2011.
>
> (b) Our client mentioned at the inspection various things that required your attention. The agent David Johnson of Cameron Industrial Commercial acknowledged this and assured our client that the following repairs will be tended to:
>
> (i) The provision for an emergency exit.
>
> (ii) Access to the back door and back of the premises with a key.
>
> (iii) A properly working sliding door in the bathroom.
>
> (iv) A brand-new windowpane in the back room, as the current one is broken and this provides for an insurance hazard.
>
> (v) A new window lock for the window, so it may be locked if it required.
>
> (vi) Removal of plants growing on the roof of which are now posing a fire hazard to the premises.
>
> (vii) The fixing and replacement of a central support beam at the front of the premises, which is being eaten away by weather and pests.

43. The Landlord did not respond to that correspondence and on late 19 April 2012, re-entered the Premises and purported to forfeit the lease.

44. In my view, the documentary evidence produced during the course of the hearing is inconsistent with the Tenant's version of what transpired prior to entering into the lease. When one examines the correspondence passing between the parties, the items of remedial work which the Tenant contends were promised to be undertaken by the Landlord seem to grow with the passage of time. In particular, the correspondence that predates the signing of the lease only raises the issue of a rent-free period and permission to undertake some minor landscaping work. Nothing is said regarding any work to be undertaken by the Landlord. The correspondence in late November 2011 only raises the issue of painting, broken window glazing and a branch to be

removed from a tree. Moreover, even the more detailed correspondence dated 5 December 2011 only adds the broken window latch and the missing key to the back door to the Tenant's list of complaints. It is not until the middle of March 2012 that the list of remedial work to be undertaken by the Landlord resembles what the Tenant now contends was represented to her to prior to entering into the lease.

45. In that regard, I note the comments made by McClelland CJ in *Watson v Foxman* [2] concerning the fallibility of human memory in the context of a claim for misleading and deceptive conduct:

> Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes and litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

46. There are other factors that cast some doubt on the Tenants recollection of what transpired prior to her entering into the lease. In particular, she gave evidence that the representations were initially made by David Johnson at the inspection of the property on 13 October 2011. She said that the meeting was attended by herself, David Johnson and an ex-student of hers. David Johnson gave evidence that no other person was at that meeting apart from himself and the Tenant. Moreover, the ex-student was not identified and was not called to give evidence during the course of the hearing. Given the importance of such corroborative evidence, it is surprising that this witness was not called to give evidence in this proceeding. No explanation was proffered why this witness was not called and I can only infer that this witness may not have assisted the Applicants' case.[3]

47. In addition, the Tenant said that she needed to get the remedial work done before December 2011 because that was when the Premises would be inspected for the purpose of the obtaining accreditation. I find it strange that the issues raised by her regarding the remedial work were not raised immediately after she signed the lease, given the impending inspection for accreditation. The issues were not fully raised until March - after rent fell into arrears.

48. In my view, the evidence of Mr Johnson and to a lesser extent Mr Sal and Dr Kucminska are more consistent with the chain of e-mail correspondence passing between the parties prior to and after the lease was executed.

49. Therefore, I find on the balance of probabilities that although some minor works may have been discussed prior to the lease being executed, no firm

[2] (2000) 49 NSWLR 315 at 318-319.
[3] *Jones v Dunkel* (1959) 101 CLR 298.

commitment was given by the leasing agent that the Landlord would agree to that work being undertaken by it at its cost.

Was the Tenant prevented from carrying out its business?

50. The issues for consideration under this head of damage focus on whether the Landlord breached the terms of the lease or other statutory provisions imposing obligations on it. In particular, the Tenant alleges that the Landlord:

    (a) Failed to provide a copy of the lease and the disclosure statement to the Tenant no earlier than 7 days prior to signing the lease, contrary to ss.15 and 17 of the *Retail Leases Act* 2003 (**'the RLA'**).

    (b) Failed to repair damage to the premises contrary to s.52 of the RLA.

    (c) Failed to comply with s.251 of the *Building Act* 1993 and the Regulations made under that Act, insofar as they relate to the maintenance of *essential safety measures*.

51. As indicated above, I have approached this proceeding on the understanding that the Applicants have couched their claims based on the Landlord having breached the terms of the lease and various provisions of the RLA, the *Building Act* 1993 and the *Australian Consumer Law*, with the result that the Applicants could not reasonably operate their business as a consequence. Therefore, I shall consider each of the above categories based on that understanding.

Breach of ss.15 and 17 of the *Retail Leases Act* 2003

52. The Tenant gave evidence that the first time that she was given a copy of the lease and disclosure statement was shortly before she was asked to sign the documents on 3 November 2011.

53. Section 17 of the RLA states:

> (1) At least 7 days before entering into a retail premises lease, the landlord must give the tenant-
>
> (a) a disclosure statement in the form prescribed by the regulations (but the layout of the statement need not be the same as the prescribed disclosure statement); and
>
> (b) a copy of the proposed lease in writing.
>
> (2) If a tenant has not been given the disclosure statement before entering into a retail premises lease, the tenant may give the landlord, no earlier than 7 days and no later than 90 days after entering into the lease, a written notice that the tenant has not been given the disclosure statement.
>
> (3) If the tenant gives the landlord a notice in accordance with subsection (2) -
>
> (a) the tenant may withhold payment of the rent until the day on which the landlord gives the tenant the disclosure statement; and…
>
> (5) If-

(a) any information provided by the landlord in the disclosure statement is misleading, false or materially incomplete; or

(b) the tenant is not given a copy of the proposed lease in accordance with subsection (1) (b)-

the tenant may give the landlord a written notice of termination.

(6) The tenant may give a notice of termination under subsection (5) at any time before the end of 28 days after-

(a) the tenant is given the disclosure statement; or

(b) the tenant is given a copy of the proposed lease; or

(c) the lease is entered into-

whichever happens last.

54. None of the witnesses called to give evidence on behalf of the Landlord were able to say that a copy of the lease or the disclosure statement was given to the Tenant any earlier than 3 November 2011, the day on which the lease was signed. Therefore, I accept the Tenant's evidence on this point. However, I accept Mr Whitten's submission that the RLA provides its own consequences for failure to comply with those provisions.

55. It is common ground that no notice was given under s.17(3) or s.17(5) of the RLA. Therefore, the Tenant did not avail herself of the rights given to her under those subsections. In those circumstances, I do not consider that a breach of those sections has any material consequence in terms of preventing the Applicants from conducting their business; nor does it give rise to a claim for damages.

Breach of s.52 of the *Retail Leases Act* 2003

56. The Tenant alleges that the Landlord breached s.57 of the RLA because it failed to repair damage to the Premises and continued to charge rent, notwithstanding the fact that the Premises was unable to be used due to damage. Section 57 (1) (a) of the RLA provides that a tenant is not liable to pay rent or outgoings for any period during which the premises cannot be used under the lease or are inaccessible due to that damage.

57. As Mr Whitten correctly points out, the Landlord's obligations under s.57 are informed by s.52 which provides that the Landlord is responsible for maintaining the leased premises in a condition consistent with the condition of the premises when the retail premises lease was first entered into. It is common ground that the condition of the Premises did not change during the Tenant's occupation. Further, no expert evidence was called by the Tenant that the Premises were, in fact, damaged, although she did rely upon a report prepared by an officer employed by *WorkSafe*.

58. Unfortunately, the author of that report was not called to give evidence and in those circumstances, little weight can be given to the contents of that report. In any event, even if I accepted the report as evidence in the proceeding, its

contents do not take the matter much further. In particular, the report states, in part:

> I was informed that the key to the back door has never been provided to the tenant who is running a beauty salon/school from the premises. This leaves only one exit from the building. The key to the rear door is necessary to ensure employees and persons at the workplace have safe access and egress from the premises, especially if there was a need to evacuate the premises.
>
> It was reported that the front porch was rotted. On inspection I did not see any rotting that would cause any issues to person's health and safety. The entry area appeared to be stable …
>
> Concerns were raised about a broken drainpipe at the rear of the premises. It wasn't raining at the time so I could not observe any issue …
>
> There was a broken window observed at the rear of the premises. I was told water comes into the building. I did not observe this as it was not raining at the time …
>
> I was advised that some of the doors were hard to open. At the time of my visit some of the doors had been fixed, however there was still one door that lead into one of the front rooms that was stuck and difficult to open. This may cause a risk of injury to persons who apply force to open the door.

59. As can be seen from the extract of the report, the issues raised are minor and do not in my view, evidence damage to the building sufficient to invoke an obligation on the Landlord to repair pursuant to s.52 of the RLA. Accordingly, I do not find that there is any evidence upon which the Applicants are able to substantiate their claims for damages pursuant to s.52 of the RLA.

Breach of *Building Act* 1993

60. The *Building Regulations* 2006 require the maintenance of *essential safety measures* within certain buildings, which include buildings such as the Premises. The *essential safety measures* include fire hydrant systems or fire extinguishers. The Tenant alleges that the Premises did not comply with the *Building Regulations*, insofar as all *essential safety measures* had been attended to. This seems to have been confirmed in a report entitled *Annual Essential Safety Measures Report* dated 13 April 2012 obtained by the Landlord, which states:

> Unable to sign off due to no proof of or items being maintained. No firefighting equipment on site.

61. Mr Whitten argued that the terms of the lease required the Tenant to take responsibility for the *essential safety measures*. Clause 4 of the lease states, in part:

> 4.1 Throughout the period of the tenancy, it is the Lessee's responsibility to ensure that:
>
> (a) all firefighting equipment and exit signage;

(b) all roller doors, electric gates, electric doors, air-conditioning and heating systems including cooling towers and/or other related equipment that service the property; and

(c) triple interceptor and/or related equipment that service the property;

are appropriately serviced, maintained, repaired and replaced (when necessary);

(d) at its own cost;

(e) by an essential safety measure contractor ("ESM Contractor") or other professional to be nominated by the Lessor at its absolute discretion.

(f) in accordance with the *Building Act* 1993, the *Building Regulations* 2006 and the *Building Code of Australia* (Building Legislation) and relevant authority requirements, but does not include works of a capital structural nature.

4.2 Throughout the period of the tenancy, the Lessee must comply with Regulation 1218 of the *Building Regulations* 2006 and indemnifies the Lessor for any action, liability, penalty, claim or demand in respect of non-compliance of such Regulation.

62. The Tenant contends that the Landlord remains responsible for complying with the statutory requirements concerning essential safety measures, notwithstanding the terms of the lease. In that regard, I note that s.251 of the *Building Act* states:

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

63. Regulation 1217 states:

> The owner of a building or place of public entertainment must ensure that any essential safety measure required to be provided in relation to that building or place under the Act or these Regulations or any corresponding previous Act or regulation-
>
> (a) is maintained in a state which enables the essential safety measure to fulfil its purpose; and…

64. In my view, the words of the provision made it clear that the obligation to bear the cost of the *essential safety measures* ultimately rests with the owner of the land. I do not consider it open for a landlord to contract out of that

obligation, even if at first instance the lease requires the tenant to undertake the work required in order to comply with whatever *essential safety measures* are applicable for that particular building or the use to which that building is put.

65. In *Chen v Panmure*,[4] Regulation 709(8) required the owner to provide hardwired smoke detectors. However, the lease made the tenant responsible to carry out that work. Given the effect of s.251(2) the *Building Act* 1993, the Tribunal decided that, to avoid the circuitry of recouping the cost of that work from the Landlord, no determination was to be made against the tenant requiring it to carry out that work, which effectively rendered the clause in the lease unenforceable.

66. However, the situation is slightly different in the present case. This is not a proceeding where the Tenant seeks a declaration to be relieved of an obligation to carry out *essential safety measures* or to recoup monies spent in undertaking whatever work may be required to comply with the *essential safety measures* applicable to the Premises. In the present case, the Tenant contends that the failure to provide fire safety equipment prevented the Applicants from being able to undertake their business operations.

67. It is common ground that the only fire fighting equipment provided during the currency of the lease was a portable fire extinguisher, which the Tenant supplied herself. It is also common ground that an *essential safety measures* report dated 13 April 2012 was commissioned by the Landlord, which revealed that there was no fire fighting equipment on site.[5]

68. Nevertheless, the deficiency was remedied by the Landlord after re-entry at a cost of $423.50, representing the cost to Link Fire Pty Ltd to install the requisite fire fighting equipment.[6]

69. It is clear that the express terms of the lease required the Tenant to arrange for an *essential safety measures* report and to purchase whatever fire fighting equipment was required in order to comply with such a report. In my view, s.251 of the *Building Act* 1993 does not necessarily prohibit a landlord from placing such an obligation on a tenant, save and except that the Landlord must reimburse the Tenant for the costs associated therewith, failing which the Tenant is entitled to set-off those costs against rent due and payable under the lease. The relevant regulation does not state that the owner of the land must be the entity that carries out the relevant work but merely states that the owner must ensure that the *essential safety measures* are carried out. The regulation does not prohibit a landlord from placing a contractual obligation on a tenant to undertake that work, albeit that the landlord ultimately remains legislatively responsible to ensure that the work is carried out.

[4] [2007] VCAT 2464.
[5] Presumably the Tenant had removed her fire extinguisher prior to the inspection by the relevant author of that report.
[6] Paragraph 27 of the witness statement of Dr Anna Kucminska.

70. Indeed, it may be beneficial, from a practical viewpoint, for the tenant to implement whatever remedial work is required in order to comply with an *essential safety measures* report, having regard to the fact that the tenant is in occupation at the relevant time and is therefore better placed to minimise disruption to its business operations.

71. Moreover, it seems that the *Building Act* 1993 contemplates such a scenario, given that the Act expressly provides for the tenant to undertake that work and recoup its expenditure by setting off the costs of compliance against rent. Therefore, I do not consider that a contractual obligation, placed on the tenant to undertake whatever work is required in order to comply with an *essential safety measures* report, offends s.251 of the *Building Act* 1993. The contractual and the statutory obligations are able to sit side-by-side.

72. I make this finding even though the schedule to the lease stated that *fire fighting equipment* was part of the fixtures and chattels described in the lease. Although the failure to provide that fire fighting equipment may constitute a breach of the lease on the Landlord's part, it does not, in my opinion, permit the Tenant to disregard its contractual obligations to comply with the regulatory framework concerning the maintenance of *essential safety measures*, notwithstanding that the Landlord may ultimately have to pay for that or alternatively, allow the Tenant to set-off the cost of that from rent due and payable under the lease.

73. Moreover, I do not regard the failure by the Landlord to supply fire fighting equipment as a factor that could reasonably be relied upon by the Applicants as an act or omission on the part of the Landlord being the cause preventing them from operating their business, especially where compliance ultimately cost $110 for the *essential safety measures* report and $423.50 for the fire fighting equipment as against the rent that was in arrears of $2,300 at that time.

74. One further issue raised by the Tenant during the course of the hearing relates to the rear exit door. The Tenant gave evidence that the Landlord failed to provide her with a key to the rear door, which made the premises unfit to conduct the business (and also non-compliant with *essential safety measures*). Although there is conflicting evidence over this issue, I accept the Tenant's evidence that no rear door key was provided to her. It seems illogical to raise that as an issue if it were not the case.

75. It was put to the Tenant during cross-examination that she should have simply engaged a locksmith to change the barrel of the rear door lock and thereby remove that impediment to conduct the business. In answer to that proposition, the Tenant replied that she was not permitted to change the lock. I do not accept that proposition. There is nothing in the lease document which prohibits the Tenant from changing the locks to the Premises and indeed, prudent practice would dictate that that should be done in any event. Moreover, the Tenant's email dated 13 March 2012 conceded that the leasing agent told her to do that. When pressed further on this subject, the Tenant

conceded that the reason why the lock was not changed was because she did not want to spend $550 on that expense. Again, I do not consider that this factor reasonably prevented the Applicants from conducting their business.

Conclusion

76. In my view, the matters raised by the Tenant as constituting the factors which prohibited the Applicants from conducting the business from the Premises do not justify that outcome. The factors can be summarised as:

    (a) Failure to undertake remedial work. In that regard, I note that the cost of repairing the rear window and making good the sticking toilet door is $220.

    (b) Failure to comply with *essential safety measures*. As indicated above, the cost to comply with the *essential safety measures*, based on the evidence before the Tribunal, is $423.50 for the fire extinguisher and $110 for the essential safety measures report.

    (c) Failure to provide a rear door key. The Tenant gave evidence that she obtained a quotation to change the rear door lock for $550.

77. Accordingly, based on my findings the total cost to undertake the work that would make the Premises fit to commence business operations is $1,303.50, of which $533.50 (or possibly $1,083.50) may constitute a cost to the Landlord or an amount which the Tenant could set-off against rent pursuant to s.251 of the *Building Act* 1993.

78. When those costs are weighed against the potential losses allegedly suffered by the Applicants and claimed in this proceeding, it seems inconceivable that those factors reasonably prevented the Applicants from conducting the business. Moreover, as I have already indicated, at the time when the Landlord re-entered the premises, rent for March and April had not been paid, which totalled $4,600.

79. Therefore, I am not persuaded that those factors were the cause of the business either not commencing or not operating from the Premises.

80. My finding is reinforced by the fact that no expert evidence was called in support of the Tenant's contention that the beauty therapy business was unable to be operated as a result of any act or omission on the part of the Landlord. This is notwithstanding that some documents were produced during the course of the hearing, which the Tenant said set out certain guidelines to be adhered to for work in the health and beauty industry. Those guidelines included ensuring that the premises from which the business was being conducted had adequate ventilation, toilets, compliant plumbing and electrical safety.

81. However, the only issues raised by the Tenant relating to the failure to provide the *essential safety measures*, was an inability to access the rear door because she did not have a key, a broken window latch which prevented it from being

locked/opened and a broken gas pipe, although no expert evidence was adduced as to the nature of the broken gas pipe.[7]

82. Indeed, the Tenant called evidence from Ann Thomson, the manager of an assisted living facility which was to have provided a source of patronage for the business being operated by the Applicants. Ms Thomson said that the only obstacle preventing her sending residents to the Premises was the inability to exit from the rear door (because the Tenant did not have a key) and a sticking toilet door. As indicated above, the cost to replace the rear door lock barrel was $550 and the cost to fix the sticking toilet door was included in the quotation from RSJ Construction of $220.

83. Further, there is no evidence that the Tenant or the Second Applicant was denied registration, accreditation, or other regulatory permission to operate the business as a result of any failure to provide *essential safety measures*. Indeed, apart from the fire fighting equipment, it would appear that no other work was required to comply with the *Building Act* 1993 and the Regulations made under that Act.

84. Even if the factors raised by the Applicants prevented the business from commencing or continuing, I consider that the Applicants have failed to mitigate their losses by not taking any steps to remove the impediments to the running of the business. The principle of mitigation requires that a party claiming damages is under a duty to take all reasonable steps to mitigate the loss consequent on the breach committed by the other 'defaulting' party and prevents that party from claiming in respect of any part of the damage that is due to his or her neglect to take such steps. The law relating to mitigation of damage is succinctly set out by the Full Court of the Supreme Court of Victoria in *Tuncel v Renown Plate Co* [8] as follows:

> The word "mitigation" is used in various ways as the author of *Mayne and McGregor on Damages* 12th ed. (1963), at par. 144, was at pains to point out. He, however, formulated in three rules the result of the authorities on "mitigation" as that word should be used in the context of the facts of this case and, in our opinion those rules accurately state the relevant law in a convenient form, viz.:-
>
> "The three rules are these:-
>
> "(1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.
>
> "(2) The second rule is the corollary of the first and is that where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong he can recover from loss incurred in so doing; this is so even although the resulting damage is in the event greater than it would have

[7] The broken gaspipe was not an issue that the WorkSafe inspector thought was material.
[8] [1976] VR 501 at 503.

been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

"(3) The third rule is that where the plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so even although the plaintiff would not have been debarred under the first rule form [from] recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. Put shortly, the plaintiff cannot recover for avoided loss."

85. Having regard to the minimal cost of removing what the Applicants contend were the obstacles preventing them from being able to conduct the business, I find that the Applicants have failed to mitigate their claimed loss and damage. This is particularly the case when one considers that this cost was less than the value of rent that was in arrears as at March 2012.

86. Therefore, for the reasons set out above, I dismiss the Applicants' claims.

Is the lease void?

87. As indicated above, this issue was not fully argued during the course of the hearing but belatedly raised in written closing submissions filed by the Applicants.

88. In support of that proposition, the Applicants raise a number of issues which concern matters already touched on and some new matters relating to engagement of the leasing agents and the signing of the lease.

89. The matters touched on relate to the Applicants' claims pursuant to ss.15 and 17 of the RLA. As I have already found, the right to end the lease pursuant to s.17 of the RLA was not exercised by the Tenant and in those circumstances, that right has expired.

90. However, the Tenant further argued that the leasing agent had no legal authority to lease the property in November because it was engaged by the respondent in mid-December. There is no evidence of that allegation and in any event, it is irrelevant as the lease was subsequently executed by the Landlord and the Tenant given possession. In other words, there was performance of the lease. Accordingly, I do not consider this to be a ground on which a finding can be made that the lease was void.

91. The Tenant further submitted that she signed the lease in reliance upon certain declarations made by the Landlord in the disclosure statement under the heading *Landlord Acknowledgements and Signature*. In that regard, the Tenant contends that although electric light fittings were present, the electricity switchboard was not compliant. She referred to a letter from *MIG Electrical Services* which stated that the *existing switchboard should be upgraded or required RCD's installed in order for the main board to comply with current standards.* Apart from that letter, no evidence was adduced going

to that issue. There is no evidence suggesting that the lights did not operate or that the switchboard was faulty but merely, that the existing switchboard needed to be upgraded to comply with current day standards. However, the switchboard was no different to when the tenancy commenced. Accordingly, I am not persuaded that issue could render the lease void.

92. The Tenant further contended that some of the documents signed by the director of the Landlord were falsified. There is no evidence of that and I dismiss that contention without saying more.

93. Finally, the Tenant contended that the lease failed to provide for a minimum lease period of 5 years, as required under s.21 of the RLA. I do not accept that is the case. The lease provided for an initial term of 2 years with two further options for terms of 2 years each. In my view, the lease complies with that provision.

94. Accordingly, and having regard to my findings set out above, I do not consider that the lease is void (*ab ibnitio*). I dismiss this aspect of the Applicants' claims.

Was the lease lawfully terminated?

95. The Tenant contends that the failure to provide *essential safety measures*, including the fire fighting equipment, and failure to undertake remedial work in some way prohibited the Landlord from otherwise exercising its rights of re-entry. For the reasons that follow, I do not regard this as being the case.

96. The lease, which is in a standard form REIV format, states:

> If:
>
> (A) The Lessee fails to pay the rental or any other monies payable by the Lessee to the Lessor under this Lease for a period of 14 days after any of the days on which they ought to have been paid, although no formal legal demand has been made…
>
> then the Lessor, despite any waiver of any previous breach or default by the Lessee or the failure of the Lessor to have taken advantage of any previous breach or default, may in addition to any other power, re-enter the Premises or any part and occupy or re-let the Premises.
>
> (iii) Upon re-entry, this Lease shall absolutely determine but without prejudice to the right of action of the Lessor in respect of any previous breach of any of the Lessee's covenants provided that the right of re-entry to any breach of any covenant term or condition to which Section 146 of the Property Law Act 1958 extends shall not be exerciseable until the expiration of 14 days after the Lessor has served on the Lessee the notice required by Section 146 (1)…

97. The notice of default is dated 4 April 2012. According to Nyree Maskal, by 2 April 2012, the Tenant was more than one month behind in the rent. She said that she advised the Tenant that if it was not paid within 24 hours, another notice of default would be issued. In her witness statement, Ms Maskel states:

23. On 4 April 2012, Sheila not having paid the rent nor responded further, I issued a further notice of default. The notice and my covering e-mail stressed that if arrears of $2,575 were not paid by 19 April 2012, the landlord would exercise its rights under the lease and re-enter take possession of the property.

24. By 18 April 2012, I had not received any further communication from Sheila. I e-mailed her a reminder that if the rent arrears were not paid by the next day, we would be proceeding with taking back possession.

25. The same day, I received a faxed letter from solicitors acting for Sheila.

26. On 19 April 2012, I e-mailed Anna attaching a copy of the letter from Sheila's then solicitors and recommended that we still proceed to re-enter and take possession of the property. Anna gave her approval for the taking of any necessary steps to address the situation.

27. The same day, I arranged for re-entry and possession of the property and the locks changed.

98. Although the Tenant initially gave evidence that she did not receive the notice of default, she subsequently conceded during cross-examination that the purpose of her visit to her solicitor, prompting the letter dated 18 April 2012 referred to above, was in answer to the notice of default and proposed lockout. Indeed, Ms Thompson gave evidence during the course of the hearing that she had also received a copy of the notice of default and had given a copy, or at the very least advised the Tenant of its existence, prior to the Landlord re-entering. Importantly, the Tenant conceded during cross-examination that she was in possession of the notice of default on the Thursday prior to Good Friday, being 5 April 2012.

99. The notice of default relates solely on the non-payment of rent as constituting the breach of lease relied upon. Accordingly, s.146 of the *Property Law Act* 1958 does not apply.[9] Nevertheless, even if s.146 of the *Property Law Act* 1958 applied, the requisite time period has been satisfied given that the re-entry occurred not less than 14 days after the Tenant received notice to remedy the breach.

100. Further, the issue raised by the Tenant regarding alleged breaches of the lease on the part of the Landlord do not, in my view, assist the Tenant's case. Rent was payable under the lease without set-off. Although, the *Building Act* 1993 may have permitted the Tenant to set-off costs incurred in complying with her obligations to maintain the *essential safety measures*, no such costs were, in fact, incurred by her. Moreover, the fact that there was no rear door key or that some remedial works may have been promised but not undertaken is of no consequence, as the terms of the lease make it clear that rent was to be paid without deduction.

101. Having said that, it was open for the Tenant to apply to the Tribunal for relief against forfeiture, if she considered that the termination was unjust and was willing to make good past breaches of the lease. That course was not pursued

[9] See s. 146(12) of the *Property Law Act* 1958.

by the Tenant. Rather, the tenant embarked on litigation claiming substantial damages against the Landlord.

102. Consequently, I find that the lease was lawfully terminated by the Landlord pursuant to its terms.

The Landlord's counterclaim

103. It is common ground that the Tenant was given a rent-free period up until 2 January 2012. The Landlord contends that the rent-free period was conditional upon the Tenant not breaching the terms of the lease. Mr Whitten argued that the failure to pay rent for the period March and April 2012 rendered the rent free period as having being extinguished.

104. However, it is also common ground that the offer made by the Tenant prior to the lease being signed was not conditional upon her complying with the terms of the lease. It was that offer which was accepted by the leasing agent in writing by e-mail correspondence dated 27 October 2011.

105. Further, it was on the faith of that representation that the Tenant executed the lease. According to the Tenant, she did not read the entire lease prior to signing that document on 3 November 2011, presumably as a result of the Landlord failing to comply with its obligations under the RLA by not providing a copy of the lease and disclosure statement to the Tenant 7 days before those documents was executed. Moreover, the disclosure statement expressly states under clause 10.2 that there was a rent-free period of 2 months. It does not state that the rent-free period was conditional upon the Tenant complying with all terms and conditions of the lease.

106. In my view, it would be unfair and unconscionable for the Landlord to re-neg from the representations made by its leasing agent regarding the rent-free period by relying upon the strict terms of the lease. Accordingly, and to the extent that the special condition giving the Tenant a rent-free period purports to make that conditional upon the Tenant complying with all terms of the lease, it should be read down and construed as being unconditional.

107. Consequently, I find that the Landlord is not entitled to claim rent for the period covering the rent free period. In that regard, I accept the submissions made by the Tenant that to now claim those monies in reliance upon the wording of the special condition would constitute a breach of s.18 of the *Australian Consumer Law (Victoria).*[10]

108. Having said that, as at the date of forfeiture, the Tenant had failed to pay rent for the month of March and April 2012, rent being payable in advance. That amounts to $4,600. In addition, the Landlord claims the following outgoings and other expenses associated with re-entry:

    (a) Garden maintenance (March to December 2011):.....$487

    (b) Water rates: $453.07

[10] Part 2.2 - *Australian Consumer Law and Fair Trading Act* 2012.

(c) Gas: $218.29

(d) Electricity: $290.45

(e) Rates: $842

(f) Electrical services: $365.75

(g) Essential safety measures:

(i) Fire audit report: $110

(ii) Fire extinguisher: $423.50

(h) Advertising for the premises: $907.50

(i) Lease preparation fee: $660

(j) Agents commission: $3,336

(k) Locked out fee, change of locks: $165

(l) Ongoing loss of rental: ..... $11,500 [11]

TOTAL: $26,658.56

109. The counterclaim made by the Landlord is based upon the Landlord being unable to re-let the Premises following re-entry. Accordingly, the claims for garden maintenance, rates and utilities cover periods that extend after re-entry.

110. Mr Whitten submitted that in the interests of finality, the claim for ongoing loss of rental has been calculated to September 2012, being a total of 6 months after re-entry. Dr Kucminska gave evidence that despite all reasonable and continued attempts to market the Premises for lease, they remained vacant since the termination of the lease and as a result of which, the Landlord continues to lose income of $2,300 per month.

111. Having regard to the concession made by the Landlord that in the interests of finality, the Landlord's claim for loss and damage extends to September 2012, I make the following findings in respect of each of the heads of damage referred to above.

Garden maintenance ($487)

112. The Landlord's claim for garden maintenance appears to comprise ongoing lawn mowing services provided by *Jims Mowing*. A number of invoices were tendered in evidence as a bundle evidencing that expenditure. It is not clear from the Applicants' closing submissions in reply, whether that head of damage is disputed. In particular, the Tenant states state that *Garden Maintenance was to be done by myself*. In my view, that statement indicates that garden maintenance was the Tenant's obligation. Accordingly, I will allow garden maintenance for the period up to and including September 2012 based on the invoices produced during the course of the proceeding. In that respect, I note that many of the invoices are duplicates. Therefore, I have only allowed $352 based on the dates set out in the invoices as follows:

[11] This amount excludes rent for April 2012 as that has been counted under the head of damage for rent arrears.

(a) 23 November 2011: $44

(b) 14 December 2011: $44

(c) 31 January 2012: $44

(d) 21 February 2012: $44

(e) 13 March 2012: $44

(f) 3 April 2012: $44

(g) 1 May 2012: $44

(h) 22 May 2012: $44

TOTAL:.....$352

Water rates ($453.70)

113. Only one invoice was produced as evidence of the Landlord's expenditure for water rates in the amount of $273.05, which is dated 11 July 2012. In the absence of any further corroborating evidence, I will only allow that amount.

Gas ($218.29)

114. No invoices were produced as evidence of the Landlord's expenditure for gas. Moreover, the Tenant submitted that no gas was used because the hot water service was not operative as at the date of commencement of the lease. Accordingly, I find on the balance of probabilities that no expenditure was incurred by the Landlord in respect of gas for which the Tenant is liable. I dismiss this aspect of the Landlord's claim.

Electricity ($290.45)

115. The invoices produced in evidence during the course of the proceeding concerning electricity supplied by AGL amount to $253.45. However, the invoice dated 20 February 2012 in the amount of $98.26 relates to the period 13 September 2011 to 28 January 2012. Given that the lease commenced in November 2011, I discount that invoice by 50% and will allow $49.13 in respect of that period. Therefore, I will allow $204.32 as the remaining invoices span the period that the Tenant occupied the Premises.

Rates ($842)

116. Only one invoice has been produced as evidence in support of the Landlord's claim for municipal rates. It spans the period 1 July 2011 to 30 June 2012 and comprises the fourth instalment of $300 for the total annual rates payable.

117. There is no other documentary evidence substantiating any other payments made in respect of municipal rates. Accordingly, in the absence of that documentary evidence, I will only allow 50% of that amount ($150) commensurate with the period of time that the Tenant occupied the Premises over which that rate notice applied.

Electrical services ($365.75)

118. There is no explanation as to what the electrical services relate to. I assume that they relate to upgrading the existing switchboard so that it complies with current standards. I do not regard this expense as an expense for which the Tenant is liable. The terms of the lease do not, in my opinion, require the Tenant to undertake that work. Therefore, I dismiss this aspect of the Landlord's claim.

***Essential safety measures* ($433.50)**

119. As I have already found, s.251 of the *Building Act* 1993 provides that the cost of maintaining *essential safety measures* is a cost to be borne by the owner of the property and not the tenant. Accordingly, although the terms of the lease impose an obligation on the Tenant to undertake the work, the provisions of the *Building Act* 1993 allowed the Tenant to recoup that cost from the Landlord or alternatively, set-off that expense from rent otherwise payable. Accordingly, I dismiss this aspect of the Landlord's claim.

Advertising for the premises ($907.50)

120. The only document produced in evidence in support of the Landlord's contention that it expended $907.50 for re-advertising is a quotation from the leasing agent for that amount. The evidence of Dr Kucminska does not address this issue specifically but merely makes a general statement that the Landlord has suffered and continues to suffer loss and damage. There is no statement that this amount has been agreed by the Landlord or that the Landlord has paid any or all of this amount. In my view, there is insufficient evidence before the Tribunal to substantiate this aspect of the Landlord's claim. Accordingly, I dismiss this aspect of the Landlord's claim.

Lease preparation fee ($660)

121. There is no documentation produced in evidence in support of this claim. Moreover, s.51 of the RLA prohibits a landlord from claiming the landlord's legal or other expenses relating to the negotiation, preparation or execution of the lease. Accordingly, I dismiss this aspect of the Landlord's claim.

Agents commission ($3,336)

122. There is no documentation produced in evidence in support of this claim, nor is there any explanation given as to what this claim relates to. As indicated above, the evidence of Dr Kucminska does not address this issue specifically that merely makes a general statement that the Landlord has suffered and continues to suffer loss and damage. Given that there is insufficient evidence substantiating this claim, I dismiss this aspect of the Landlord's claim.

Lockout fee, change locks ($165)

123. There is no documentation produced in evidence in support of this claim. However, there is evidence that the locks were changed following re-entry. Having regard to the quotation previously obtained by the Tenant to change the lock for the rear door in the amount of $550, I find that the amount

claimed of $165 is reasonable and I will allow that amount in favour of the Landlord's claim.

Ongoing loss of rental ($13,800)

124. The failure to make prompt payment of rent is deemed to be an essential term of the lease pursuant to Clause 3 (e) of the lease. Termination of the lease was affected by re-entry. In other words, pursuant to the terms of the lease, the Landlord had two grounds upon which to terminate: the right to terminate under the lease and the repudiation of the lease for breach of an essential term.

125. As I have found, the termination of the lease was lawful and in those circumstances, the general measure of damages is a difference between the contractual rent reserved by the lease and the rental value of the Premises as at the date of the breach.[12]

126. Given that the lease commenced on 3 November 2011 and was to run for a period of two years in its first term, I find that it is reasonable for the Landlord to claim loss of rental for the period of six months following termination of the lease, having regard to the evidence of Dr Kucminska that reasonable attempts have been made to re-let the Premises but to no avail.

127. Accordingly, I will allow this aspect of the Landlord's claim, less rent for April 2012, which is already included in the head of damages relating to rent arrears.[13]

Reconciliation of Landlord's claim

128. Having regard to my findings set out above, I find that the Landlord is entitled to $14,944.37. From this amount, I deduct the security deposit of $2,530 leaving a balance of $12,414.37.

129. I note that Mr Whitten states in his closing submissions that the Landlord wishes to be heard on the question of costs. Accordingly, I will give liberty to the parties to make application for the matter to be returned to the Tribunal on the question of costs and interest, should either decide to pursue that course. Having said that, I refer the parties to s.92 of the RLA, under which costs are not to be awarded in a *retail tenancy dispute*, unless the exceptions to that provision are invoked. Further, even if s.92 of the RLA does not apply so as to prohibit any order for costs, s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 states that the parties are to bear their own costs unless it is fair to otherwise order costs, having regard to the matters set out under s.109(3) of that Act.

SENIOR MEMBER E. RIEGLER

[12] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609 at 637-638.
[13] Being a period that the Tenant substantially occupied the Premises.